

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DREAMFUNDED MARKETPLACE, LLC
(CRD No. 283594),

and

MANUEL FERNANDEZ
(CRD No. 6639970),

Respondents.

Disciplinary Proceeding
No. 2017053428201

Hearing Officer–LOM

**EXTENDED HEARING PANEL
DECISION**

June 5, 2019

Respondent DreamFunded Marketplace, LLC, was registered with FINRA as a funding portal member, and its co-founder and Chief Executive Officer, Respondent Manuel Fernandez, was an associated person of the funding portal member. While the entity was registered and Fernandez was associated with it, they committed multiple violations of the Securities and Exchange Commission’s Regulation Crowdfunding Rules and FINRA’s Funding Portal Rules, as well as FINRA Rule 8210.

First Cause of Action: Respondents failed to respond fully and completely to a FINRA Rule 8210 request. They thereby violated FINRA Rule 8210, Funding Portal Rule 800(a) (which makes FINRA Rule 8210 applicable to funding portals), and Funding Portal Rule 200(a) (which requires adherence to high standards of commercial honor and just and equitable principles of trade). For this misconduct, we expel the entity Respondent from FINRA membership as a funding portal member and bar the individual Respondent from association with any FINRA funding portal member.

Third Cause of Action: While acting on behalf of the entity Respondent, Fernandez made false and misleading statements regarding a purported investment in an issuer. Respondents posted the misstatements regarding the purported investment on the entity’s website and on social media. In doing so, they employed a deceptive device or contrivance and created a misimpression,

either with intent to mislead investors or in reckless disregard of the likelihood of misleading them. This misconduct violated FINRA Funding Portal Rule 200(b), which we conclude requires scienter, and Funding Portal Rule 200(a).

As charged in the same Cause of Action, Respondents made false and misleading statements on their website regarding the due diligence that they conducted on issuers before allowing issuers to make crowdfunding offerings on Respondents' platform. They did so either with intent to mislead investors or in reckless disregard of the likelihood of misleading them. This misconduct also violated FINRA Funding Portal Rules 200(b) and 200(a).

As charged in the same Cause of Action, Respondents made statements on their website about real estate transactions. These statements were misleading, and violated Funding Portal Rule 200(c)(2), which we find does *not* require scienter, and Funding Portal Rule 200(a).

For the two scienter-based violations charged in the Third Cause of Action, together, we expel the entity Respondent from FINRA membership as a funding portal member and bar the individual Respondent from association with any FINRA funding portal member. Separately, for the non-scienter-based violation standing alone, we would find a Letter of Caution an appropriate response to a first-time violation. In light of the expulsion and bar imposed for other violations, however, we do not impose any sanction.

In addition to the sanctions imposed, we order Respondents to pay hearing costs.

Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Causes of Action: We find that Enforcement proved some or all of the violations alleged. Because we expel the entity and bar the individual Respondent in connection with the First and Third Causes of Action, we discuss the lesser sanctions that would be appropriate for the other violations but do not impose them.

Fourth Cause of Action: We dismiss the claim that Respondents lacked a reasonable basis for believing that two issuers were in compliance with their legal and regulatory obligations.

Summary of the Ten Causes of Action: We summarize our determinations regarding the charges and the sanctions contained in each of the ten Causes of Action in the Introduction to the Decision, under the heading Resolution of Charges.

Appearances

For the Complainant: Edwin Aradi, Esq., Rockville, Maryland, Colleen J. O’Loughlin, Esq., and James E. Day, Esq., New York, New York, Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Todd A. Zuckerbrod, Esq., Boca Raton, Florida

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DECISION

I. INTRODUCTION

A. Crowdfunding Background

1. Crowdfunding Did Not Initially Involve Securities

This case concerns issues of first impression that involve “crowdfunding.” Crowdfunding is a way of raising money for a range of purposes using the Internet to create a public forum where the “crowd” can discuss and evaluate a proposal. The concept is that public discussion fosters the collective “wisdom of the crowd,” enabling individual members of the crowd to make better-informed decisions than they might make on their own.

Typically in crowdfunding, small individual contributions are sought from a large number of people, which enables a small project or cause that otherwise might not attract more traditional financing to raise money. Crowdfunding has been used to raise funds for charitable purposes and to support artistic endeavors. Contributors may receive nothing in return or may receive recognition for their contribution in a public expression of gratitude. They also may receive a token of value related to a project or cause, such as tickets to a performance, or a finished product, such as a music album.

Until relatively recently, crowdfunding has not involved the offer of a share in any financial returns or profits that the fundraiser may expect to generate from business activities financed through crowdfunding—what is sometimes referred to as “equity crowdfunding.” This is because the offer of a share in the profit from another person’s business endeavor involves the offer and sale of a security, triggering the application of the federal securities laws. Those laws impose on a securities offering extensive and costly regulatory requirements that are incompatible with the typical, small-budget crowdfunding campaign.

2. New Exemption for Crowdfunding Securities Offerings

As relevant here, in 2012 Title III of the JOBS Act (the commonly used reference to the Jumpstart Our Business Startups Act)¹ established a regulatory framework for crowdfunding offerings of securities. The Act adds a new exemption from registration for such offerings in a new provision of the Securities Act of 1933 (“Securities Act”), Section 4(a)(6). The Act also sets forth the requirements for making a crowdfunding offering pursuant to the exemption. Those requirements appear in new Section 4A of the Securities Act.

¹ Pub. L. No. 112-106, 126 Stat. 306 (2012).

3. Intermediaries for Crowdfunding Securities Offerings

The new exemption from registration is only available if a crowdfunding securities offering is conducted exclusively through an “intermediary” that, in turn, complies with certain other requirements of the JOBS Act. The JOBS Act requires that a crowdfunding intermediary be registered with the Securities and Exchange Commission (“SEC”) either as a broker or as a “funding portal.”² The statute further requires that crowdfunding intermediaries comply with requirements set forth in the statute and with rules prescribed by the SEC for the protection of investors and in the public interest.

The JOBS Act also requires intermediaries to register with a national securities association that is itself registered with the SEC. Because FINRA is currently the only such association, crowdfunding intermediaries—both brokers and funding portals—must register with FINRA.

4. SEC and FINRA Rules for Crowdfunding Securities Offerings

Pursuant to the JOBS Act, the SEC promulgated Regulation Crowdfunding Rules (“Crowdfunding Rules”) to regulate crowdfunding securities offerings and directed FINRA to develop rules appropriate to the regulation of crowdfunding portals. The SEC has approved, and FINRA has adopted, FINRA’s Funding Portal Rules (“Funding Portal Rules”).

The Crowdfunding and Funding Portal Rules authorize small offerings to investors online. Each crowdfunding offering is made exclusively through a website operated by a single intermediary. Potential investors review information about the issuer and the offering online, and may discuss the offering online. They may make an investment commitment and transfer funds to be held in escrow. There is a mandatory waiting period before the offering can close, during which investors retain the right to rescind their investment commitment. If all goes well and the target amount of funding is reached by the target date, the offering can be closed and investor funds released to the issuer. If, however, the target amount is not reached by the target date, then the offering is canceled and the funds held in escrow are returned to investors.

a. An Intermediary Provides Information

Generally, an intermediary (whether a broker or a funding portal) is required to provide information on its website, including educational materials that explain the process for investing on the platform, the types of securities being offered, and the risks associated with investing in such securities. Under the JOBS Act, the intermediary also is responsible for making an issuer’s disclosures available to the SEC and investors. The intermediary facilitates an offering by providing a place on its website for potential investors to discuss the issuer and the offering, so

² The JOBS Act speaks of a broker registering with the SEC, but there is no separate broker-only registration under the Exchange Act. Brokers are registered under Section 15(b) of the Exchange Act as broker-dealers. When speaking here of a registered entity, we may use the term broker-dealer. When describing the JOBS Act, which refers only to brokers, we use the term broker.

that any commentary by the crowd is collected in one place and can be viewed by those interested in the offering. The intermediary thus serves as a communications center for the offering.

b. An Intermediary Performs a Gatekeeping Function

An intermediary for a crowdfunding offering performs a gatekeeping function, although a crowdfunding intermediary has less responsibility than a broker-dealer does in connection with other types of securities offerings. An intermediary for a crowdfunding offering is not required to conduct due diligence on an issuer. It is, however, required to have a reasonable basis for believing that an issuer making a crowdfunding offering on the intermediary's platform is in compliance with the applicable statutory and regulatory requirements. To obtain a reasonable basis for believing an issuer to be in compliance, an intermediary may rely on the issuer's representations—unless the intermediary has reason to question the reliability of those representations. An intermediary may not ignore facts that would indicate a potential fraud or give rise to investor protection concerns such that a reasonable person would deny access to the funding portal or cancel an issuer's offering. If an intermediary has a reasonable basis for believing that the issuer could be engaged in fraud or that the offering raises investor protection concerns, then the intermediary is required to deny access to its platform.

c. An Intermediary Provides Notices to Investors

An intermediary is required to notify investors when their investment commitments have been received and when certain significant events in the life of an offering occur, such as a material change in the terms of the offering, a change in the company's ownership, or the early closing of the offering. Investors have various rights when these events occur. For example, investors have a right to rescind their investment commitment during a window, which must be at least 21 days, between the opening of the offering and the first sales transaction. Similarly, investors must reconfirm their commitments within five business days of receiving a notice of a material change in the terms of an offering or their commitments will be canceled. Notices sent by the intermediary are critical to investor protection, because those notices inform the investor of his or her rights and provide information necessary to protect those rights.

d. An Intermediary Preserves Records

An intermediary is required to keep records of issuers' SEC filings, notices to investors, and other communications regarding offerings on its platform for five years, and for the first two of those years, the records must be in an easily accessible place. The records must be available for regulatory inspection and examination. Recordkeeping is fundamental to regulators' ability to oversee crowdfunding offerings and protect investors. Without records, regulators would have little way to monitor the activities of crowdfunding issuers and intermediaries, who would then be able to evade statutory and regulatory requirements with impunity.

e. A Funding Portal Intermediary Does *Not* Recommend Investments or Handle Investor Monies and Is Exempt from Broker-Dealer Registration

A funding portal provides more limited services than a broker does. In contrast to a broker, under the JOBS Act a funding portal may *not* offer investment advice or recommendations; may *not* solicit transactions in the securities displayed on the portal; may *not* compensate persons for soliciting transactions or based on sales of securities displayed on the portal; and may *not* hold, manage, possess, or otherwise handle investor funds or securities. Thus, while a registered broker-dealer may receive and hold investor funds, a registered funding portal must contract with a third party to hold investor funds in escrow until an offering closes and the funds are authorized for release to the issuer.

The concept is that a funding portal provides an online platform where issuers and potential investors—the “crowd”—may engage with one another about the offering but a funding portal does not actively promote any particular investment on its portal, does not solicit transactions, and does not handle investors’ money. Because a funding portal’s activities are more limited than a broker’s, the portal is not subject to net capital and other requirements that apply to a registered broker-dealer.

In adopting its Crowdfunding Rules, the SEC explained that even though a funding portal does not engage in *all* the activities of a full-fledged broker, such a portal nevertheless does function as a broker. A funding portal is engaged in the business of effecting securities transactions for the accounts of others through crowdfunding. As long as such an entity is registered as a funding portal, however, it need not register as a broker-dealer and need not comply with the much more extensive and costly requirements imposed on a full-fledged registered broker-dealer.

The JOBS Act authorizes the SEC to exempt a funding portal from registering as a broker, but only under the following conditions:

- i. The portal is subject to the examination, enforcement, and other rulemaking authority of the SEC;
- ii. The portal is a member of a registered national securities association (which currently means FINRA); and
- iii. The portal is “subject to such other requirements” as the SEC determines to be appropriate.

In sum, the JOBS Act balances two competing concerns. The Act promotes job creation and new investment opportunities by enabling start-ups and small businesses to make small securities offerings online to numerous potential investors at a minimum of expense. At the same

time, the Act provides a regulatory framework to prevent misconduct in such crowdfunding offerings and protect those small investors. The statute serves that second concern in part by requiring that all intermediaries, including funding portals, be subject to both SEC and FINRA rulemaking and oversight.³

B. This Proceeding

1. Respondents

From July 12, 2016, until November 3, 2017, the Respondent entity, DreamFunded Marketplace, LLC (the “DreamFunded Portal” or the “Portal”), was registered with FINRA as a funding portal member. The individual Respondent, Manuel Fernandez (“Fernandez”), was the Portal’s co-founder and Chief Executive Officer (“CEO”). Because he was the CEO of the Portal, he was an associated person of a funding portal member. He was assigned a Central Registration Depository (“CRD”) number. Fernandez had no experience working in the securities industry, but the applicable rules did not require him to take any classes or training, or to take any licensing or qualifying examination to qualify to operate a funding portal.

To some degree, Respondents’ violations may be partly attributable to the lack of a mechanism for educating and qualifying a person to run a funding portal. Fernandez may not have fully comprehended the applicable rules or the nature and degree of regulatory oversight exercised by the SEC and FINRA. On the other hand, as discussed below, when FINRA’s staff inquired about various concerns, Fernandez provided incomplete, false, or misleading information. His failure to be truthful in dealing with regulatory inquiries cannot be excused by a lack of training.

³ For general background, the SEC provides guidance to crowdfunding investors, issuers, and funding portals. Links can be found at <https://www.sec.gov/spotlight/crowdfunding.shtml>. The full JOBS Act is discussed at <https://www.sec.gov/spotlight/jobs-act.shtml>. The SEC’s Regulation Crowdfunding, which contains the Crowdfunding Rules (17 C.F.R. § 227.100, *et seq.* (2015)), can be accessed at <https://www.sec.gov/divisions/corpfin/ecfrlinks.shtml>. (References to the Crowdfunding Rules hereinafter are referred to as “Crowdfunding Rule [No.]”.) The adopting release for the SEC’s Crowdfunding Rules can be found at <https://www.sec.gov/rules/final/2015/33-9974.pdf>. It can also be found at SEC Release Nos. 33-9974 and 34-76324, 2015 SEC LEXIS 5486 (Oct. 30, 2015) (“Crowdfunding Rules Adopting Release”). The SEC release approving FINRA’s Funding Portal Rules can be found at Securities Exchange Act Release No. 34-76970 (Jan. 22, 2016), 81 FR 4931 (Jan. 28, 2016) (Notice of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change; File No. SR-FINRA-2015-040). The approving release can also be found at SEC Release No. 34-76970, 2016 SEC LEXIS 262 (Jan. 22, 2016) (“Funding Portal Rules Approving Release”).

In the SEC release proposing draft Crowdfunding Rules, the SEC discussed at some length the balance necessary between facilitating crowdfunding securities offerings and protecting investors. *See* SEC Release on Proposed Crowdfunding Rules, Release Nos. 33-9470 and 34-70741, 2013 SEC LEXIS 3346, at *14-19 (Oct. 23, 2013) (“Crowdfunding Rules Proposing Release”). The SEC said, “Rules that are unduly burdensome could discourage participation in crowdfunding. Rules that are too permissive, however, may increase the risks for individual investors, thereby undermining the facilitation of capital raising for startups and small businesses.” *Id.* at *17-18.

While it was registered, the DreamFunded Portal acted as an intermediary in approximately 15 crowdfunding offerings. This case focuses on three of those offerings.

2. Origin of Proceeding

In October 2016, a staff member of the FINRA group responsible for surveillance of funding portals, which is within the Membership Application Program (“MAP”), noticed a video clip on YouTube that caused her concern. The video clip showed Respondent Fernandez making an offer of \$1 million for 30% of a company that was in the process of making an offering on the DreamFunded Portal. MAP staff thought that the video might be a violation of a Crowdfunding Rule that prohibits a principal of an intermediary from holding an interest in an issuer using that intermediary’s platform. Having a financial interest in an issuer using the principal’s platform to raise capital could be a conflict of interest. The appearance that Fernandez had invested \$1 million in the issuer might also be viewed as promotional material or an endorsement of that particular issuer, which would violate another Crowdfunding Rule. The video seemed potentially inconsistent with the prohibition against a funding portal making investment recommendations.

MAP staff initiated a series of inquiries to the Portal and Fernandez to determine whether a violation might have occurred. These inquiries were not issued pursuant to Rule 8210, but rather were part of a “for cause” examination that continued into the summer of 2017.

In response to MAP staff’s inquiries, Fernandez said that he had not in fact made an investment in the issuer, despite what appeared on the video. His assertion gave rise to a concern about a different potential violation, a violation of a Crowdfunding Rule against making false, exaggerated, unwarranted, promissory, or misleading statements in connection with an issuer using the intermediary’s services.

As MAP staff focused on the DreamFunded Portal and obtained more information, they began to believe that Respondents might have committed a number of violations of the Crowdfunding and FINRA Portal Rules. They referred their concerns to the Department of Enforcement (“Enforcement”). Separately, the Office of Fraud Detection and Market Intelligence (“OFDMI”), which conducts surveillance of crowdfunding offerings, had become concerned about some of the offerings on Respondents’ platform. Once the groups conferred about MAP staff’s concerns about the Portal and OFDMI staff’s concerns about the offerings on the Portal’s platform, MAP deferred to OFDMI to investigate.

Pursuant to a Rule 8210 request, in October 2017 OFDMI and Enforcement staff took Fernandez’s sworn testimony in an on-the-record interview (“OTR”). In this initial OTR, Fernandez’s testimony led FINRA staff to have additional concerns regarding the funding for the DreamFunded Portal and whether Fernandez might have misused investor monies intended for investment in establishing and operating the Portal. Promptly after the initial OTR, OFDMI sent the Portal and Fernandez another Rule 8210 request for information and documents, and sought to take a second OTR.

The Portal and Fernandez took various positions with respect to the Rule 8210 request that followed Fernandez's initial OTR, at times indicating they would cooperate and at other times contesting FINRA's jurisdiction to make the request. Fernandez repeatedly sought extensions of the deadline for responding to the request and put off appearing for a second OTR. Enforcement then filed the Complaint.

3. Context for Our Decision

The Complaint contains ten Causes of Action. It alleges violations of FINRA Rule 8210 and various SEC Crowdfunding Rules and FINRA Funding Portal Rules.

FINRA Rule 8210 has never been applied or interpreted in the crowdfunding context, and the rules particular to crowdfunding and funding portals have never been the subject of a litigated FINRA disciplinary proceeding. The Extended Hearing Panel necessarily must decide some issues of first impression. Furthermore, because of the numerous Causes of Action, each of which raises multiple issues, we also must resolve many issues of fact and law, large and small. In this context, and in order to explain our reasoning and the basis for our decision fully, we find it necessary to write at length.

We proceed with care that our interpretations of the JOBS Act and the applicable rules are reasonable, and that our conclusions are informed by Congress's twin concerns, both to relieve crowdfunding offerings of the elaborate and expensive regulatory system that applies to other types of securities offerings, and to protect investors and the public interest. Our role, however, is limited to enforcing the law and rules as written, not to make policy or rewrite the rules.

Even though the context is new, much of our decision is nevertheless grounded on well-established, bedrock principles that apply to all FINRA members—broker-dealers and funding portals alike. FINRA members and their associated persons must comply with Rule 8210 requests, so that FINRA can oversee their activities and fulfill its regulatory mission; and FINRA members may not make false and misleading statements in the conduct of their business. Crowdfunding securities offerings, no less than other kinds of securities offerings, require adherence to high standards of commercial honor and just and equitable principles of trade. Telling the truth—both to regulators and to investors—is the core responsibility of a FINRA member.

We believe that much of Fernandez's hearing testimony was not truthful. He was evasive, vague, and inconsistent. On key points, his testimony was not credible, lacked corroboration, or was contradicted by other more credible evidence. Fernandez's demeanor at the hearing and his lack of credibility are important factors in our decision, both as to the violations and as to the sanctions.

We might hesitate to impose stringent sanctions in other circumstances—as, for example, where a person operating a funding portal makes mistakes from a lack of understanding of the rules, but expresses a sincere desire to correct those mistakes, and develops and implements

policies and procedures to avoid mistakes in the future. As will become apparent in the course of this decision, the applicable rules are complicated. There also is a tension pulling in opposite directions between the goal of empowering small issuers to make crowdfunding offerings with a minimum of regulatory costs, and the goal of protecting the small (and likely inexperienced) investors who might invest in those offerings. All this, in addition to the lack of training to run a funding portal, could lead to unintentional, minor, or easily remedied mistakes. In that context, future misconduct might be avoided by the imposition of limited and appropriately tailored sanctions.

In this case, however, the violations have a very different character, and we do not hesitate to impose stringent sanctions for certain violations. We emphasize that we base our findings and conclusions regarding Respondents' violations on the unique facts and circumstances of this particular case. Respondents committed numerous violations in a systemic, wholesale compliance breakdown. Fernandez failed to tell FINRA staff the truth prior to the hearing, and he failed to tell the Extended Hearing Panel the truth at the hearing. Fernandez also attempted to shift responsibility for all missteps to others. We have no confidence that in the future, if permitted to continue in the securities industry, Respondents would comply with regulatory requirements or fully and truthfully respond to regulatory inquiries.

4. Resolution of Charges

First Cause of Action Charges:

Failing to respond to a FINRA Rule 8210 request, in violation of that Rule and Funding Portal Rules 800(a) and 200(a).

We expel the DreamFunded Portal from FINRA funding portal membership and bar Fernandez from association with any FINRA funding portal member for their failure to respond fully and completely to a FINRA Rule 8210 request, which is made applicable to funding portals by Funding Portal Rule 800(a). By virtue of the violation, they also violated Funding Portal Rule 200(a), the equivalent of FINRA Rule 2010 for funding portals.⁴

FINRA staff issued the Rule 8210 request not only to investigate potential violations of the law and regulations applicable to crowdfunding securities offerings, but also to investigate Fernandez's potential misuse of investor monies intended to fund the establishment and operation of the DreamFunded Portal. Among other things, Fernandez failed to produce his personal bank account statements, and produced some but not all bank account statements for the Portal and its parent company, DreamFunded, Inc. (the "Parent"), as well as other related entities. He also failed to produce any accounting or bookkeeping records tracking the

⁴ Like FINRA Rule 2010, Funding Portal Rule 200(a) requires adherence to high standards of commercial honor and just and equitable principles of trade. As discussed below, we find that a violation of a FINRA rule or a Crowdfunding or Funding Portal rule is also a violation of Funding Portal Rule 200(a). Violation of Funding Portal Rule 200(a) is alleged in all the Causes of Action, but, as to the other Causes of Action where we find a violation of a rule, we do not repeat that the misconduct also violated Funding Portal Rule 200(a).

expenditures of the money invested in the Portal. The missing documents were critical to the staff's investigation, particularly with respect to Fernandez's potential misuse of investor monies. Without the missing documents, OFDMI and Enforcement staff were unable to trace the flow of funds and to form a reliable basis for determining whether Fernandez had engaged in the suspected misconduct.

It appears that Fernandez twice sought an extension of time to produce the documents identified in the Rule 8210 request on the basis of a dubious medical excuse. The first time he provided a medical excuse along with a request for an extension, Fernandez traveled out of town to the Sundance Film Festival in Utah during the period covered by the medical excuse. Fernandez provided a second medical excuse along with a request for another extension, and he traveled to Las Vegas and attended a Santana concert during the period covered by the medical excuse. This is an aggravating factor, and we find the failure to respond fully and completely to the Rule 8210 request egregious.⁵

Second Cause of Action Charges:

Giving access to the Portal despite a potential for fraud or other investor protection concerns, in violation of Funding Portal Rules 301(c)(2) and 200(a); posting issuer communications on their platform that Respondents knew or had reason to know contained untrue statements of material fact or were otherwise false and misleading, in violation of Funding Portal Rules 200(c)(3) and 200(a).

The Extended Hearing Panel divided on whether the overall facts and circumstances of Company A's offering raised a potential for fraud, but we agreed that the facts and circumstances raised, at a minimum, investor protection concerns. In either case, Respondents violated Funding Portal Rule 301(c)(2) by continuing to give access to their platform to Company A. They learned facts in the course of the offering that would have caused a reasonable person to have investor protection concerns. Respondents should have resolved those concerns or terminated access to the Portal, canceled the offering, and returned investors' monies.

The CEO of the issuer, DA, asked Fernandez to lower the target amount for the offering and to close the offering early so as to gain immediate access to investor funds held in escrow. DA directed those investor funds to his personal bank account, which was overdrawn. This occurred in the context of multiple discrepancies in the issuer's disclosures and other signs that the issuer's representations might not be reliable. Fernandez nevertheless facilitated the transfer of investor funds to the CEO, despite the risk that the CEO was seeking to access the funds for his own personal use, and not to further the issuer's business.

For giving Company A continued access to the Portal despite the accumulation of facts and circumstances giving rise to investor protection concerns, in violation of Funding Portal Rule

⁵ The portions of the Decision most relevant to the First Cause of Action appear below at 65, 73, 76, 80-82, 98, 105-09, and 138-44.

301(c)(2), we would suspend the DreamFunded Portal for 30 days. We find it aggravating that Fernandez not only gave Company A access to the Portal but facilitated the early release of investor funds to the overdrawn personal account of the issuer's CEO without any business rationale. It is also aggravating that, as discussed in connection with other charges, he did so without giving investors the notices that were required to protect their rights. For his misconduct, we would suspend Fernandez for six months and fine him \$10,000.⁶ Because we expel the entity and bar Fernandez for other violations, we do not impose these lesser sanctions.

We do not find, however, that Respondents should have denied Company B access to the Portal *solely* on the basis of its financial projections and forecasts, and we dismiss this aspect of the claim. Enforcement characterizes the financial projections and forecasts as wildly exaggerated, and claims that they gave rise to investor protection concerns. Projections and forecasts, however, are necessarily based on estimations, predictions, and intangibles, and are generally highly optimistic. It would be difficult to distinguish between reasonable and unreasonable predictions about the future in a crowdfunding securities offering without investigating the basis for the projections and forecasts. But there is nothing in the applicable law or regulations that requires funding portals to conduct such an investigation or to screen issuers on the basis of their projections and forecasts. Intermediaries are allowed to rely on representations by an issuer unless and until they learn facts indicating that they should not. In this context, we are reluctant to conclude that Respondents should have denied access to the Portal's platform based on the issuer's projections and forecasts alone.

Separately, Enforcement charges in the Second Cause of Action that Respondents violated Funding Portal Rule 200(c)(3), which concerns the content standards for communications with investors. Enforcement alleges that Respondents knew or should have known that the two issuers' communications regarding their projections and forecasts contained untrue statements of material fact or were otherwise false or misleading. Consequently, under this Rule, Respondents should not have posted those communications. As discussed in connection with some of the other charges, projections and forecasts do not have the same character as a statement of fact about past performance, or the status of a company's research and development, or the company's current financial condition. Projections and forecasts are not subject to verification in the same way as a statement of fact about past performance or current

⁶ These sanctions are based on the finding that the offering raised investor protection concerns, a finding with which the entire Extended Hearing Panel agreed. One Panel member was of the view that the offering raised a potential for fraud, and, for that reason, giving the issuer continued access to the Portal's platform was a more serious violation. In light of all the circumstances, this Panel member would expel the DreamFunded Portal from FINRA funding portal membership and bar Fernandez from association with any FINRA funding portal member.

The Panel member who thought that Fernandez's actions to facilitate the early release of investor funds to DA's overdrawn personal bank account were suspect observed that the prohibition against aiding and abetting a fraud contained in Funding Portal Rule 200(b) may have been violated. That Rule provides that no funding portal member may effect a transaction in a security "by aiding or abetting, any manipulative, deceptive or other fraudulent device or contrivance." However, the Complaint did not charge an aiding and abetting violation of this provision, and we do not have a sufficient record to determine whether Respondents aided and abetted a fraud.

status. To evaluate predictions about the future would not only require due diligence and information gathering, but also the application of judgment to the information obtained in light of anticipated future conditions. Intermediaries like the DreamFunded Portal, however, have no duty to conduct due diligence or to validate issuers' projections and forecasts. We therefore find no violation of Funding Portal Rule 200(c)(3).⁷

Third Cause of Action Charges:

Effecting a securities transaction by any manipulative, deceptive, or fraudulent device or contrivance, in violation of Funding Portal Rules 200(b) and 200(a); and making a funding portal communication that is false and unwarranted or misleading, in violation of Funding Portal Rules 200(c)(2) and 200(a).

Funding Portal Rule 200(b) uses language that echoes the language of securities laws and rules that require proof of scienter for a violation. It is modeled after FINRA Rule 2020, which also requires scienter for a violation. We conclude that a violation of this Rule requires scienter, and we find that Respondents had scienter when making certain false and misleading statements on the Portal's platform and Respondents' social media accounts. But as to one category of alleged false and unwarranted or misleading statements, we find the record insufficient to conclude the statements were made with scienter.

Funding Portal Rule 200(c)(2) does not contain the same language concerning fraudulent conduct, and we conclude that it does not require scienter. It prohibits communications that contain a variety of false or misleading statements that may not rise to the level of fraud, such as exaggerated, unwarranted or promissory statements, or statements that FINRA endorses or indemnifies a portal's business practices. We conclude as to one category of statements made by Respondents that, even though the evidence was insufficient to show the scienter necessary to prove a violation of Funding Portal Rule 200(b), the evidence was sufficient to show a violation of this non-scienter based provision, Funding Portal Rule 200(c)(2).

Although he denies doing so, we find that Fernandez posted on social media and the Portal's website a video clip of his appearance on a CNBC television show called "Make Me a Millionaire Inventor." In the video clip, Fernandez appeared to strike a deal to invest \$1 million in Company C, one of the issuers on the DreamFunded Portal's platform. Because he appeared to have made a substantial investment in Company C, the show left the impression that Fernandez had great confidence in the issuer's prospects. In fact, Fernandez did not make the investment. Fernandez knew that the show left a false impression and he either intended to deceive investors and others, or, at a minimum, was reckless of the danger of misleading them. By this conduct, Fernandez, and through him, the DreamFunded Portal, violated Funding Portal Rule 200(b), the scienter-based Rule.

⁷ The portions of the Decision most relevant to the Second Cause of Action appear below at 35-39, 41-42, 48-49, 109-13, and 144.

Respondents also falsely represented on the Portal's website that they had a team of people carefully reviewing issuers' applications to make offerings on the platform. Respondents falsely purported to conduct the same type of due diligence as sophisticated venture capitalists do in private offerings. In fact, Respondents had no due diligence team and kept no records of any due diligence. Their false and misleading statements were designed to promote Fernandez and encourage investment in issuers on the Portal's platform. The statements created a false sense of the likelihood of a profit and a false sense of the safety of the investments on the Portal's platform. Respondents knew that the statements were false and knew (or, at a minimum, recklessly disregarded) that they were likely to mislead investors. Respondents had scienter and thereby violated Funding Portal Rule 200(b).

The Complaint also alleges that Respondents made misleading statements about real estate transactions, as though they had been conducted through the Portal when they were not, and as though they were the equivalent of bank deposits, when they were not. It appears to us that the tombstones were posted on Respondents' website as a place-holder when Respondents removed all the equity crowdfunding offerings from the website. Although the record was insufficient for us to find that Respondents had scienter with respect to the real estate tombstones, the posting concerning the tombstones was misleading, and thus in violation of Funding Portal Rule 200(c)(2), which does not require scienter.

Respondents are accountable for their own false and misleading actions and statements. Respondents' misconduct here involved no reliance on others. The two violations of Funding Portal Rule 200(b), which requires scienter, involved a high level of culpability. For these two violations together, we expel the DreamFunded Portal and bar Fernandez. Separately, for the non-scienter-based violation, we would find a Letter of Caution an appropriate response to a first-time violation. In light of the expulsions and bars imposed for other violations, however, we do not impose any sanction for the violation of Funding Portal Rule 200(b).⁸

Fourth Cause of Action Charges:

Lacking reasonable basis for believing issuers in compliance, in violation of Crowdfunding Rule 301(a) and Funding Portal 200(a).

We dismiss entirely the Fourth Cause of Action, which charges that Respondents lacked a reasonable basis for believing that two issuers were in compliance with relevant requirements.

The charge as to Company A is based on what we believe to be an erroneous interpretation of the regulatory requirements and the issuer's SEC filing. The Complaint charges that the issuer's initial SEC filing was missing a financial statement, and that should have signified to Respondents that the issuer was not in compliance. In fact, the issuer had only recently been formed and had no operating history, so it provided financial information in its

⁸ The portions of the Decision most relevant to the Third Cause of Action appear below at 21-25, 50-63, 74-75, 81-82, 114-20, and 144.

SEC filing indicating that it had zero assets, zero income, zero debt, and zero taxes paid. The CEO certified that financial information. The issuer had no separate financial statement of the type that an issuer with an operating history might provide, but such a separate statement would have been redundant and meaningless. In fact, the Form C, which crowdfunding issuers make disclosures on and file with the SEC, requires a crowdfunding issuer to attach its financial statements “if any,” meaning if it has one. In the case of Company A, the absence of a separate financial statement did not signify a lack of issuer compliance.⁹

The charge as to Company B is based on the premise that Respondents were aware of unrealistic and unwarranted financial projections and forecasts, and that meant that Company B was not in compliance. As noted above, we decline to impose on Respondents and other funding portals a duty to validate issuers’ future financial projections.¹⁰

Fifth Cause of Action Charge:

Failing to conduct background checks and securities enforcement regulatory histories, in violation of Crowdfunding Rule 301(c)(1) and Funding Portal Rule 200(a).

Crowdfunding Rule 301(c)(1) implements a mandate in the JOBS Act that an intermediary must perform a background check and a securities enforcement regulatory history on each officer, director, and beneficial owner of 20% or more of an issuer’s outstanding voting equity securities. Under Crowdfunding Rule 301(c)(1), the purpose of the requirement is to give the intermediary a reasonable basis for concluding that an issuer and its principals are not subject to any disqualifying event listed in Crowdfunding Rule 503.

There is no evidence that Respondents themselves conducted the required background checks and regulatory histories—other than Fernandez’s uncorroborated testimony, which was not credible. Respondents produced no record of any such background checks or regulatory histories. Nor is there any evidence to support Fernandez’s claim that they retained a private investigator to do the work. We also reject the claim that FundAmerica, a broker-dealer that provided services to the Portal, conducted the required background checks and regulatory histories on Respondents’ behalf. It is unclear whether FundAmerica conducted such checks and histories, and, if they did, whether they did so with respect to the issuers and their principals or with respect to the investors whose monies a FundAmerica affiliate held in escrow. Any background checks and regulatory histories that may have been conducted by FundAmerica

⁹ The lack of a separate financial statement for Company A’s filing, however, did cause confusion. As discussed below, FINRA staff told Fernandez that Company A’s Form C was missing a financial statement, and Company A subsequently filed an amendment that supplied a purported financial statement. The confusion illustrates how easily mistakes can be made in interpreting new rules in the context of a new industry. This is particularly true where there is no training and no development of a shared understanding of what the rules require.

¹⁰ The portions of the discussion most relevant to the Fourth Cause of Action appear below at 34-36, 39-40, 48-49, and 120-23.

appear to have been conducted solely for its own purposes. According to Fernandez, because of privacy concerns, FundAmerica refused to release the information it gathered to Respondents. Thus, Respondents did not have the information they were required to gather, and, consequently, they could not form a reasonable basis for concluding that the issuers and their principals were not subject to disqualification. We find that Respondents violated Crowdfunding Rule 301(c)(1).¹¹

Because the background and regulatory history checks are statutory requirements, as well as regulatory requirements, we believe that Respondents' failure to conduct those checks is a serious violation. It is unclear, though, whether any disqualified person was improperly permitted to be involved in one of the crowdfunding offerings on the Portal's platform. For this misconduct, we would suspend both Respondents for 30 days. In light of the expulsions and bars imposed for other violations, however, we do not impose these sanctions.

Sixth, Seventh, Eighth, and Ninth Causes of Action Charges:

Failing to give investors required notices and information, in violation (respectively) of Crowdfunding Rules 304(c)(1), 304(b)(2), 303(d), and 303(f), and Funding Portal Rule 200(a).

We find that Respondents failed to provide required notices to investors, including notices of a material change in an offering and notices of the early closing of two offerings. The failure to provide the required notices deprived investors of information concerning their right to cancel their investment commitments prior to the release of investor funds from escrow and the distribution of those funds to the issuers. When FINRA staff asked for copies of such notices, which were required to be kept as records, Fernandez produced after-the-fact material change notices for one issuer, which we believe to have been fabricated. Respondents also failed to provide information required to be disclosed in notices of investor commitments and confirmations of the completion of transactions. Confirmations of the transactions, for instance, did not disclose basic—and required—information such as the price and quantity of securities purchased or the amount of securities sold in the offering.¹²

Although a failure to give notice or to memorialize information in a confirmation might seem minor in isolation, collectively these failures were significant. The misconduct was not a mere slip up in an otherwise appropriately functioning system for providing notices. The evidence revealed a pattern of failure to give required notices and information to investors. Moreover, unlike some of the other violations alleged in the Complaint, giving investors the notices to which they were entitled did not involve the exercise of judgment. Rather, compliance required only that Respondents pay attention to the rules regarding when notices must be given and the information that the notices must contain. Respondents' failure to provide the required

¹¹ The portions of the Decision most relevant to the Fifth Cause of Action appear below at 65-66, 123-28, and 145.

¹² As further discussed below, we found some of these charges only proven in part.

notices and confirmations harmed investors by depriving them of information necessary to enforce their rights.

We aggregate these violations for purposes of sanctions because the violations collectively represent a systemic failure to give investors the information to which they were entitled. For these violations, we would suspend Respondents 30 days. In light of the expulsions and bars imposed for other violations, however, we do not impose these sanctions.¹³

Tenth Cause of Action Charges:

Failing to establish and implement written policies and procedures reasonably designed to achieve compliance, in violation of Crowdfunding Rule 403(a) and Funding Portal Rule 200(a), and failing to establish and maintain a system to supervise the activities of the funding portal that was reasonably designed to achieve compliance, in violation of Funding Portal Rules 300(a) and 200(a)

We find that Respondents failed to implement written policies and procedures reasonably designed to achieve compliance, in violation of Crowdfunding Rule 403(a). Respondents had a document that was intended to memorialize the DreamFunded Portal's policies and procedures. It was a manual that mainly parroted the statutory and regulatory requirements for crowdfunding offerings and made Fernandez responsible for all the Portal's activities. We believe that effective written policies and procedures for a crowdfunding intermediary need not be elaborate, but they need to be implemented. In this case, Fernandez (and through him, the Portal) failed to implement procedures to ensure that they complied with legal and regulatory requirements.¹⁴

We also find that Respondents violated Funding Portal Rule 300(a), which requires that a funding portal establish and maintain a supervisory system reasonably designed to achieve compliance. Our emphasis here is not on whether Fernandez made the written policies and procedures available to his employees. It is not clear that they were doing anything covered by those policies and procedures. Our emphasis is on Fernandez and his own failure to establish and follow a system for supervising the activities of the Portal itself to ensure compliance. The Portal's written policies and procedures made Fernandez responsible for all aspects of the entity's business, but he seldom referred to the general guidance in the written policies and procedures and there was no evidence that he developed and implemented a system of supervising and managing the Portal's activities. It appears to us that Fernandez did little to

¹³ The portions of the discussion most relevant to the Sixth, Seventh, Eighth, and Ninth Causes of Action appear below at 36-38, 41-48, 50, 65-67, 73-74, 128-32, and 145-146.

¹⁴ We note that Crowdfunding Rule 403(a) does not focus on supervision. That word does not appear in the Rule. The requirement is to establish and implement written policies and procedures reasonably designed to achieve compliance. We believe that means policies and procedures focused on the activities particular to a crowdfunding intermediary, such as giving investors the required notices.

ensure that *he* understood the Portal's obligations and little to assist the Portal in carrying them out.

The failure to implement procedures for operating the Portal in compliance with statutory and regulatory requirements, along with Fernandez's lack of any system for supervising and managing the entity's activities so that it complied with its obligations, led to pervasive violations. Overall, Respondents' misconduct betrayed a dismaying disregard for compliance and investors' rights.

For this misconduct, we would suspend Respondents for 30 days and direct them during that period to create a plan for remedying the deficiencies we have found in this Cause of Action. We would direct them at the end of the suspension to submit the plan to FINRA and work with the staff until it is acceptable. In light of the expulsions and bars imposed for other violations, however, we do not impose the suspension or the requirement to develop a plan for remedying deficiencies.¹⁵

II. PROCEDURAL HISTORY

On February 23, 2018, Enforcement filed and served the first Notice of Complaint and the Complaint. After service of a second Notice and Complaint, Fernandez filed and served an Answer bearing the date April 5, 2018, which the Office of Hearing Officers received on April 20, 2018. Fernandez had no legal representation. The Hearing Officer issued a notice that day, acknowledging receipt of the Answer on behalf of both Respondents, and setting an Initial Pre-Hearing Conference ("IPHC") for May 1, 2018.

Fernandez participated in the May 1, 2018 IPHC without legal counsel. The parties agreed to a pre-hearing schedule and hearing dates. As the parties agreed, the Hearing Officer set a three-day hearing for August 28–30, 2018.

Approximately three months after the IPHC, and only one month before the scheduled hearing, on July 26, 2018, counsel filed a notice of appearance on behalf of Fernandez only. The following day, July 27, the Hearing Officer held a Pre-Hearing Conference ("PHC") and granted a motion by Fernandez's new counsel for an extension of the hearing dates. The Hearing Officer reset the hearing for about a month later, three days in late September.

At the PHC on July 27, 2018, counsel for Fernandez contended that Fernandez had no authority to act for the DreamFunded Portal. Counsel asserted that Fernandez had sold the entity earlier in 2018, although, according to counsel, the sale was later rescinded. Fernandez had not previously asserted that he had no authority to act for the entity and had not informed the Hearing Officer that the entity had been sold. Counsel declared that he did not represent the

¹⁵ The portions of the discussion most relevant to the Tenth Cause of Action appear below at 73-76, 123-34, and 146.

DreamFunded Portal and that Fernandez would not represent it going forward. As a result of the PHC, the status of Fernandez's authority was unclear.

On August 8, 2018, the Hearing Officer issued an Order requiring the DreamFunded Portal to designate a corporate representative to appear on the entity's behalf and attend the hearing in September or possibly suffer a default decision against it. On August 10, 2018, Fernandez's counsel filed a notice of appearance to represent the Portal, as well as Fernandez.

The hearing began on September 24, 2018, with both Respondents represented by counsel. After three days, the first witness, Respondent Fernandez, was not yet finished testifying and only one other witness, who had been taken out of order to accommodate his schedule, had finished. More time was needed to complete the hearing. Fernandez asserted that he would not be available to complete the hearing for months, at least until sometime after January 2019. Motion practice regarding hearing dates ensued. The Hearing Officer found that Fernandez was available before January 2019.¹⁶ The hearing resumed on November 12, 2018, with Fernandez in attendance, and ran through November 16, 2018. Thus, the hearing ran eight days in two sessions, both held in Washington, D.C.

Four witnesses testified at the hearing,¹⁷ and, at the request of Respondents' counsel, the full transcript of Fernandez's initial OTR was admitted into evidence, along with other exhibits.¹⁸ Enforcement and Respondents filed their initial post-hearing briefs in mid-January 2019, and Enforcement filed its reply brief in mid-February 2019.¹⁹

III. FINDINGS AND CONCLUSIONS

We base our findings and conclusions on a careful study of the record evidence and the applicable law and rules. As discussed below, we find many of Respondents' factual assertions unconvincing and many of their legal arguments flawed. We also find a few gaps in Enforcement's proof.

The decision includes the following segments:

¹⁶ Order Setting Dates for Hearing to Resume, October 8, 2018, at 5.

¹⁷ In addition to Fernandez, the following people testified: JD, a former investigator and senior director in Enforcement; SV, a principal examiner in the MAP group; and PD, an investigator in OFDMI. The hearing testimony is referred to with the prefix "Tr.," followed by the individual's name or initials in parentheses and then the identifying pages. For example, Fernandez's testimony is cited as follows: Tr. (Fernandez) 66.

¹⁸ Fernandez gave his initial OTR, which is referred to here as "Fernandez OTR," on October 20, 2017. Complainant's exhibits are referred to with the prefix "CX" and an identifying number. Respondents' exhibits are referred to with the prefix "RX" and an identifying number. The Fernandez OTR is CX-72.

¹⁹ The parties were given a briefing schedule that provided for filing opening briefs simultaneously, followed by reply briefs filed simultaneously. Enforcement timely filed its opening post-hearing brief on January 18, 2019, and Respondents filed theirs a day later. Enforcement timely filed its reply brief on February 15, 2019. Respondents filed no reply brief. References to the briefs are as follows: "Enf. PH Br.," "Resp. PH Br.," and "Enf. Reply."

- After finding that FINRA has jurisdiction to bring the charges, we discuss Fernandez, the DreamFunded Portal, and the three offerings at issue here. We then describe how FINRA staff became concerned about Fernandez and the Portal and requested information pursuant to FINRA Rule 8210. Although we make credibility findings throughout our discussion of the facts, we make additional credibility findings in a separate segment of the decision. We introduce a few of the relevant regulatory requirements and sometimes refer to specific Crowdfunding and Funding Portal Rules in the segments of the decision setting forth the facts. We believe that these brief descriptions of the rules assist in understanding the significance of the facts discussed.
- To provide an easy reference point, we summarize some of our most important findings at the end of the factual discussion.
- We next provide a more in-depth discussion of the law and applicable rules to place individual statutory requirements and regulatory rules in context. It is important to recognize that certain Crowdfunding and Funding Portal Rules derive directly from the JOBS Act.
- We then discuss our conclusions regarding the specific charges. At the risk of repetition, in connection with each Cause of Action, we briefly summarize the rules relevant to that particular Cause of Action. Because the Crowdfunding and Funding Portal Rules are new and unfamiliar, we think it helpful to have the specifics at hand when analyzing whether Enforcement proved a violation. Our discussion of the specific charges includes legal conclusions and, in connection with some of the charges, additional factual findings. Some of the charges turn on facts that do not neatly fit into the narrative describing the offerings and the Respondents' interactions with FINRA staff.
- Finally, we end with a sanctions analysis.

A. Jurisdiction

At various points in the proceeding, Respondents have raised arguments that relate to FINRA's jurisdiction and authority. Fernandez thought at one point that FINRA's jurisdiction would end when he withdrew the Funding Portal's registration as a funding portal member.²⁰ He also has asserted that FINRA has no authority over him because in early 2018 he purportedly sold the DreamFunded Portal (sale to be effective January 21, 2018) and the buyer had responsibility for dealing with FINRA, at least until the transaction was unwound (rescission to be effective April 16, 2018).²¹ According to Respondents, FINRA did not have jurisdiction to

²⁰ Tr. (Fernandez) 65-66, 916, 1009, 1050; Resp. PH Br. 3.

²¹ Tr. (Fernandez) 1720-27, 1730; CX-47; CX-68; CX-69; RX-19, at 20-25; Resp. PH Br. 3-4. The documentation in the record regarding the purported sale indicates that there was never an actual transfer of the Portal's papers and assets. CX-69. After the purported sale, Fernandez retained the ability to access and make changes to the DreamFunded.com website. Tr. (Fernandez) 1052-53. He also continued to access one of the Portal's bank accounts after the purported sale. Tr. (Fernandez) 1036-37, 1054-55; RX-2, at 128-39. If Fernandez transferred ownership and

issue a Rule 8210 request to the funding Portal or Fernandez; but, rather, was limited to inspection and examination of its operations.²² And even if FINRA did have jurisdiction to issue a Rule 8210 request, it could not require the production of documents and information relating to the financing of the Portal and the Parent, prior to the Portal becoming a FINRA member.²³ From time to time in his testimony, and through counsel in closing argument and post-hearing briefing, Fernandez also asserted that the JOBS Act was not intended to impose the elaborate regulatory structure for broker-dealers on crowdfunding offerings, attempting to cast doubt on the legitimacy of the proceeding and characterizing the attempt to regulate crowdfunding as a threat to capitalism.²⁴

Respondents raise these arguments largely to defend against the First Cause of Action, which alleges a violation of FINRA Rule 8210. Later in this decision, we discuss Respondents' arguments as they relate to the Rule 8210 violation and particular aspects of crowdfunding law and regulation.

To the extent that these arguments challenge FINRA's general jurisdiction to bring this disciplinary proceeding against the DreamFunded Portal and Fernandez, we reject them. Although the JOBS Act distinguishes between broker-dealers and funding portals in many ways, it folds funding portals into the existing disciplinary system for broker-dealers. In so doing, Congress gave FINRA the same general jurisdiction to discipline its funding portal members that it has to discipline its broker-dealer members.

Title III of the JOBS Act requires that a crowdfunding intermediary, either a broker-dealer or a funding portal, be registered with the SEC and FINRA, and be subject to their rulemaking and disciplinary authority. The statute then gives FINRA authority over funding portals to the same extent it has over registered broker-dealers. The statute expressly states that a funding portal is included in the terms "broker or dealer" and "registered broker or dealer" in Sections 15(b)(8) and 15A of the Securities Exchange Act of 1934 ("Exchange Act").²⁵ These are the Exchange Act provisions that require a broker to register with FINRA and that govern FINRA's responsibilities for regulating and disciplining its members.

Pursuant to Congress's directive, the SEC promulgated its Crowdfunding Rules, which focus on regulation of crowdfunding issuers and offerings. The SEC also directed FINRA to promulgate rules to regulate funding portals. After obtaining the SEC's approval, FINRA

control to anyone else, Funding Portal Rule 110(a)(4) required him to file with FINRA an application for prior approval of the change of ownership or control. Nothing in the record suggests that he ever made an application for prior approval of a change in ownership.

²² Resp. PH Br. 5-6; Tr. (Fernandez) 1718-19.

²³ CX-42, at 1-2.

²⁴ Tr. (Fernandez) 1049-50; Tr. (remarks of Respondents' counsel) 2035-39; Resp. PH Br. 6.

²⁵ Section 304(a)(2) of the JOBS Act, adding Section 3(h)(2) to the Exchange Act.

adopted its Funding Portal Rules, which define funding portals as FINRA “members”²⁶ and define various persons, including principals of funding portals such as CEOs, as persons “associated with members.”²⁷ Nothing in the SEC’s Crowdfunding Rules or FINRA’s Funding Portal Rules makes any distinction between the two types of FINRA members, broker-dealers or funding portals, for purposes of bringing a disciplinary complaint. As provided by the JOBS Act, FINRA treats all members—including funding portal members—as broker-dealers for purposes of discipline.

Moreover, the Funding Portal Rules expressly provide that the jurisdictional provisions of FINRA’s By-Laws apply to funding portals. FINRA Funding Portal Rule 100(a) states that all funding portal members and persons associated with funding portal members shall be subject to FINRA’s By-Laws. Funding Portal Rule 900(a) provides that funding portal members and their associated persons are subject to FINRA’s broker-dealer disciplinary procedures, as set forth in FINRA’s Rule 9000 Series.²⁸ Funding Portal 900(a) refers to Funding Portal Rule 100(b)(6) for the definition of a funding portal member as any funding portal admitted to membership in FINRA, and refers to Funding Portal Rule 100(b)(1) for the definition of an associated person of a funding portal member. For disciplinary purposes, an associated person includes not only the principals of a funding portal member and those that directly or indirectly control it, but also any employee. FINRA has acted to comply with its obligation in Section 19(g) of the Exchange Act to enforce its rules, including its Funding Portal Rules, effectively.

Under FINRA’s By-Laws, FINRA retains jurisdiction to commence a disciplinary proceeding against a “member”—including a funding portal member—for two years after a member has resigned from membership, as long as the complaint is based on conduct that occurred while the entity was a member.²⁹ It similarly retains jurisdiction to commence a disciplinary proceeding against a person “associated with a member”—including an associated person of a funding portal member—for two years if the complaint is based on alleged misconduct that occurred while the person was associated with the member.³⁰

We find that FINRA has jurisdiction to bring this disciplinary proceeding against both Respondents. The Complaint meets the two jurisdictional requirements. First, it was filed within

²⁶ Funding Portal Rule 100(b)(6).

²⁷ Funding Portal Rule 100(b)(1).

²⁸ Under Funding Portal Rule 900(a), all funding portal members are subject to FINRA’s Rule 9000 Series “unless the context requires otherwise.” When FINRA proposed its Funding Portal Rules, it explained that the phrase “unless the context requires otherwise” is intended to ensure that funding portals will not be subject to terms under its By-Laws and rules that could not relate to funding portals by virtue of their distinct status and limited permissible business activities under the JOBS Act and Regulation Crowdfunding. Funding Portal Rule 900(a) also specifically excludes certain Series 9000 Rules as inapplicable to funding portal members. For example, FINRA Rule 9557, concerning notice to members experiencing difficulties meeting the net capital requirements, is specifically excluded. Funding Portal Rules Approving Release, 2016 SEC LEXIS 262, at *29 & n.64, and *42.

²⁹ FINRA By-Laws, Article IV, Section 6.

³⁰ FINRA By-Laws, Article V, Section 4.

two years of the time that the Portal was registered and Fernandez was an associated person of the Portal. Second, it charges Respondents with misconduct they committed during the period of the Portal's registration and Fernandez's association with the Portal. The termination of the entity's registration, contrary to Fernandez's belief, did not immediately terminate FINRA's jurisdiction.

We also specifically reject Respondents' contention that the purported sale of the DreamFunded Portal affected FINRA's jurisdiction. Regardless of whether the purported sale transferred to the buyer responsibility for the entity's interactions with FINRA staff (at least until the transaction was rescinded), the transfer of ownership did not terminate FINRA's jurisdiction over the entity. And, as to Fernandez, the purported sale of the entity could not absolve him of his obligation to respond to Rule 8210 requests or his potential liability for his own alleged misconduct. He remained subject to FINRA's jurisdiction regardless of the sale.

B. Fernandez

Fernandez made his background, marketing successes, and wealthy connections the centerpiece of his defense. He contended that Enforcement had disrespected his skills and accomplishments, and he wanted to convey to the Extended Hearing Panel that he is a man of substance and ability.³¹ For that reason, and because his credibility is central to many issues, we briefly sketch a picture of Fernandez's manner of promoting himself.

Fernandez describes himself as coming from a tough, impoverished background and becoming a success through a combination of innate intelligence, hard work, discipline, and nurturing a network of mentors and connections. According to Fernandez, he did not finish high school, but he obtained a GED, took courses at Stanford University in an executive education graduate school of business program, and obtained a paralegal certificate from Lorenzo Patino School of Law in Sacramento, California. Fernandez made a point of telling us that he has a high IQ and belongs to an organization of people with high IQs. In his twenties, Fernandez became active in political affairs and the Hispanic community in Sacramento, where he grew up. At one point, he worked at Wells Fargo as a home loan consultant. After he left that position, he started a company to buy foreclosed properties from the bank, in partnership with an agency of the

³¹ Tr. (remarks of Respondents' counsel) 1119-20 ("Enforcement has gone through a process of minimizing my client's financial and business acumen, . . . Basically has painted him as somebody that didn't have the wherewithal to run a portal . . . What we are establishing is his entrée and development in the field of [I]nternet funding and crowdfunding and the manner in which he has developed in that area to become an expert in this field."); Tr. 1130 ("My client wants to present to you who he is to refute the five days of denigration that he has suffered at the hands of the Enforcement Division . . . [He wants] to demonstrate the caliber of gentleman that he is . . ."); Tr. 1743 ("[T]hese false charges have unduly harmed this individual, who has spent his life -- or his adult life trying to build a reputation in a community that he operates which is populated in some considerable degree by some of the most influential politicians in this country and wealthiest individuals to ever walk the face of the earth.").

Sacramento government. Starting in 2008, Fernandez and a business partner began to invest in real estate through crowdfunding.³²

Fernandez began to see access to capital as a critical problem for minorities, like himself, and he sought out wealthy and successful persons with whom he could network and from whom he could learn.³³ Fernandez views marketing and social media as keys to success. As one of his mentors encouraged him, “You have to market yourself”³⁴ Fernandez observed that another multibillionaire “wanted to be in the media a lot because that’s how you attracted the best deals.”³⁵

Fernandez became a prolific user of social media to project an image of himself as a highly successful entrepreneur, author, and investor. As he spent time with prominent people, Fernandez promoted himself by publicizing his activities. He has posted numerous photographs of himself with well-known people on his social media accounts, including Twitter, Facebook, YouTube, and Instagram. Some of the accounts are identified as individual accounts (*e.g.*, “mannyfernandezsv”) and others as corporate accounts (*e.g.*, “dreamfunded.”).³⁶ Fernandez appears on television shows about investing and posts video clips from those appearances on social media.³⁷ He now gives numerous speeches around the world,³⁸ and portrays himself as an expert on blockchain and cryptocurrency.³⁹

³² Tr. (Fernandez) 170-71, 882-83, 1095-1128, 1132-46, 1156-60; CX-2 (FINRA Background Questionnaire), at 4.

³³ Tr. (Fernandez) 1066, 1074, 1108-14, 1122-28, 1133-34, 1157-58, 1639-43, 1697-99; CX-52, at 22-28, 32.

³⁴ Tr. (Fernandez) 1117.

³⁵ Tr. (Fernandez) 1117.

³⁶ Tr. (Fernandez) 1117-18, 1121-28, 1132-39, 1141-45; RX-24 (photograph with prominent Silicon Valley investor, posted on social media June 12, 2017); RX-25 (Dec. 15, 2014 group letter to the Chair of the SEC); RX-26 (photograph with Hillary Clinton, posted on social media Nov. 2, 2016); RX-27 (photograph with SEC Commissioner, posted on social media Mar. 4, 2015); RX-28 (photograph with former Microsoft CEO, posted on social media Nov. 8, 2017); RX-29 (photograph of a White House badge for Fernandez, posted on social media on June 11, 2017); CX-54 (photograph with co-founder of Napster, posted on social media Jan. 10, 2018); CX-59 (photograph with famous former NFL quarterback, posted on social media Jan. 22, 2018); CX-61 (photograph at Santana concert, posted on social media Jan. 28, 2018).

³⁷ Tr. (Fernandez) 244-49, 345-49; CX-72 (Fernandez OTR), at 208-10. Fernandez regularly concluded his emails with a signature and links to his Twitter account, his LinkedIn account, various magazine articles about his activities, and his appearance on CNBC Squawk Box. CX-15, at 5-6.

³⁸ CX-52, at 18-20, 32, 34-46; CX-82, at 5; Tr. (Fernandez) 760, 1145-46; Tr. (remarks of Respondents’ counsel) 795.

³⁹ CX-55. Enforcement asserted in post-hearing briefing that, at the time of the hearing, Fernandez was attempting to raise money from investors through an initial coin offering. Enf. PH Br. 5. It appears, however, that Enforcement relied on an exhibit not in evidence, CX-56. We make no finding regarding any initial coin offering.

Fernandez believes himself a marketing genius.⁴⁰ He described his genius as being able to get people to believe what he wants them to believe. “I know how to get the media to consistently tell a story the way I want”⁴¹ He claimed he had taught some of this skill to a former employee, AH. “I taught him a lot of that. How to make it indirect to make a person think it’s true.”⁴²

An example of making a statement indirectly in order to make it more believable is the way that Fernandez is described in brochures advertising his speeches. He was scheduled to speak shortly after the second session of the hearing in Mexico at a program headlined “Show Me the Money Masterclass.” The marketing brochure for that speech touted Fernandez as “a graduate of Stanford University, founder of DreamFunded and one of the investors in the CNBC show ‘Make Me a Millionaire Inventor,’ and on the Oprah Winfrey Network.”⁴³ Although he denied holding himself out as a Stanford graduate, Fernandez admitted that his public biography states that he is “Stanford educated.” He blamed the misleading description of him as a Stanford graduate on someone who misread his biography when creating the brochure.⁴⁴ We find that Fernandez purposely created a false impression by his vague description of his education that caused others to unknowingly publicize him falsely as something he is not.⁴⁵

The misstatement of Fernandez’s educational background might seem trivial, but it is illustrative of his way of operating. He has fostered other misleading impressions to promote himself, the DreamFunded Portal, and some of the Portal’s crowdfunding offerings.

One example is a video clip from Fernandez’s appearance on “Make Me a Millionaire Inventor,” a CNBC television show pairing inventors with potential investors. Fernandez was

⁴⁰ Tr. (Fernandez) 1075.

⁴¹ Tr. (Fernandez) 1075.

⁴² Tr. (Fernandez) 1076.

⁴³ CX-82, at 5.

⁴⁴ Tr. (Fernandez) 881-86. At the hearing Fernandez described his background in computer science in somewhat grandiose terms, saying that he had taken “endless courses at Stanford, graduate in the school of engineering.” Tr. (Fernandez) 588. In his OTR, Fernandez acknowledged that he had stated on his LinkedIn profile that he had studied computer science, business, and entrepreneurship at Stanford University. CX-72 (Fernandez OTR), at 22. In post-hearing briefing, through counsel, Fernandez represented that he took three courses at Stanford. Resp. PH Br. 12.

⁴⁵ Fernandez similarly described his legal education on LinkedIn in a misleading way, so as to lead a person to think he had been a law student instead of a paralegal student. He wrote on LinkedIn, “After studying law for one year, I decided that being a lawyer was not what I wanted to do with my life. However, I learned the foundation of law and research, which helps me in my business portfolio companies and real estate investment start-up investing.” CX-72 (Fernandez OTR), at 22. Fernandez claimed he did not mean to mislead anyone, and said that whether a person would think from his statement that he had been a law student depended on that person’s perception. Essentially, Fernandez shifted the blame for misunderstanding his description of his legal studies away from himself and to the person who misperceived what he was saying. Fernandez said that he thought his statement was a good summary and would help attract other people in the LinkedIn network to connect with him. CX-72 (Fernandez OTR), at 23, 25. He never acknowledged that his description of his paralegal training as though he had been studying to become a lawyer was misleading.

introduced on the show as the CEO of “DREAMFUNDED.COM,” which was described as “a crowdfunding platform that had invested over \$100 million in startups.”⁴⁶ The assertion that the crowdfunding platform had invested over \$100 million was untrue. The program was filmed months before the Portal’s crowdfunding platform was even in operation—and, ultimately, the Portal raised only \$15,000 for two issuers.⁴⁷ The video, however, functioned as a third-party statement about Fernandez’s success and access to capital, conveying an impression very different from reality. The misstatement appeared true because someone else made it—someone who, presumably, had no reason to make a misstatement. Fernandez perpetuated the false impression by posting the video on social media, even though he knew the statement was not true.⁴⁸ The posting presented an inflated picture of his influence and ability to raise capital.⁴⁹

As further discussed below, the video was also false in another way. It showed Fernandez striking a deal to invest \$1 million in Company C, a company that was making a crowdfunding securities offering on the DreamFunded Portal. If he actually invested in Company C, that could violate the JOBS Act and a Crowdfunding Rule prohibiting a principal of an intermediary from holding a financial interest in an issuer using the intermediary’s platform. The video showing the offer to invest in Company C also might violate the JOBS Act and a Crowdfunding Rule prohibiting a funding portal from making recommendations or soliciting transactions. Potential investors could reasonably perceive Fernandez’s announced investment as an endorsement or recommendation of an investment in Company C, which would encourage them to make an investment in Company C, too. Potential investors and issuers considering using the DreamFunded Portal for their crowdfunding offerings also could be encouraged to seek out Fernandez because of his perceived resources and connections.

Fernandez, however, did *not* invest in Company C.⁵⁰ He denies even making the offer.⁵¹ This makes his posting of the video on social media sites as though it were a real investment highly misleading, a potential violation of other provisions of the JOBS Act and Crowdfunding Rules.

At least through the first few days of the hearing, two years after the television show first aired, a video clip showing Fernandez making the \$1 million offer was still available on

⁴⁶ CX-18. The video clip is available to view on a thumb drive that is part of the record.

⁴⁷ Tr. (Fernandez) 1270.

⁴⁸ Fernandez admits that he posted promotional materials from the CNBC show to various social media sites, although his testimony was confused and hazy as to exactly what he posted. Tr. (Fernandez) 1802-09.

⁴⁹ When Fernandez was asked at the hearing whether he told the producers of the show that DreamFunded had invested more than \$100 million in startups, he testified that he did not. Tr. (Fernandez) 313-14. When asked where the producers got the idea, he claimed that they just made it up, “as Hollywood does.” Tr. (Fernandez) 313. We do not believe that the producers simply made up the numbers. Fernandez’s testimony denying that he was the source of the false statement is not credible.

⁵⁰ Tr. (Fernandez) 344-45.

⁵¹ Tr. (Fernandez) 869, 1814-21; Tr. (remarks of Respondents’ counsel) 873-74.

YouTube on what appeared to be a DreamFunded Portal channel. In an attempt to avoid potential liability for a violation of the Crowdfunding Rules, Fernandez denied that he was responsible for posting it and called it a “clone” of the Portal’s channel or a “dummy page.”⁵² But, after the first three days of the hearing in September, Fernandez took steps to have the posting taken down from YouTube, as he testified when the hearing resumed.⁵³

We are skeptical of Fernandez’s denial of responsibility for the video clip, for reasons discussed below, but, regardless of whether he was responsible for posting the video clip, he is responsible for the way he describes himself on the DreamFunded.com website. On the website, he includes his appearance on the CNBC show in publicizing his activities⁵⁴ and he continues, as the brochure for the recent speech in Mexico demonstrates, to refer to the CNBC show in promoting himself as an “investor” on “Make Me a Millionaire Inventor.”⁵⁵ All the while, Fernandez knew that the false and misleading video clip is available on the Internet for viewing.⁵⁶ Furthermore, he knew that the entire episode, including the offer, was posted to CNBC’s own website. He explained how a clip from the CNBC posting could be obtained, manipulated, and reposted so that “then the average person will look at it and say, wow, this is CNBC.”⁵⁷ This is another example of making something appear true by making it come indirectly from someone other than Fernandez.

In sum, Fernandez is accustomed to exaggeration and creating misleading impressions to market himself. He may not have appreciated that these habits are incompatible with the responsibilities of a funding portal.

C. The DreamFunded Portal

1. Fernandez Promotes Crowdfunding Securities Offerings

The JOBS Act became law in 2012, but crowdfunding securities offerings could not begin immediately because, under the Act, the SEC first had to write rules and create the regulatory structure for such offerings. The SEC adopted its Crowdfunding Rules in 2015 and approved FINRA’s Funding Portal Rules in January 2016. Because most of the SEC’s Crowdfunding Rules did not go into effect until May 16, 2016, there was a substantial gap

⁵² Tr. (Fernandez) 258-59, 345, 1193-96.

⁵³ Tr. (Fernandez) 887, 1193-98.

⁵⁴ CX-52, at 32; CX-82, at 5; Tr. (Fernandez) 345-49.

⁵⁵ CX-82, at 5.

⁵⁶ For example, when MAP staff saw the video clip with the offer on the Portal’s website in spring 2017, SV emailed Fernandez about it. His attorney, MT, responded by saying it had been taken down and was “no longer present on the portal’s website.” CX-84. SV testified that she nevertheless continued to see the video clip with the offer in various locations on the Internet. Tr. (SV) 1379-86. The video clip with the offer was still on what appeared to be the Portal’s website in September 2017. Tr. (SV) 1391-93; CX-14.

⁵⁷ Tr. (Fernandez) 585-86.

between passage of the JOBS Act and the launch of crowdfunding offerings. During that period, those interested in participating in the marketplace for crowdfunding offerings lobbied regulators and urged them to work quickly to promulgate rules.⁵⁸ The SEC approved FINRA's Funding Portal Rules on an accelerated basis.⁵⁹

Starting in late 2013 and continuing to the present, Fernandez has promoted the development of crowdfunding securities offerings. Before the SEC and FINRA promulgated rules, Fernandez spoke to important political figures about crowdfunding and lobbied the SEC. As recently as the time of the hearing, Fernandez has been involved with proposed crowdfunding legislation for California.⁶⁰

2. Fernandez Establishes the DreamFunded Portal

In 2014, anticipating that the SEC would soon promulgate the rules required by the JOBS Act and allow crowdfunding offerings to commence, Fernandez began establishing a crowdfunding portal.⁶¹ He began raising money from his real estate business partner and other wealthy people in his network,⁶² and set up two special purpose vehicles called DreamFunded I and DreamFunded II. DreamFunded I was formed by a Regulation D offering for \$227,500 with an initial closing on July 30, 2014. DreamFunded II was formed by another Regulation D offering for \$41,000 with an initial closing on April 14, 2015. The two special purpose vehicles then contributed their funds in a subsequent Regulation D offering by the Portal's Parent. Each special purpose vehicle received in return for its contribution to the Parent a promissory note. Direct investors contributed \$599,500 to the Parent's offering. Each individual investor received an instrument referred to as a SAFE Convertible Note.⁶³ In total, Fernandez raised \$878,000 to fund the creation of the Portal.⁶⁴

⁵⁸ RX-25 is a December 15, 2014 letter to the Chair of the SEC and other SEC commissioners signed by Fernandez and close to 250 other people from all over the country. As to the portion of the JOBS Act dealing with crowdfunding, the signatories noted that "[a]lthough the Commission proposed rules in October 2013—nearly a year past the statutory deadline—the Commission still ha[d] yet to adopt them, eight months after the comment period ha[d] closed." They concluded, "For the sake of economic growth and innovation, we want to emphasize how critical it is for the SEC to finalize the remaining rules as soon as practicable."

⁵⁹Funding Portal Rules Approving Release, 2016 SEC LEXIS 262 (approving proposed rule change to adopt Funding Portal Rules 100, 110, 200, 300, 800, 900, and 1200, as modified by Amendment No. 1, on an accelerated basis).

⁶⁰ Tr. (Fernandez) 1121-22, 1134-36. With respect to equity crowdfunding, Fernandez testified, "I'm an expert. We helped draft – we helped move this forward. We're one of the inventors." Tr. (Fernandez) 1643.

⁶¹ Tr. (Fernandez) 1146-49.

⁶² Tr. (Fernandez) 1148.

⁶³ CX-7, at 1 (responses to FINRA staff questions in connection with the DreamFunded Portal's application for FINRA membership).

⁶⁴ Tr. (Fernandez) 1148; CX-7, at 1.

On March 29, 2016, Fernandez formed the DreamFunded Portal as a Delaware limited liability company.⁶⁵ The DreamFunded Portal had only one member, the Parent. But the Parent had multiple sources of funding, including DreamFunded I, DreamFunded II, and 36 identified individual direct investors.⁶⁶ With its layers of financing, the DreamFunded Portal had a more complicated ownership structure—and more money—than most funding portals. The MAP examiner, SV, testified that a more typical funding portal might have only \$500 in its bank account.⁶⁷

Both the DreamFunded Portal and the Parent were headquartered in San Francisco, where Fernandez has a residence.⁶⁸ Fernandez has been the Parent’s CEO from 2014 to the present, and he was the Portal’s CEO from its formation in March 2016 through the entire time that it was a funding portal, even during the period when it ostensibly had been sold. No one other than

⁶⁵ CX-6, at 1.

⁶⁶ CX-7; CX-8; CX-9.

At the hearing, Fernandez asserted that the funds raised by the special purpose vehicles and the Parent in the Regulation D offerings were *not* raised to form the DreamFunded Portal. He claimed that he had a different purpose, which was to form an investment club. Tr. (Fernandez) 61-62, 94. His testimony was impeached by his OTR testimony, where he said that the money was raised to create the Portal. Tr. (Fernandez) 96-98. At his OTR, he testified, “The whole purpose was to create the registered portal and create the brand.” CX-72 (Fernandez OTR), at 53. He explained that the funds were for the “operation, branding, and potential growth of . . . [the] funding portal.” CX-72 (Fernandez OTR), at 62; Tr. (Fernandez) 101-02.

We credit Fernandez’s OTR testimony on this point and not his hearing testimony. The OTR testimony is consistent with other record evidence. As discussed above, throughout 2014 and 2015, Fernandez was actively lobbying regulators and others to do whatever they could to enable crowdfunding offerings to begin. His focus was on entering the equity crowdfunding market place. He also claims to have received numerous awards for his work on equity crowdfunding. Tr. (Fernandez) 1139-40. The Portal posted on its website a stream of clips from various news publications, and, as early as September 2015, Forbes reported that the new equity crowdfunding platform had raised \$1 million. CX-52, at 44. In the process of applying for the Portal to become a FINRA member, Fernandez told MAP staff (in written responses to the staff’s questions) that the Portal was financed by DreamFunded I, DreamFunded II, and a number of individual direct investors. CX-7; CX-8 (Source of Funds Reconciliation); CX-9 (DreamFunded investors spreadsheet). For his hearing testimony to be true, Fernandez would had to have lied to MAP staff and in his OTR.

We do not believe Fernandez lied to MAP staff or in his OTR. We believe that Fernandez testified differently at the hearing because doing so served his argument that FINRA has no jurisdiction to issue the Rule 8210 request. As discussed below, he argues that FINRA has no jurisdiction because the financial records of the Parent and the two special purpose vehicles do not relate to the Portal.

We find that, as Fernandez testified at his OTR, and as he told MAP staff when applying to register the Portal, he raised funds to create and launch the DreamFunded Portal through the special purpose vehicles and the Parent.

⁶⁷ Tr. (SV) 1445-55.

⁶⁸ CX-2 (FINRA Background Questionnaire), at 7. Fernandez’s other residence is in Sacramento, California. CX-2, at 1.

Fernandez has ever served as CEO of the DreamFunded Portal. Fernandez also was the Portal's only Chief Compliance Officer ("CCO") and Chief Financial Officer ("CFO").⁶⁹

3. FINRA Grants the Portal's Application for Membership

The DreamFunded Portal applied for FINRA membership shortly before the SEC's Crowdfunding Rules became effective on May 16, 2016.⁷⁰ In reviewing the application, FINRA's MAP staff asked for an explanation of how the Parent was funded, copies of various bank statements, and flowcharts showing the flow of funds between the entities and between the entities and investors involved in financing the Portal.⁷¹

MAP staff also reviewed the Portal's website in connection with its application for membership and told Respondents that in a number of ways the website appeared to be out of compliance with the law and rules related to crowdfunding offerings. For example, the website seemed to promise "quick liquidity," a way of achieving "best practice diversification," and a guaranteed ability to sell shares purchased on the site, statements the staff thought were exaggerated and promissory in nature, and not fair and balanced.⁷² Funding Portal Rule 200(c)(2)(A) prohibits a funding portal from distributing or making available to investors communications that are exaggerated or promissory in nature. Funding Portal Rule 200(c)(2)(B) prohibits distributing or making available to investors any communication that is not fair and balanced.

Through counsel, Respondents wrote back to the staff, saying that they had revised the website and that they were working on a separate website just for crowdfunding. They hoped the new website would be ready for review in mid-June 2016.⁷³

FINRA granted the DreamFunded Portal's application for FINRA membership on July 12, 2016.⁷⁴

⁶⁹ CX-2 (FINRA Background Questionnaire), at 7; CX-6, at 2. A second person, RH, was a co-founder of the Portal and, for a short time, was the Portal's Chief Operations Officer. However, he left his position with the Portal in September 2016, after OFDMI staff raised concerns that he was part owner of an issuer that was making an offering on the Portal's platform, which is not permitted under the Crowdfunding and Funding Portal Rules. CX-6, at 2; CX-87, at 1; Tr. (PD) 1836-37.

⁷⁰ SV testified that the DreamFunded Portal filed its application for FINRA membership in May 2016. Tr. (SV) 1360-61. On May 16, 2016, FINRA posed questions to Respondents about the information they initially provided. Respondents provided additional information on June 6, 2016. CX-7 (Respondents' responses to FINRA staff questions).

⁷¹ CX-7 (Respondents' responses to FINRA staff questions).

⁷² CX-7 (Respondents' responses to FINRA staff questions), at 4.

⁷³ CX-7 (Respondents' responses to FINRA staff questions), at 4.

⁷⁴ CX-3, at 1.

Under Funding Portal Rule 100(b)(1), all officers, owners, controlling persons, and employees of a funding portal are associated persons. As the CEO of the Portal, Fernandez was an associated person of a FINRA member, and, as noted above, he received a CRD number.⁷⁵ Although Fernandez had no experience working in the securities industry, he did not have to take any classes or training, did not have to take any qualifying examination, and did not have to obtain a license. He has never been a registered person with FINRA.⁷⁶

4. The DreamFunded Portal Conducts Business

Between July 2016 and October 2017, the DreamFunded Portal acted as an intermediary in approximately 15 crowdfunding offerings. Of those, two closed, with investors' funds released from escrow.⁷⁷ The two offerings that closed raised an aggregate of only \$15,000.⁷⁸ During the Portal's 16 months of operations, Fernandez claims that he vetted and rejected over 800 other issuers that applied to make offerings using the DreamFunded Portal's platform.⁷⁹ He produced no records corroborating that claim. Indeed, he testified that he tossed any paper records of his purported due diligence because they were not important.⁸⁰

5. Fernandez Gives Testimony and Withdraws the Portal from FINRA Membership

On October 20, 2017, Fernandez appeared to give testimony at an OTR. As discussed further below, FINRA staff sought additional information and testimony pursuant to FINRA Rule 8210 by letter dated October 24, 2017.⁸¹

Fernandez testified at the hearing that he withdrew the DreamFunded Portal from its FINRA membership on October 4, 2017, but at his OTR on October 20, 2017, he testified that he had not yet filed the withdrawal papers at the time of the OTR because it was a "hard emotional decision." FINRA terminated the Portal's status as a FINRA funding portal member on November 3, 2017.⁸² From that point forward, Fernandez was no longer associated with a FINRA member.

⁷⁵ Answer ("Ans.") ¶ 5; CX-4, at 4; CX-6, at 2.

⁷⁶ CX-1 (Fernandez CRD record).

⁷⁷ Ans. ¶ 18.

⁷⁸ Tr. (Fernandez) 1270; CX-66.

⁷⁹ Tr. (Fernandez) 1249-74.

⁸⁰ Tr. (Fernandez) 190-94, 198-99.

⁸¹ CX-72 (Fernandez OTR); CX-35.

⁸² Tr. (Fernandez) 66, 916; CX-72 (Fernandez OTR), at 96-97; Ans. ¶ 4.

6. Respondents Have Changing and Intermittent Legal Counsel

Fernandez asserted reliance on advice of counsel during the investigation and as a defense in his Answer.⁸³ He also claimed not to know what his attorneys produced to FINRA staff in response to a Rule 8210 request. He simply relied on his attorneys to do the “right thing.”⁸⁴ Because Fernandez asserted reliance on advice of counsel, we have in the record a few communications between Fernandez and one of his attorneys that would ordinarily have been protected from disclosure by the attorney-client privilege.

During the course of establishing and operating the Portal, and in responding to regulatory inquiries, Respondents have had several different attorneys. There appear to have been gaps in legal representation when Fernandez may have been operating without guidance from counsel. It is helpful to understand when Fernandez had counsel and when he may not have had counsel because he sometimes asserts he relied on counsel when he apparently had no counsel.

KL provided legal representation in connection with the Portal’s FINRA membership application and supplied Fernandez with written supervisory procedures for the Portal. In late August 2016, after the Portal became a FINRA member, KL told the staff in the future to deal directly with Fernandez.⁸⁵

We are unaware of any subsequent legal counsel for Respondents until the following April. The MAP examiner who opened a for cause examination at the end of 2016 to examine whether certain potential violations had occurred dealt with Fernandez exclusively in connection with her inquiries until April 2017. Toward the end of April, MT wrote to MAP staff that he had been recently retained by Respondents to deal with their inquiries.⁸⁶ It appears that from September 2016 until April 2017, as potential crowdfunding offerings were posted on the Portal’s website and went live, Fernandez was operating the Portal without legal counsel.

MT responded to inquiries from both MAP and OFDMI staff through the summer and fall of 2017, but he did not accompany Fernandez at his OTR on October 20, 2017. On December 6, 2017, MT emailed OFDMI staff that he no longer represented Fernandez.⁸⁷

⁸³ CX-63 at 3-49; Ans. introduction, and Ans. ¶¶ 2, 18-21, 24-25, 28, 31, 33-36, 39, 43-44, 48-51, 53-57, 59, 61, 63, 65-74, 76-92, 94-96, 98-100, 103-05.

⁸⁴ Tr. (Fernandez) 225-33.

⁸⁵ CX-72 (Fernandez OTR), at 38-39; CX-3; Tr. (Fernandez) 172, 743-45; Tr. (SV) 1361-63.

⁸⁶ CX-84; Tr. (SV) 1363-67, 1393-95.

⁸⁷ CX-38, at 1.

Fernandez then retained SA in December 2017. SA acted as Respondents' counsel only until January 25, 2018.⁸⁸ We are unaware of any legal counsel from that point until July 26, 2018, when Respondents' current counsel filed an appearance in this disciplinary proceeding.

D. Introduction to Legal and Regulatory Requirements

We first briefly introduce some of the relevant legal and regulatory requirements before setting out the chronology of events relevant to each issuer.

1. Issuer's Responsibilities

As more fully discussed below, the Securities Act, as amended by the JOBS Act, requires an issuer making a crowdfunding offering to describe its business and anticipated business plan, state the purpose for the offering and intended use of the proceeds, and provide a description of its financial condition.⁸⁹ Crowdfunding Rule 201 implements these statutory requirements. Among other things, the Crowdfunding Rule requires the following:

- An issuer must describe its business and its anticipated business plan (Crowdfunding Rule 201(d));
- An issuer must disclose the purpose of its offering and how it plans to use the proceeds (Crowdfunding Rule 201(i)); and
- An issuer making an offering for \$107,000 or less (such as the offerings at issue) must provide information about its total income, taxable income, and total tax as reported on the issuer's most recent federal income tax returns—if any. An issuer must also provide its financial statements. The issuer's CEO must certify the financial statements as true and correct in all material respects, unless the statements have been reviewed or audited by an independent public accountant. Then the accountant may certify the statements (Crowdfunding Rule 201(t)).

The SEC has created the Form C for issuers to use in disclosing the required information.⁹⁰ Under Crowdfunding Rule 203(a)(1), the Form C must be filed before an offering can commence. Among other things, an issuer must disclose on the cover page information about itself and about the offering. An issuer must disclose the type of security offered, the target amount of the offering, and the deadline to reach the target amount.⁹¹ In other parts of the Form C, directors, officers, and principal securities holders must disclose their business history during

⁸⁸ CX-39; CX-47.

⁸⁹ Section 4A(b)(1) of the Securities Act.

⁹⁰ The SEC makes a template of the Form C available on its website at <https://www.sec.gov/files/formc.pdf> ("Form C template").

⁹¹ Form C template at 1.

the past three years and the nature and amount of their ownership in the issuer.⁹² The Form C provides places to enter information about a company’s business plan and the intended use of offering proceeds.⁹³

In several places, the Form C asks for financial information. It has a section for basic financial information, including number of employees, total assets, cash and cash equivalents, accounts receivable, short-term and long-term debt, revenues/sales, cost of goods sold, taxes paid, and net income.⁹⁴ The Form C also has a section in question-answer that asks about the financial condition of the issuer. This section of the Form C requests certain financial information, including “[f]inancial statements of the issuer and its predecessors, *if any*.”⁹⁵ It asks whether the issuer has an operating history and then asks for different financial information depending on whether the issuer has an operating history. An issuer with an operating history must discuss its financial statements and known material changes or trends in financial condition, along with the results of operations and other matters. In contrast, the Form C instructs an issuer with no prior operating history to discuss “financial milestones and operational, liquidity and other challenges.”⁹⁶

The Securities Act, as amended by the JOBS Act, makes certain kinds of issuers ineligible to raise funds through crowdfunding securities offerings and authorizes the SEC to designate other kinds of issuers ineligible.⁹⁷ Under this authority, the SEC promulgated Crowdfunding Rule 100(b)(6), which provides that a company is not eligible to make a crowdfunding offering if the company’s only business plan is to engage in a merger with or acquisition by an unidentified company. The Form C implements the statute’s eligibility requirement in a section requiring the issuer to certify, among other things, that it is “[n]ot a development stage company that (a) has no specific business plan or (b) has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies.”⁹⁸

2. Funding Portal’s Responsibilities

Crowdfunding Rule 301(a) requires that an intermediary have a “reasonable basis” for believing that an issuer seeking to offer and sell securities on its platform is in compliance with the applicable law and related regulatory requirements. An intermediary in a crowdfunding offering is not required to conduct due diligence, however, to obtain that reasonable basis. Under

⁹² Form C template at 6-7.

⁹³ Form C template at 8.

⁹⁴ Form C template at 2.

⁹⁵ Form C template at 14 (emphasis supplied).

⁹⁶ Form C template at 13.

⁹⁷ Section 4A(f) of the Securities Act.

⁹⁸ Form C template at 5.

Crowdfunding Rule 301(a), an intermediary is entitled to rely on an issuer’s representations concerning its compliance—unless the intermediary has a “reasonable basis” for doubting the reliability of those representations.

Crowdfunding Rule 301(c)(2) requires an intermediary to deny access to an issuer if it has a “reasonable basis” for believing that the issuer or the offering presents a potential for fraud or “otherwise raises concerns about investor protection.” Crowdfunding Rule 402(b)(10) makes plain that Crowdfunding Rule 301(c)(2) applies to a funding portal and reiterates that a funding portal must deny access or cancel an offering if it has a “reasonable basis” for believing there is a risk of fraud or there are other concerns about investor protection.

After giving access to its platform, a funding portal has some continuing responsibilities. As discussed below, for example, the funding portal must give investors various notices with specified information. It also has some responsibility for reviewing the issuer’s postings on its platform, because Funding Portal Rule 200(c)(2)(A)(i) prohibits a funding portal from distributing or making available on its website any communication that includes “a false, exaggerated, unwarranted, promissory, or misleading statement or claim.”

Intermediaries that are registered as securities broker-dealers are subject to recordkeeping rules for broker-dealers promulgated by the SEC under the Exchange Act. Funding portal intermediaries are subject to the recordkeeping requirements set forth in Crowdfunding Rule 404. Under Crowdfunding Rule 404, a funding portal must make and preserve for five years (and for two years in a readily accessible place) a number of different records, including the following:

- all records related to an investor’s purchase or attempt to purchase securities on the funding portal’s platform;
- all records related to issuers on the platform;
- all communications that occur on or through the platform;
- all agreements relating to the business; and
- all records required to demonstrate compliance with the funding portal’s obligations under the Crowdfunding Rules.

E. Offerings at Issue

1. Company A

Company A was a social networking company. In hearing testimony, Fernandez described the company’s product as an application to allow users to post content on multiple social networks simultaneously. He said the application also would draw onto Company A’s

platform those people connected to its users on other social networks.⁹⁹ In an SEC filing, Company A described its application as a way of selecting and posting messages on Facebook, Twitter, Tumblr, and LinkedIn using a one-button instant sharing feature. It claimed to facilitate live streaming across social platforms.¹⁰⁰

a. Company A Files Its Form C

On October 28, 2016, Company A's Form C was filed with the SEC.¹⁰¹ It appears that KL, the attorney who had assisted Fernandez during the FINRA membership application process, had stopped representing Respondents by then and that Fernandez had no other counsel. It is unclear who prepared the Form C. At the hearing, Fernandez claimed that MT reviewed and approved issuers' Forms C, including this one, before they were posted on the Portal's website.¹⁰² But MT was not retained until the spring of 2017.¹⁰³ We therefore believe that Fernandez's hearing testimony regarding MT's review was not true.

Company A's Form C reported that the company's date of organization was September 20, 2016, approximately a month before it filed the Form C. The Form C identified KR as the inventor of the application and CEO of the company. He signed the Form C on September 30, 2016. Prior to the offering, KR held 100% of the voting power in Company A. DA was the company's co-founder and Chief Marketing Officer. Fernandez had known DA for several years, and Fernandez sometimes socialized with him.¹⁰⁴ Although DA was listed as a common stock holder, he held no voting power.¹⁰⁵ The company planned to offer 100,000 securities for a target amount of \$10,000. It set September 26, 2017, as the target closing date.¹⁰⁶

Company A's Form C disclosed that it had no operating history, no assets, and no revenues, and that it did not foresee generating any profits in the near future. It also declared that the amount of money sought in the offering would not be enough to sustain its business plan.¹⁰⁷ Nonetheless, Company A claimed a \$1 million valuation. It asserted that it would have 100 million active users by its fifth year and could achieve a "1B+ market cap," without providing any explanation of how the issuer hoped to make that happen.¹⁰⁸

⁹⁹ Tr. (Fernandez) 1324-31.

¹⁰⁰ CX-27, at 6.

¹⁰¹ CX-74.

¹⁰² Tr. (Fernandez) 609-15, 891-94.

¹⁰³ CX-73.

¹⁰⁴ CX-26, at 7; CX-55; CX-72 (Fernandez OTR), at 132, 202.

¹⁰⁵ CX-26, at 6-7.

¹⁰⁶ CX-26, at 1, 31.

¹⁰⁷ CX-26, at 8.

¹⁰⁸ CX-26, at 29-32.

Company A’s Form C included a marketing piece designed to encourage investors to invest in Company A. The marketing piece posed potential questions investors might have about the investment and answered them. The final question was “Lastly what is your exit [strategy]? How do I get my money back?”¹⁰⁹ Company A responded to that question, “Our exit strategy is to be acquired by a strategic partner within 5-10 years at a sales target of \$500 Million. This gives you a significant return on your investment.”¹¹⁰ Company A then identified “Strategic Acquisition Partners” by showing logos of large tech companies such as Facebook, Google, Twitter, Apple, Microsoft, and Amazon.¹¹¹ The Form C suggested no way that investors could obtain a return on their investment in Company A other than a future merger or acquisition.

The instructions on Form C require a “reasonably detailed description of any intended use of proceeds” and, if there are multiple possible uses, a discussion of the factors that may be used in determining how to allocate the proceeds among those possible uses.¹¹² Company A said on its Form C that its purpose was “to continue developing and complete our mobile application.”¹¹³ It planned to use the funds to “pay officers, app marketing, and social advertising.”¹¹⁴ The company provided no concrete details, and it did not discuss the factors that it would consider in allocating the proceeds among the different uses.

With respect to financial information, Company A provided on the form its assets, accounts receivable, short-term and long-term debt, revenues, income, and taxes paid: It entered a zero for every item.¹¹⁵ The financial information was consistent with a company that had no prior operating history, and KR, the CEO of Company A, certified that the financial statements “included in this Form are true and complete in all material respects.”¹¹⁶

No separate financial statement accompanied the Form C. The absence of a separate financial statement later became an issue for FINRA staff, and it forms one basis for the charges in the Fourth Cause of Action.

b. Respondents Fail to Review Company A’s Form C Before Posting It

In his OTR, Fernandez testified that he did not review the Forms C for all the issuers listed on the Portal’s website prior to putting them on the platform, and he admitted that

¹⁰⁹ CX-26, at 32.

¹¹⁰ CX-26, at 32.

¹¹¹ CX-26, at 32.

¹¹² CX-26, at 9.

¹¹³ CX-26, at 9.

¹¹⁴ CX-26, at 9.

¹¹⁵ CX-26, at 2.

¹¹⁶ CX-26, at 21.

Company A's Form C was one he did not review until later.¹¹⁷ At the hearing, however, Fernandez repudiated his OTR testimony and testified that he did review Company A's Form C before it was posted on the DreamFunded Portal's platform. He claimed that there were many versions of the Form C, and he could not be certain which one he saw. By vaguely suggesting that he read some unspecified version of the original Form C before it was posted, he sought to make it appear that he had done some checking on the issuer's disclosures but, at the same time, to avoid responsibility for any defects in the Form C.¹¹⁸

We find that Fernandez's testimony at his OTR on the lack of review is more consistent with events than his hearing testimony. Fernandez did not regularly review issuers' Forms C before posting them to the DreamFunded Portal's website. It appears that he 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 Portal's platform.

c. The First and Second Amendments to Company A's Form C Announce Material Changes and Introduce Discrepancies in the Issuer's Disclosures

In January 2017, Company A filed two amendments to its Form C. The amendments announced a material change in the issuer's ownership. The amendments also introduced discrepancies into the issuer's disclosures.

On January 12, 2017, an amendment to Company A's Form C was filed, but that first amendment was not signed.¹¹⁹ On January 24, 2017, a second amendment to the Form C was filed, which DA signed as CEO of Company A.¹²⁰ In each of these amendments, the box on the first page was checked indicating that the amendment contained a material change to the offering

¹¹⁷ CX-72 (Fernandez OTR), at 130-35, 138.

¹¹⁸ Tr. (Fernandez) 361-67. Fernandez suggested that he might have read a version of the Form C before it was posted on the SEC's EDGAR database but that the version he saw was later taken down from EDGAR. Tr. (Fernandez) 353-63.

Fernandez is incorrect about the removal of any version of the Form C. Once a filing is posted on EDGAR, it remains on EDGAR. Tr. (PD) 1835; CX-74. If a posted filing is in error, then an amendment may be filed but the original remains posted. For example, as discussed below, Company A filed an amendment to its Form C that was not signed. It followed up with another copy of the amendment that was signed. The unsigned amendment remained on the SEC website after the second amendment was posted. Indeed, the original Form C remained on EDGAR, along with all the amendments. A person can thus track the full history of the filings. CX-26; CX-26.1 (unsigned copy); CX-26.2 (signed copy); CX-26.3 (unsigned copy); CX-74.

In adopting the Crowdfunding Rules, the SEC expressly said that, in addition to current information, investors and potential investors would be able to access historical versions of a funding portal's filings on EDGAR. The SEC believed that making all the documents publicly available and searchable would provide the public with information about the registration process and the funding portal industry, thereby increasing transparency. Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *486-87.

¹¹⁹ CX-26.1 (unsigned copy), at 40.

¹²⁰ CX-26.2 (signed copy), at 40.

that required investors to reconfirm their investment commitments within five business days.¹²¹ The amendments disclosed that KR had sold his shares in the company to DA, who became the new CEO of the company.¹²² The change in ownership of the company was a material change in the offering.¹²³

The first two amendments also changed the target number of securities to be sold from 100,000 to 10,000, although the target amount of money remained \$10,000.¹²⁴ It is unclear whether the change was intentional or merely a typographical error. If intentional, the change in the target amount of securities to be sold was a material change in the offering.

The two amendments were inconsistent with the original Form C in several regards. Although the original Form C disclosed that KR had 100% of the voting power in the company, the amendments claimed that DA had purchased KR's interest and as a result held 85% of the voting equity prior to the offering.¹²⁵ The amendments listed the date of organization as September 26, 2016, instead of September 20, 2016.¹²⁶ They also listed the offering deadline as September 20, 2017, instead of September 26, 2017.¹²⁷ The amendments gave no explanation for these inconsistencies. It is unclear whether they were intentional changes or typographical errors.

Both amendments were consistent with the original Form C, however, in at least one regard. The amendments also contained no separate financial statement.

d. Respondents Fail to Give the Required Notice of Material Change to Investors

The two amendments were marked as containing a material change. SEC Crowdfunding Rule 304(c)(1) provides that if there is a material change to the terms of an offering or a material change in the information provided by the issuer, then an intermediary such as a funding portal

¹²¹ CX-26.1 (unsigned copy), at 1; CX-26.2 (signed copy), at 1.

¹²² CX-26.1 (unsigned copy), at 42; CX-26.2 (signed copy), at 42.

¹²³ At the hearing, Fernandez claimed that there was no change in the CEO of Company A. Fernandez maintained that DA had been the owner of the company all along, and he denied that KR was ever the owner of Company A. Tr. (Fernandez) 359-60.

We do not credit Fernandez on this point. The record contains no corroboration, and Fernandez's testimony is inconsistent with other evidence. KR signed the original Form C filed by Company A as CEO, and the document clearly states that KR held 100% of the voting power of the company. CX-26. Moreover, Fernandez's counsel in July 2017 produced to FINRA staff a document purported to be evidence of Respondents' due diligence on Company A, which contained photos of KR, as "Founder/CEO" and DA, as "CMO." CX-30, at 20. If Fernandez's hearing testimony were true, that would mean that the original Form C was false—and that Fernandez either knew it was false or put it up on the Portal's platform without reading it.

¹²⁴ CX-26.1 (unsigned copy), at 2; CX-26.2 (signed copy), at 2.

¹²⁵ CX-26.1 (unsigned copy), at 31; CX-26.2 (signed copy), at 31.

¹²⁶ CX-26.1 (unsigned copy), at 1, 16; CX-26.2 (signed copy), at 1, 16.

¹²⁷ CX-26.1 (unsigned copy), at 2; CX-26.2 (signed copy), at 2.

must give notice of the material change to any investor who has made an investment commitment. The notice must explain that the investment commitment will be canceled unless the investor reconfirms the commitment within five business days of receiving notice. In essence, an investor has a right to let an investment commitment lapse if a material term of the offering is changed—it is no longer the same offering—and the required notice informs the investor of that right. In order to make an investment in the offering as revised, an investor must affirmatively signify the intention to invest in the revised offering.

There is no evidence that the DreamFunded Portal gave investors notice of the change in ownership or the change in the target amount of securities in connection with either the first or second amendment to the Form C. However, it may be that no investment commitments had yet been made, and, thus, no material change notice was necessary. We do not know from the record the status of investor commitments at this juncture.¹²⁸

e. The CEO of Company A Seeks to Lower Target Amount of Offering

In a May 6, 2017 email, DA asked Fernandez to have the offering’s target amount lowered from \$10,000 to \$4,500 “at your earliest convenience.” DA provided no information regarding the reason for his request to lower the target amount for the offering.¹²⁹ By this time, Respondents had legal counsel. Fernandez wrote to his attorney, MT, on May 16, 2017, asking whether the target amount could be lowered and how it could be accomplished.¹³⁰ Respondents’ attorney wrote back that an amended Form C would have to be filed and that the disclosure on the platform would have to be changed.¹³¹

f. The CEO of Company A Directs That Investor Funds Be Deposited to His Overdrawn Personal Account

Toward the end of May 2017, DA apparently was planning for the closing of the offering immediately after the target amount was lowered. On May 20, 2017, DA emailed Fernandez saying that he would like to close out the offering at a target of \$4,000. DA included a picture of a voided check where investor funds should be sent when the offering closed. That check bore DA’s name and what appeared to be a residential address, with street number and apartment

¹²⁸ One exhibit in evidence indicates that as of February 13, 2017, Company A had investors. The exhibit reported that the company had raised \$380. CX-27, at 1. But the exhibit does not inform us whether there were investors in January 2017.

¹²⁹ RX-10, at 1.

¹³⁰ RX-10, at 1.

¹³¹ RX-10, at 2. As previously noted, because Respondents asserted reliance on counsel in defense of many of the charges, some emails between Fernandez and his attorney, which ordinarily would be withheld as privileged, are in the record. CX-62; CX-63.

number. DA referred to the bank account as “my account.”¹³² Nowhere is there any indication that investor funds were being directed to Company A or intended to be used for Company A’s purposes.¹³³

On May 25, 2017, DA sent an email to FundAmerica. DA wrote, “I just got debited again for \$20! What is this fee for as my campaign is no longer on dreamfunded. These surprise fees without proper notice is really inconveniencing me” DA ended by saying, “and now my account is overdrawn.”¹³⁴ That same day, DA forwarded his email exchange with FundAmerica to Fernandez, including the email saying his account was overdrawn.¹³⁵

g. Despite Knowing Facts Raising Investor Protection Concerns, Respondents Continue to Give Company A Access to Platform

As noted above, Crowdfunding Rule 301(c)(2) and Crowdfunding Rule 402(b)(10) require a funding portal to deny access to its platform if it has a “reasonable basis” for believing that the issuer or the offering presents a potential for fraud or “otherwise raises concerns about investor protection.” At this point, it appeared that DA might be preparing to take control of whatever investor funds were in escrow as soon as possible because of his personal financial distress, not for any visible business purpose. Coupled with other facts and circumstances of the offering, DA’s actions would have given a reasonable person concerns about a potential fraud or, at a minimum, investor protection concerns. The haphazard amendments were filled with discrepancies, and some of them, like the information about a change in the ownership of the company, were material.

A reasonable person would have denied the issuer any further access to the Portal’s services, canceled the offering, and returned investors’ funds. Instead, Fernandez continued to work with DA on closing the offering and disbursing investor funds to DA.

h. MAP Staff Member Tells Respondents about Missing Financial Statement

At some point while Fernandez and his attorney, MT, were engaged in answering various inquiries from MAP staff in late April and May 2017, Fernandez testified that he spoke to SV,

¹³² CX-33, at 1. DA did not explain why he sought a lower target amount than the \$4,500 he had earlier told Fernandez he wanted. It may be that the target amount DA sought was the amount of investor funds then held in escrow, and that number changed. As discussed below, it appears that less than \$4,500 was ultimately distributed.

¹³³ CX-33, at 3.

¹³⁴ CX-33, at 3. It is unclear what DA meant when he said his campaign was “no longer on dreamfunded.” But we note that Respondents removed several offerings from the Portal’s website on April 30, 2017, including Company A’s and Company B’s. CX-66.

¹³⁵ CX-33, at 3.

the MAP examiner assigned to work with the DreamFunded Portal. SV told Fernandez that a financial statement was missing from Company A's Form C.¹³⁶

i. Respondents Purport to Suspend the Offering

After SV's call with Fernandez about the missing financial statement, Respondents' attorney, MT, told FINRA staff in a June 1, 2017 letter response to various inquiries from MAP staff that Respondents had not received financial statements from Company A and, because they did not believe the company was in compliance, they had suspended the offering campaign. The letter response did not indicate when Respondents had purportedly suspended the offering or for how long.¹³⁷ Fernandez testified that he took the offering down from the Portal's website immediately after SV's call in order to do more "research."¹³⁸

Given that Company A's Form C had been on the Portal's website from January through April of 2017,¹³⁹ and given that Fernandez was working with DA in May 2017 to close the offering early, it is difficult to credit the claim that Respondents suspended the offering for lack of a financial statement.

At the hearing, Fernandez claimed that when SV called about the lack of a separate financial statement that the offering was not "live." He claimed that it was "pending" (meaning that the site had a PowerPoint and video about Company A and its founders, but it did not have a link that enabled investors to make an investment commitment).¹⁴⁰ In light of the fact that DA was seeking the early release of investors' funds in May 2017, Fernandez's testimony about the offering not being live is misleading at best. Even if Fernandez removed the offering from the website at the end of April 2017, he continued to work with DA as though the offering were live and ready to be closed. We find that Fernandez's hearing testimony that the offering was suspended because of the missing financial statement was not credible.

No one apparently considered whether a separate financial statement was even necessary when Company A had no operating history. It had no financial statements to disclose. As noted above, a Form C requires that an issuer's financial statements be attached—"if any."¹⁴¹

¹³⁶ Tr. (Fernandez) 360; Tr. (SV) 1415-16.

¹³⁷ RX-5, at 1.

¹³⁸ Tr. (Fernandez) 360.

¹³⁹ CX-66.

¹⁴⁰ Tr. (Fernandez) 632-34.

¹⁴¹ Form C template at 14.

j. The Third Amendment to Form C Lowers Target Amount of Offering and Provides Purported Financial Statement

On June 19, 2017, Company A filed a third amendment to its Form C.¹⁴² A checkmark in a box on the first page indicated that the amendment contained a material change.¹⁴³ This amendment disclosed that the target amount had been lowered to \$4,000.¹⁴⁴ The amendment gave no explanation for the change in target amount.

Respondents failed to give investors the required notice of the material change. They did not inform investors that, because of the decrease in target amount, the investors had five business days to reconfirm their investment commitment or the commitment would be canceled. We know that there were investors, because DA and Fernandez were working on closing the offering “as soon as convenient” and disbursing the funds in escrow once the target amount was lowered. PD, the Enforcement investigator, testified that at the time there were 13-14 investors.¹⁴⁵ Those investors were entitled to notice of the material change in the offering and the opportunity to have their commitments canceled if they so desired.

The third amendment purported to remedy what SV had pointed out as an error, that the Form C was missing any separate financial statement. The third amendment contained what purported to be an unaudited financial statement prepared by an independent accountant as of April 24, 2017. The financial statement showed no cash or assets. The financial statement was a balance sheet with a single entry showing a receivable of \$4,345 and members’ equity in the same amount.¹⁴⁶ Nowhere did the amendment identify the independent accountant who supposedly prepared the financial statement, and no person signed the financial statement or certified it.¹⁴⁷ The certification by KR in the original Form C could not serve as the required certification for the financial statement in the third amendment because KR signed his certification months before the period covered by the purported financial statement.

¹⁴² CX-74.

¹⁴³ CX-26.3 (unsigned copy), at 1.

¹⁴⁴ CX-26.3 (unsigned copy), at 2.

¹⁴⁵ Tr. (PD) 1951-52.

¹⁴⁶ As discussed below, the purported receivable is identical to the amount that Respondents’ attorney told MAP staff that Company A had raised in the offering. If the receivable merely reflected the amount of investor monies held in escrow, then it was not truly a receivable that Company A was entitled to receive. At that point, investors still had a right to have their commitments canceled and their funds returned. Since the purported financial statement showed no assets and no expenses, it is difficult to see how the company could have generated a true receivable.

¹⁴⁷ CX-26.3 (unsigned copy), at 43-49.

k. The Third Amendment Contains False Information

The third amendment contained false information. Although DA and Fernandez planned to close the offering soon, the target date listed on the amendment remained September 20, 2017.¹⁴⁸

l. The Offering Closes Early

Company A's offering closed on June 26, 2017, just seven days after the company filed the third amendment to its Form C, five days after the target amount for the offering was lowered,¹⁴⁹ and three months before the offering was originally scheduled to be closed. When the MAP examiner, SV, heard through a colleague that the offering had closed, she was shocked. She had received no notice that the purported suspension of the offering had been lifted.¹⁵⁰

m. The Portal Fails to Give the Required Early Closing Notice

Respondents gave no notice of the early closing. Under Crowdfunding Rule 304(b) an intermediary must give notice of the new closing date and inform investors that, as provided in Crowdfunding Rule 304(a), they have a right to cancel an investment commitment for any reason until 48 hours prior to the closing deadline. By failing to give the required notice of early closing, Respondents deprived investors of their right to change their minds up until 48 hours before the closing.

n. FINRA Staff Request Copies of Notices

On July 7, 2017, almost two weeks after Company A's offering closed, OFDMI staff sent Fernandez a letter pursuant to FINRA Rule 8210 saying that OFDMI was conducting a review of crowdfunding offerings for which the DreamFunded Portal had acted as intermediary. Among the inquiries was a request for a "detailed explanation of the steps taken by [the DreamFunded Portal] to reconfirm investor commitments for the [Company A] offering after amendments were filed on January 12, 2017, January 24, 2017, and June 19, 2017."¹⁵¹ Additionally, the staff asked for copies of all notices that the Portal sent to investors in connection with the three amendments.¹⁵²

As discussed below in recounting Respondents' interactions with FINRA staff, because Respondents removed Company A's offering from the Portal's website, what was happening

¹⁴⁸ CX-26.3 (unsigned copy), at 2.

¹⁴⁹ Ans. ¶ 19.

¹⁵⁰ Tr. (SV) 1546-48.

¹⁵¹ CX-29, at 1.

¹⁵² CX-29, at 1.

with the offering was not visible to OFDMI. The staff did not know on July 7, 2017, that the offering had already closed.

o. Respondents Produce No Contemporaneous Notices, and Fernandez Fabricates After-the-Fact Notices

On July 16, 2017, Fernandez copied the OFDMI request regarding notices for the Company A amendments in an email to his attorney, MT, asking “Did I make a mistake here?”¹⁵³ On July 18, 2017, his attorney responded by email, “It looks like it.”¹⁵⁴ MT explained that when offering terms change “investors must be notified and must confirm within 5 days or their subscription must be cancelled.”¹⁵⁵ MT then advised, “If you did not send these out, the only thing you can do is let them know that you failed to provide the required notices.”¹⁵⁶ The attorney suggested saying that the Portal’s systems should have automatically sent the notices but failed to do so because of an error that had since been corrected.¹⁵⁷ Since Fernandez was not even aware of his obligation to give notice to investors and had to ask his attorney whether he had made a mistake,¹⁵⁸ the excuse proffered by the attorney was apparently fictitious. There is no evidence in the record that Respondents had any system for sending out notices, much less an automated system.¹⁵⁹

¹⁵³ RX-10, at 2.

¹⁵⁴ CX-63, at 29.

¹⁵⁵ CX-63, at 29.

¹⁵⁶ CX-63, at 29.

¹⁵⁷ CX-63, at 29.

¹⁵⁸ Fernandez admitted in his OTR that he did not know that notice of early closing was required until his attorney, MT, told him that it was. CX-72 (Fernandez OTR), at 143.

¹⁵⁹ At the hearing, Fernandez laid the blame for the mistake in not sending the notices on his attorney, MT. He called MT “our compliance person, outsourced at a law firm.” Tr. (Fernandez) 605. He claimed that when he asked MT whether “I” made a mistake he was really asking MT whether MT had made a mistake. “Even I know it was his fault, so I start off the opposite, taking blame, hey, did I make a mistake here. Really – it’s him. . . . I’m not the lawyer, he’s the lawyer, so I tried to make it, like, I did a mistake, when in reality, I know it’s him, and he knows it’s him.” Tr. (Fernandez) 606; CX-84. But MT represented to FINRA staff in May that he had only recently been retained by Respondents, in which case he was not Respondents’ counsel when the first and second amendments to Company A’s Form C were filed. He was Respondents’ counsel when the third amendment was filed in June 2017, but it is apparent from his response to Fernandez’s inquiry that he did not consider himself responsible for the mistake. He told Fernandez, “If *you* did not send [the notices] out,” then Fernandez would have to admit to FINRA staff his mistake (emphasis supplied). CX-63, at 29.

Moreover, the Portal’s written policies and procedures named Fernandez as the responsible person for supervising the Portal’s associated persons and conducting reviews of business activity with the objective of ensuring ongoing compliance with the applicable laws and regulations. Fernandez also was the sole person responsible for establishing and maintaining a supervisory system reasonably designed to achieve compliance with the applicable laws and regulations. Compliance was Fernandez’s responsibility, and there is no record that he delegated it to anyone else, including MT. CX-11, at 31; CX-12, at 36.

On July 19, 2017, Respondents' attorney, MT, sent OFDMI staff a letter responding to a number of inquiries, including the request for copies of notices in connection with the amendments to Company A's Form C.¹⁶⁰ In that letter, Respondents' attorney offered a variant of the apparently fictitious excuse. He told the staff that investors had received email notices regarding the three amendments to Company A's Form C, but that "no steps were taken to confirm the investment commitments as required by the regulations."¹⁶¹ The attorney attributed the failure to confirm investors' investment commitments to an "error in our communications and systems," and represented that it had been "remedied" for offerings going forward.¹⁶² There is nothing in the record to corroborate the representations made by Respondents' attorney. He did not provide the staff with copies of the purported email notices.¹⁶³

With respect to the closing of Company A's offering, MT informed OFDMI staff that Company A received \$3,200 on June 26, 2017, while \$1,145 remained "in escrow pending resolution of possible issues related to this offering."¹⁶⁴ The attorney did not explain what the "possible issues" were or how or when they might be resolved. Nor did he provide corroborating documentary evidence.¹⁶⁵

On August 1, 2017, OFDMI staff sent Fernandez a letter renewing its Rule 8210 request for copies of the notices of material changes disclosed in the three amendments. In addition, the staff requested any documents showing the amount raised in Company A's offering. The staff pointed out that Respondents' attorney had asserted inconsistent facts in his July 19, 2017 letter. On the one hand, he had said that Company A raised \$4,345, but elsewhere in the document he had said that a total of \$3,840 was received by the Portal and invested in the company. The staff sought documents showing that, as of the date of the closing, Company A had continued, as required, to meet or exceed the target offering amount of \$4,000.¹⁶⁶

On August 23, 2017, Respondents' attorney, MT, sent OFDMI staff a response. The attorney wrote that the Portal did not have any record of notices sent to investors regarding the

¹⁶⁰ RX-5, at 17.

¹⁶¹ RX-5, at 17.

¹⁶² RX-5, at 17.

¹⁶³ Even if MT's representations to the staff were true, and Respondents actually gave investors notices by email, Respondents were likely in violation of Crowdfunding Rule 404. That Rule requires a funding portal to make and preserve certain records for five years, two of them in an easily accessible place. Included in the records to be preserved are all records relating to an investor who purchases or attempts to purchase securities through the funding portal, and all records required to demonstrate compliance with other Crowdfunding Rules. Enforcement, however, did not charge a violation of the recordkeeping Crowdfunding Rule.

¹⁶⁴ RX-5, at 17.

¹⁶⁵ RX-5, at 17; Tr. (Fernandez) 407.

¹⁶⁶ RX-5, at 8.

early completion of Company A’s offering.¹⁶⁷ As for material change notices, he wrote, “The notices of material changes were not provided by the Portal.”¹⁶⁸ MT thus admitted that Respondents had violated Crowdfunding Rule 304(c)(1), which requires an intermediary to give notice to any investor who has made an investment commitment of a material change in an offering. With respect to the amount of money raised in Company A’s offering, the attorney said that the previously reported information was “incorrect.”¹⁶⁹ He referred the staff to an attached document, but we do not have that document in the record.¹⁷⁰

Fernandez tried to fix the lack of notice of material change retroactively. On September 28, 2017, he sent an email to investors in Company A informing them that DA had determined to reduce the minimum funding amount for the offering from \$10,000 to \$4,000. Fernandez wrote, “After listening to his plans to use the capital to build a prototype We agreed.”¹⁷¹ In the email, Fernandez asked investors to tell him whether they were “ok with this change or if you want your money back from escrow.”¹⁷² He told them that they should respond within five business days, or, on October 6, 2017, the money would be released to DA of Company A.¹⁷³ Over the course of the next few days, most of the investors reconfirmed their investment commitment by email.¹⁷⁴ Only one asked for his money to be returned, and Fernandez responded that he would do that. In another email, Fernandez told the investor that his refund had been “processed.”¹⁷⁵ We do not have any evidence that the investor actually received the return of his funds.

Given that the offering closed on June 26, 2017 (without any notice to investors, either of a material change or of the early closing), the after-the-fact material change notices did not comply with the requirements and did not preserve investors’ rights. At the hearing, Fernandez tried to remedy that problem by testifying that investor funds were distributed to DA in two

¹⁶⁷ RX-5, at 11. As noted above, the absence of any record of notices purportedly sent to investors was likely a violation of Crowdfunding Rule 404.

¹⁶⁸ RX-5, at 12

¹⁶⁹ RX-5, at 12.

¹⁷⁰ RX-5, at 12.

¹⁷¹ RX-31. Fernandez testified that DA was not a software engineer. Tr. (Fernandez) 1329. DA could not himself have built a prototype. Fernandez claimed that DA could obtain the requisite talent for little to no expenditure and had someone on his team to help him who was a software programmer. Tr. (Fernandez) 1327-30. We are skeptical.

In any event, we observe that in the notice Fernandez interposed himself between the issuer and the investors. He invited investors to rely on his judgment, saying that he had heard the issuer’s plan and agreed to it, instead of providing a forum for the issuer to lay out the plan and for investors to discuss it. A funding portal is supposed to be a communications center, not an advice-giver.

¹⁷² RX-31, at 1.

¹⁷³ RX-31, at 1.

¹⁷⁴ RX-31, at 1-3.

¹⁷⁵ RX-31, at 5.

waves, with the first happening on June 26, 2017, and the second on the October 6, 2017 date specified in his notice to investors.¹⁷⁶ He did not provide any details regarding the amounts purportedly distributed in two waves or why the distribution was not completed at the closing of the offering. The suggestion that there were two waves is inconsistent with DA’s desire to close the offering quickly. It also is inconsistent with the after-the-fact notices, which do not reflect any prior distribution of investor funds to the issuer. Moreover, in his OTR, Fernandez admitted that investor funds had already been distributed before he sent the after-the-fact notices.¹⁷⁷ We do not credit Fernandez’s vague and uncorroborated hearing testimony that there were two waves of distribution. It appears to us that the after-the-fact notice was merely an attempt to cover up the lack of contemporaneous material change notices.

Even if the after-the-fact notice had remedied the lack of a contemporaneous material change notice—which it did not—the after-the-fact notice did not comply with the separate requirements discussed above for notice of the early closing. The offering was closed without informing investors that they could cancel their investment commitment up to 48 hours before the closing deadline, as required by Crowdfunding Rule 304(b)(2).

p. We Reject Respondents’ Claim That FundAmerica Provided All the Required Notices

The DreamFunded Portal had an arrangement with FundAmerica, a broker-dealer, to perform certain services in connection with the offerings on the Portal’s platform. Fernandez testified that FundAmerica automatically sent all the required notices to investors on behalf of the Portal. He said FundAmerica filed the notices electronically in Dropbox,¹⁷⁸ a web-based system for storing and sharing electronic files. Fernandez asserted that FundAmerica handled “everything.”¹⁷⁹ He said “[T]hey control everything.”¹⁸⁰ He described the Portal as no more than a gateway to FundAmerica.¹⁸¹ “All we are is a website,” he said, “a person clicks a button, and then they go to FundAmerica.”¹⁸² Fernandez said that he never saw the notices filed by FundAmerica,¹⁸³ but “we had 100 percent faith that they were doing exactly what they should do because they were approved by FINRA.”¹⁸⁴

¹⁷⁶ Tr. (Fernandez) 408-10.

¹⁷⁷ CX-72 (Fernandez OTR), at 144. We find the OTR more credible on this point than his hearing testimony.

¹⁷⁸ Tr. (Fernandez) 604-07, 627-28, 630-31, 653-54, 657-65.

¹⁷⁹ Tr. (Fernandez) 606.

¹⁸⁰ Tr. (Fernandez) 628-32.

¹⁸¹ Tr. (Fernandez) 622.

¹⁸² Tr. (Fernandez) 606.

¹⁸³ Tr. (Fernandez) 604-05.

¹⁸⁴ Tr. (Fernandez) 607.

There is no evidence in the record that FundAmerica sent the required material change and early closing notices. We have no copies of such notices.¹⁸⁵ We have only sample copies of two different FundAmerica notices, one to acknowledge receipt of investor funds to be held in escrow and another to notify investors that an offering had closed successfully with funds distributed to the issuer.¹⁸⁶ SV, the MAP examiner, testified that the only documents she remembers seeing from FundAmerica that related to the DreamFunded Portal were documents reflecting the return of investor monies for offerings that failed to close.¹⁸⁷

We have no contract to show that FundAmerica agreed to provide services such as sending investors material change and early closing notices. Instead, we have an unexecuted Prime Trust escrow agreement that appears to be a template with placeholders for the portal's name.¹⁸⁸ Prime Trust, a FundAmerica affiliate, was the Portal's escrow agent. It held investor funds committed to an offering until the offering closed or canceled.¹⁸⁹ The template escrow services agreement shows that Prime Trust awaited instructions from the funding portal on how to transmit those funds or return them to investors. It contains no provisions concerning notices of material change or early closing notices.¹⁹⁰ The template specifically provides that the escrow agent has no duties that are not set forth in the agreement.¹⁹¹

We reject Fernandez's uncorroborated claim that FundAmerica sent the required notices regarding material changes in the terms of the offerings on the Portal's platform or the required notices of early closing.¹⁹² Furthermore, even if FundAmerica did send the notices, that did not relieve Respondents of their responsibilities. Fernandez's admission that he never saw the notices he claims were sent by FundAmerica reveals that Respondents did not comply with their

¹⁸⁵ When asked for an example of a FundAmerica early closing notice, Respondents' counsel elicited testimony from Fernandez that he looked at such a notice and could confirm that it had the required information. Tr. (Fernandez) 1293-96. Respondents produced no written example of an early closing notice, and we do not credit Fernandez's self-interested and uncorroborated testimony that FundAmerica sent early closing notices that complied with the requirements. Fernandez's judgment about compliance obligations is not reliable.

¹⁸⁶ Tr. (Fernandez) 1616-22; RX-32; RX-33.

¹⁸⁷ Tr. (SV) 1444-45.

¹⁸⁸ RX-12.

¹⁸⁹ RX-12. Where an actual contract would have been dated and would have named the portal and issuer who were parties to the contract, the template declares that it is an Escrow Services Agreement "entered into as of %%TODAY%% by and between Prime Trust, LLC ('Prime Trust' or 'Escrow Agent'), %%BROKER_DEALER_NAME%% ('Portal'), and %%ISSUER_NAME%% ('Issuer') (collectively, the 'Parties')."

¹⁹⁰ RX-12.

¹⁹¹ RX-12, at 6 ("[This Agreement] sets forth the duties of Escrow agent with respect to any and all matters pertinent hereto, and no implied duties or obligations shall be read into this Agreement against Escrow Agent.").

¹⁹² We note that, if FundAmerica sent notices on behalf of the Portal, then under Crowdfunding Rule 404 records had to be kept, and the Portal had to make those records available for inspection and examination by FINRA staff. Such records can be prepared or maintained by a third party on behalf of a funding portal, but that third party must enter into a written undertaking acknowledging that the records belong to the funding portal and will be surrendered promptly upon the funding portal's request. Crowdfunding Rule 404(d).

obligations to send material change and early closing notices to investors. They did nothing to confirm that FundAmerica sent the appropriate notices. As the SEC said in promulgating the Crowdfunding Rules, while a funding portal may engage third party service providers to assist it in operating its platform, the portal remains responsible for its activities and the operation of its platform and for compliance with the applicable law and rules.¹⁹³

2. Company B

The DreamFunded Portal acted as the intermediary for a crowdfunding securities offering by Company B, a California company incorporated on April 18, 2016.¹⁹⁴ Company B had a library of short videos about health and well-being, and was developing an application to provide those videos as a form of on-demand self-help on an array of devices.¹⁹⁵ It described its mission as “helping people think and feel better anytime, anywhere.”¹⁹⁶ RM was Company B’s CEO.¹⁹⁷

a. Company B’s Form C

Company B’s Form C was filed on January 23, 2017. The target number of securities offered was 10,000 and the target offering amount was \$10,000. The deadline to meet the target offering amount was June 30, 2017.¹⁹⁸

According to the Complaint, Company B’s Form C contained a significant inconsistency in the financial disclosures. The company attached to its Form C a financial statement consisting of an unaudited balance sheet and notes. The balance sheet claimed assets of only \$4,362. The assets were identified as cash (\$1,114), a receivable (\$748), and fixed assets such as furniture and equipment (\$2,500).¹⁹⁹ A separate financial summary claimed assets with a value of \$2,333,112.²⁰⁰

We do not find that difference to be a disparity. The separate financial summary explained that the \$2.33 million asset value included the intangible value of the company’s self-help video library, which it would use to provide its self-help services. In the financial summary, the intangible asset was valued at \$2,328,750.²⁰¹ When the intangible asset figure is subtracted from total assets, the value of the remaining assets exactly matches the balance sheet figure,

¹⁹³ Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *573.

¹⁹⁴ Tr. (Fernandez) 728; CX-24, at 1.

¹⁹⁵ CX-23.

¹⁹⁶ CX-23, at 1.

¹⁹⁷ Tr. (Fernandez) 1336; CX-23, at 8; RX-16, at 10, 16.

¹⁹⁸ CX-24, at 14; CX-66.

¹⁹⁹ CX-24, at 9.

²⁰⁰ CX-24, at 15.

²⁰¹ CX-24, at 15.

\$4,362. All the other figures in the financial summary exactly match the figures in the balance sheet. Thus, Company B disclosed that it had assigned a value to its content library that was intangible and not easily verifiable. Otherwise, the financial figures were consistent.

The Complaint also alleges, however, that the \$2.33 million asset value assigned to the video library had no basis, and that Respondents had reason to know that the valuation was unrealistic and unwarranted. There is nothing in the record, however, on which to base a judgment about whether the intangible value assigned to the video library was unfounded. Nor is there anything in the record to show that Respondents knew facts that would have given them reason to doubt the figure assigned by the issuer to the value of the content library. The assignment of an intangible value turns on uncertain future benefits and is more like a forecast or projection than a verifiable fact.²⁰²

The Complaint alleges another disparity in the projected financial figures in Company B's Form C. The Form C attached a budget plan and a business plan. The two plans had different figures for projected revenue. The budget plan projected 2017 revenue of \$294,000,²⁰³ while the business plan projected 2017 revenue of \$500,000.²⁰⁴ The disparity was not explained.

Fernandez testified that he was unaware of the disparities in the financial information in Company B's Form C, but that if he had been aware he would have removed the offering from the Portal's platform.²⁰⁵ He may have made that statement based on both the revenue projections and the alleged disparity in asset values. Maybe the disparity between the projections should have prompted Respondents to ask for an explanation, but, without more information, we cannot conclude that a disparity in the projections alone would be a basis for denying the company access to the Portal.

²⁰² In its post-hearing brief, Enforcement cites an exhibit, CX-21, indicating that Company B's video library consisted of 309 minutes of content. Enforcement derides the asset value assigned to the video library, suggesting that the total valuation equated to \$7,443 per minute of video content, and implying that that figure was on its face unwarranted. *Enf. PH Br. 10 & nn.67 and 71, 35 & n.226*. The exhibit is not in the record and we do not rely upon it. Furthermore, there is no evidence that Fernandez was even aware of the size of the video library.

In any event, the intangible value of the video library is by its very nature related to the content of the video library and not its physical size. The intangible value turns on how many people would be willing to subscribe to Company B's mobile application to obtain access to the content in the videos, and how much those people would be willing to pay. It is an estimate or forecast of the market for the videos and the application. There is nothing in the record by which we could evaluate that estimate or forecast.

²⁰³ CX-24, at 59.

²⁰⁴ CX-23, at 12.

²⁰⁵ *Tr. (Fernandez) 742*.

b. The Offering Closes Early, But Without the Required Early Closing Notice

Company B's offering closed early, after \$10,500 was raised, a little more than the target amount.²⁰⁶ The money was disbursed on April 14, 2017. After the money was disbursed, the offering was removed from the Portal's platform on April 30, 2017.²⁰⁷ The record is devoid of any notices of the early closing of the offering.

c. Video Creates False Impression That Fernandez Made \$50,000 Investment in Company B

Fernandez appeared on behalf of the DreamFunded Portal at a Shark Tank-type of event where he met the CEO of Company B. After listening to her talk about her company, he offered to invest \$50,000 in it. He made the statement in front of a public audience.²⁰⁸ Company B posted a video of its CEO and Fernandez on its Facebook page with the caption "Thank you so much to Manny Fernandez and DreamFunded for believing & investing in our network, mission, vision, team, and strategy."²⁰⁹ In the video, Fernandez and the company's CEO discuss the \$50,000 investment. He admits saying that he was making an investment in Company B.²¹⁰ From at least September 21, 2016, through March 2, 2017, the video was posted on Company B's website,²¹¹ which included links to both Fernandez's and the DreamFunded Portal's Facebook pages.²¹² Information regarding Company B was posted on the Portal's platform in November 2016,²¹³ and between January 23, 2017, and April 30, 2017, its offering was live on the Portal's platform.²¹⁴

Fernandez never invested in Company B.²¹⁵ Although the video created the false impression that he did invest in Company B, Fernandez never told the company to take down the video.²¹⁶ There is no evidence he did anything to correct the false impression that he had

²⁰⁶ CX-66.

²⁰⁷ CX-30, at 2; CX-66; Tr. (Fernandez) 742-43.

²⁰⁸ CX-15, at 1; CX-72 (Fernandez OTR), at 177-80; Tr. (Fernandez) 703-05, 708.

²⁰⁹ CX-19; CX-19.1.

²¹⁰ Tr. (Fernandez) 703-05.

²¹¹ Tr. (Fernandez) 821-22; Tr. (SV) 1410-12.

²¹² CX-19.1; Tr. (Fernandez) 828, 985; Tr. (SV) 1414; Tr. (PD) 1866-67.

²¹³ CX-83, at 2.

²¹⁴ CX-66.

²¹⁵ CX-20; Tr. (Fernandez) 705.

²¹⁶ CX-19.1; Tr. (Fernandez) 713.

invested \$50,000 in Company B.²¹⁷ He continued to provide access to the Portal’s platform, facilitated the early closing of the offering, and distributed investor funds to the company.

3. Company C

a. Unsuccessful Offering

Company C was organized on April 29, 2016.²¹⁸ Its product was a new type of fire hose with a harness, which was designed to lessen fatigue and decrease injuries to firefighters.²¹⁹ Although the company’s offering was not “live,” meaning that investors could not yet make investment commitments, information about Company C was posted on the DreamFunded Portal’s platform starting in the fall of 2016.²²⁰ The company’s Form C was filed with the SEC on January 25, 2017.²²¹ The target funding amount for Company C’s offering was \$10,000 and its target date was September 30, 2017.²²² The offering did not reach its target amount, and on April 30, 2017, the offering was removed from the Portal’s website.²²³

b. Video Clip on Social Media Creates False Impression That Fernandez Invested \$1 Million in Company C

i. Fernandez Offers \$1 Million for 30% of Company C and the CEO Accepts

As discussed briefly above in describing Fernandez’s method of marketing himself, in January 2016, Fernandez participated in the filming of a CNBC television show called “Make Me a Millionaire Inventor.” The show follows the format of having an inventor of a new product make a presentation to an investor in the hope of raising capital to pursue the next step of building a business. A host greets the inventor, introduces the investor, and facilitates the ensuing discussion.²²⁴

The Extended Hearing Panel watched a video clip from the show in which Fernandez participated. The clip showed Fernandez making a \$1 million offer to the CEO of Company C and the CEO accepting the offer. The video clip was six minutes and 43 seconds long.²²⁵

²¹⁷ CX-72 (Fernandez OTR), at 186-87.

²¹⁸ CX-66.

²¹⁹ CX-18.

²²⁰ CX-83.

²²¹ CX-66.

²²² CX-66.

²²³ CX-66.

²²⁴ CX-18.

²²⁵ CX-18.

The host of the show first greeted KB, the inventor and CEO of Company C, and his wife, the company's CFO. Then the host introduced them to Fernandez as the CEO of DreamFunded.com, "a crowdfunding platform that's invested over \$100 million in startups."²²⁶ As discussed above, the statement that the crowdfunding platform had invested over \$100 million in startups was untrue, and we believe that Fernandez was the source of the misinformation. KB said "I'm really pinching myself. After 16 years, coming to this moment where I'm standing in front of an investor. It's real, but at the same time it still feels like a dream."²²⁷

On the video clip, Fernandez watched KB's presentation on the new type of fire hose, which KB said he had been working on for 16 years. KB's wife presented information regarding the potential market for the product. A retired fire chief from Sacramento, California, participated with Fernandez in asking questions of the couple.²²⁸

The couple had come to the show seeking a \$500,000 investment in return for 25% of the company. The fire chief suggested that that might be too small a request. Fernandez agreed that it was too little, and said that the couple was giving up too much of their company too soon. After the host asked him whether he would make an offer to the couple, Fernandez said, "OK. I'll make you an offer on behalf of DreamFunded.com."²²⁹ Fernandez's next words were, "Million dollars for 30% of the company. How's that sound?" The couple gratefully accepted the deal. As they did, the words "Final Offer Accepted" came on the screen. The video then separately showed KB, the inventor, talking to the camera about how happy he was. He said slowly, with emotion, "a million dollars . . . just to hear that number. . ."²³⁰ As the host showed the couple out of the studio, he said, "I don't get to say this very often, but congratulations. You're a millionaire inventor."²³¹

ii. Fernandez Posts a Video Clip of the Offer on Social Media

The episode of the show featuring Fernandez and the fire hose invention did not immediately air. A press release dated September 19, 2016, announced that it would air on October 6, 2016.²³² Fernandez posted the press release on the DreamFunded.com website.²³³ He

²²⁶ CX-18. The quoted statement begins approximately 37 seconds from the beginning. Hereinafter, references to specific points in the video will be indicated as "Begins around [mins:secs]."

²²⁷ CX-18. Begins around 1:01

²²⁸ CX-18.

²²⁹ CX-18. Begins around 5:34.

²³⁰ CX-18.

²³¹ CX-18. Begins around 6:14.

²³² CX-14; Tr. (Fernandez) 244-45, 251-52.

²³³ Tr. (Fernandez) 244; CX-14.

also held a viewing event the night that the episode aired.²³⁴ Within a couple of days after the viewing event, Fernandez posted a video clip of his appearance on Twitter.²³⁵ He admits that the video clip he initially posted contained the scene in which he made the offer to invest. His purpose in posting the video clip with the \$1 million offer was to generate publicity.²³⁶ He claims, however, that he did not post the video with the offer on the DreamFunded Portal's website or its YouTube channel.²³⁷

According to Fernandez, a few hours after he posted the video clip on Twitter, SV, the MAP examiner called him and told him that the video "wasn't a good thing to put up there."²³⁸ He portrayed her as having discovered the posting almost immediately and being so concerned that she called him from home right away. He testified that he immediately took the video down.²³⁹ He claims that he later reposted a "truncated" version of the video clip cutting out the offer.²⁴⁰ He testified that he put the truncated version on the Portal's website, and that he had a second call with SV prior to Thanksgiving 2016 in which she said the truncated version without the offer was "okay."²⁴¹ Fernandez described SV as "pretty impressed by the video."²⁴²

SV, the MAP examiner, did not recall the telephone conversation that Fernandez testified about in which she supposedly told him to remove the video from Twitter.²⁴³ She testified that she would not have told Fernandez to take down the video clip immediately based on her first viewing because at that point the staff did not know whether there was a violation. MAP staff

²³⁴ Tr. (Fernandez) 248-49.

²³⁵ Tr. (Fernandez) 249-51, 258-59, 595, 1804-05.

²³⁶ Tr. (Fernandez) 1802-05; CX-72 (Fernandez OTR), at 207-10.

²³⁷ Tr. (Fernandez) 259, 1808-09. Fernandez testified that he did post some version of the video on his personal YouTube channel and on a Facebook account. It is unclear whether he was talking about clips prior to the airing of the show, which did not contain the offer because it was the "reveal," or clips after the show was aired. Tr. (Fernandez) 1794-99. Fernandez claimed that by the time of the hearing there was no version of the video clip on any of his or the Portal's social media accounts. Tr. (Fernandez) 1810-12.

²³⁸ Tr. (Fernandez) 259.

²³⁹ Tr. (Fernandez) 1644-47, 1653-58, 1808-09.

²⁴⁰ Tr. (Fernandez) 1655-58.

²⁴¹ Tr. (Fernandez) 595, 1655-58. Although, as discussed above in connection with Fernandez's manner of marketing himself, a copy of the video clip containing Fernandez's offer to invest was available on the Internet on what looked like the DreamFunded Portal's YouTube channel long after early October 2016, Fernandez maintains that he is not responsible for it. He claims that someone else posted a "hacked" version of it. Tr. (Fernandez) 259-60; CX-17. We find that claim not credible, as discussed below in the credibility section.

²⁴² Tr. (Fernandez) 1769-70.

²⁴³ Tr. (SV) 1520-23, 1533-37, 1570-73, 1575. Respondents' counsel repeatedly tried to suggest to SV that she had asked Fernandez to take down the video clip almost as soon as he put it up. SV said she did not remember any such call. Tr. (SV) 1520-23, 1575, 1581-84.

first investigated to determine whether there was an issue.²⁴⁴ SV said she was unaware of any truncated version of the video until Respondents' counsel suggested to her in cross-examining her at the hearing that there was one.²⁴⁵ As discussed below, whenever SV viewed the video clip on Facebook, YouTube, and the Portal's website, the video always contained the scene of Fernandez making the \$1 million offer.²⁴⁶

iii. MAP Staff Opens a “For Cause” Examination after Seeing Video Clip with Offer on YouTube

SV testified that she saw the video clip with the offer for the first time on or about October 24, 2016, on YouTube, more than two weeks after the CNBC program aired. She believes that she also saw it around that time on the DreamFunded Portal's website.²⁴⁷ She became concerned because they had just dealt with another funding portal that had received a cautionary action for having a financial interest in an issuer. She talked to others in the MAP department, and sometime in late 2016, MAP staff opened a for cause examination, focusing on the potential violations raised by the video clip.²⁴⁸

On November 15, 2016, SV sent Fernandez an email inquiry pursuant to the for cause examination. She noted that the DreamFunded Portal's website showed 15 potential offerings. For each, she asked whether a Form C had been filed, and when it was filed or when it was expected to be filed. She also asked when each offering would launch. Importantly, she asked whether the funding portal or any of its directors, officers, or partners had invested or had plans to invest in any of the offerings.²⁴⁹ She asked this last question because of the video clip of Fernandez making an offer to Company C's inventor,²⁵⁰ but she did not mention the video clip in her email.²⁵¹

While waiting for a response, on November 16, 2016, SV took a screenshot of the Portal's website. It contained information about the different investment opportunities, including Company C (and Companies A and B). Company C's product was described as innovative firefighter equipment. A picture showed KB, the inventor, using the equipment. SV believes that

²⁴⁴ Tr. (SV) 1521-22.

²⁴⁵ Tr. (SV) 1536-37.

²⁴⁶ Tr. (SV) 1384-85.

²⁴⁷ Tr. (SV) 1379-80, 1513.

²⁴⁸ Tr. (SV) 1367, 1398-99, 1405.

²⁴⁹ CX-15, at 3-4.

²⁵⁰ Tr. (SV) 1367, 1379, 1381-82, 1384-86.

²⁵¹ CX-15, at 3-4.

there was a link to the video clip underneath the picture, but she was not certain about her recollection.²⁵²

On November 29, 2016, SV sent Fernandez a follow-up email checking on the status of his response to her mid-November inquiries.²⁵³ That evening, Fernandez responded by email. He did not, as SV had requested, respond issuer by issuer. He indicated that no Form C had yet been filed (apparently referring generally to all the issuers), but that he expected to launch and file in 30 days or less. As to the question about possible investments in the issuers, he wrote,

We 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. We would be invested [*sic*] in investing.²⁵⁴

On December 28, 2016, SV sent Fernandez an email asking which two offerings had been given a “verbal non-binding agreement.”²⁵⁵ On January 10, 2017, Fernandez responded by email. He explained that Company C had been given “a non-binding verbal agreement” in connection with the filming of a television show before the Portal became registered with FINRA, but that Fernandez had decided after due diligence not to invest. Instead, he invited the issuer to make an offering on the Portal’s website. Similarly as to Company B, Fernandez explained that he had made a “commitment” to invest \$50,000 when he appeared on a Shark Tank-type of show, but he had later concluded the investment was “not a fit for me personally.” He invited that issuer also to make an offering on the Portal’s platform.²⁵⁶ Fernandez’s January email was inconsistent with what he had previously written to SV, but Fernandez’s explanation that he had eventually determined not to invest in Company A or Company B appeared to resolve the issue of violating the Crowdfunding Rule against an officer of a funding portal investing in an issuer on the portal’s platform. If he did not invest, he did not violate the rule against such investments.

Fernandez’s statements in the January 10 email, however, opened up a new issue. MAP staff became concerned that the video showing Fernandez making an offer of \$1 million to Company C—an offer that appeared to have been accepted—was false and misleading in violation of other Crowdfunding Rules.²⁵⁷

²⁵² Tr. (SV) 1387-91; CX-83. Like most of the other offerings on the website in November 2016, the offerings by Company A, Company B, and Company C each had a posted target amount of \$100,000. CX-83. Eventually, \$100,000 became the maximum amount, while the target amount was lowered to \$10,000 once the offerings became “live” and available for investment.

²⁵³ CX-15, at 3.

²⁵⁴ CX-15, at 2

²⁵⁵ CX-15, at 1-2.

²⁵⁶ CX-15, at 1.

²⁵⁷ Tr. (SV) 1403.

Fernandez’s testimony regarding this string of emails is not credible. Fernandez admits that the email on November 29, 2016, which says that he had given two companies a “verbal non-binding agreement” to invest, came from his email address. But he denies sending it. He claims that someone else accessed his email address and sent the response. He accuses AH, his former employee.²⁵⁸ Fernandez testified in his OTR that AH had only worked for him for a short time during 2016 before Fernandez fired him,²⁵⁹ but in the hearing Fernandez maintained that he had rehired AH in the fall. Fernandez asserted that AH had misused his coding skills in late 2016 to gain access to Fernandez’s email account and pretend to be Fernandez in correspondence with MAP staff. Fernandez’s email account was password protected and he did not give his password out to others. Although for a while he had an assistant who sometimes answered his email correspondence for him, she was not authorized to do that with FINRA correspondence. Moreover, he always checked the emails she sent in his “sent” box to make sure they were correct.²⁶⁰ To believe Fernandez’s story, we would have to believe that AH had used his technological skills to break into Fernandez’s email account and then provided answers to SV’s queries that actually fit the facts—and did not seem on their face to be harmful to Fernandez. We would also have to believe that Fernandez somehow did not notice this correspondence with his regulator in his sent box, or the follow-up correspondence in his inbox. We do not find this story believable.

Fernandez makes the assertion about AH using his email account in order avoid contradicting his hearing testimony, in which he claimed, as discussed below, that he did *not* make the offer to the CEO of Company C that we saw in the video clip. He claims that the video clip was “edited” or “snipped together” to make it look like he made the offer.²⁶¹ He says the video clip was “mutilated” to make it appear that he made an offer when he did not.²⁶² However, in the November 29, 2016 email, he *admits* that he made an offer to Company C.

iv. MAP Staff See Video Clip with the Offer on Facebook in February 2017

Throughout her surveillance of the DreamFunded Portal and in connection with the for cause examination, SV saw the video clip of Fernandez making the \$1 million offer online.²⁶³ Typically, she would take a screenshot of it.²⁶⁴ She made a screenshot of the clip from Facebook on February 15, 2017. She believes that it was the same as the version on YouTube.²⁶⁵ The

²⁵⁸ Tr. (Fernandez) 262-63 (“[I]t could have been one of my staff people”); 269 (“I didn’t write this.”).

²⁵⁹ CX-72 (Fernandez OTR), at 49-50.

²⁶⁰ Tr. (Fernandez) 262-83; CX-15.

²⁶¹ Tr. (Fernandez) 288-89.

²⁶² Tr. (Fernandez) 1202-03.

²⁶³ Tr. (SV) 1379-86; CX-14; CX-18; CX-77; CX-83.

²⁶⁴ Tr. (SV) 1356-59.

²⁶⁵ Tr. (SV) 1380-82; CX-77.

screenshot shows that the video clip ran six minutes and 43 seconds, the same running time as the video clip in the record.²⁶⁶ SV testified that the offer was in every version of the video that she saw online, although some might have cut off portions at either end of the video clip that did not involve the offer.²⁶⁷ SV saw the video clip multiple times in three different places: YouTube, Facebook, and the Portal's website.²⁶⁸

v. MAP Staff See Video Clip with the Offer on the Portal's Website in Spring 2017

The video clip showing Fernandez making the offer was on the DreamFunded Portal's website at least until February 2017. SV, the MAP examiner, saw it there and, by email dated March 21, 2017, asked Fernandez about it.²⁶⁹

Fernandez did not himself respond. Instead, about a month later, on April 28, 2017, MT, an attorney, responded by letter on Respondents' behalf, saying that he had been recently retained. He wrote that the video was no longer on the website. He did not say when it was taken down.²⁷⁰

vi. The Video Clip with the Offer Is on the Portal's Website in September 2017

Despite the representation that the video clip had been removed from the Portal's website, SV saw the video clip of Fernandez making a \$1 million offer to the CEO of Company C on the DreamFunded Portal's website in September 2017 and took a screenshot of it.²⁷¹ The press release that Fernandez posted on the Portal's website publicizing his appearance on the CNBC show "Make Me a Millionaire Inventor" was also still on the Portal's website in September 2017.²⁷²

vii. A Video Clip of Fernandez's Appearance on the CNBC Show Was on YouTube in May 2018

We have a May 16, 2018 screenshot of what appeared to be the DreamFunded Portal's YouTube channel. The screenshot shows a picture of Fernandez from the "Make Me a

²⁶⁶ Tr. (SV) 1383; CX-18.

²⁶⁷ Tr. (SV) 1384-85, 1595. SV said she thought some versions of the video clip that she saw cut off a scene at the end when the inventor hugged his wife and thanked her for her help. But all versions she saw included the \$1 million offer. Tr. (SV) 1592-95.

²⁶⁸ Tr. (SV) 1384-85.

²⁶⁹ Tr. (SV) 1393-95; CX-84, at 1-2.

²⁷⁰ CX-84 at 2.

²⁷¹ Tr. (SV) 1391-93; CX-14.

²⁷² CX-14.

Millionaire Inventor” show and a still from the video clip of the program. The screenshot indicates that the video clip ran six minutes and 44 seconds, roughly the same time as the copy of the video clip that the Extended Hearing Panel watched and that is in the record, as CX-18. Fernandez admitted that there is a DreamFunded Portal YouTube channel, but he claimed that the May 2018 screenshot was a “clone” of the one that belonged to the DreamFunded Portal.²⁷³ He flatly stated, “I did not put anything on our YouTube page” with the \$1 million offer.²⁷⁴

viii. The Video Clip with the Offer Is on YouTube Until at Least September 2018

A video clip showing Fernandez on “Make Me a Millionaire Inventor” was on what looked like the DreamFunded Portal’s YouTube channel in September 2018, at the time of the first session of the hearing. A Google search for “DreamFunded” and “YouTube” brought up the video. The clip ran six minutes and 43 or 44 seconds, the same as the video clip the Extended Hearing Panel viewed, CX-18.²⁷⁵

Fernandez, however, contended that the September 2018 version of the YouTube channel where the video clip showing the offer appeared was only a “clone” of the Portal’s YouTube channel. He said that the YouTube site was not “official” because the Portal’s website had no link to YouTube. The Portal’s website, in contrast, did have links to Instagram and other social media.²⁷⁶

Even if by the time of the hearing in September 2018 the Portal had no link on its website to a YouTube channel, it did have a YouTube channel or page, and Fernandez, or someone acting at his direction, posted one or more videos on it.²⁷⁷ “We have an official channel,” Fernandez testified, but the one found in September during the hearing was “just someone cloning the information.”²⁷⁸

c. Fernandez Denies He Made the Offer

Fernandez denies that he made the offer shown in the video clip. He claims that the video was altered to make it appear that he did. He testified that the producers of the program cut and spliced from a much longer filming session, and that he did not know what the video would look

²⁷³ Tr. (Fernandez) 259-60. A second video clip of Fernandez on the CNBC program was available at the same time on YouTube, but it ran only 17 seconds, long enough to cover the introduction of Fernandez as an investor in over \$100 million in startups, but nothing more. We cannot be certain, however, what that short video clip covered. CX-17.

²⁷⁴ Tr. (Fernandez) 261.

²⁷⁵ Tr. (Fernandez) 557-66, 569-70, 576-78.

²⁷⁶ Tr. (Fernandez) 569-570.

²⁷⁷ Tr. (Fernandez) 259-60, 571.

²⁷⁸ Tr. (Fernandez) 260.

like until he saw it the night of his viewing party. He complains that the video falsified what he said on the program and damaged him. In his view, the video clip constituted “mutilation.”²⁷⁹ In this way, he apparently means to absolve himself of any responsibility for the false and misleading impression the video creates.

We find, to the contrary, that Fernandez made the offer shown in the video clip, which the inventor and his wife accepted. We understand that the video clip is not a single take of the entire presentation, discussion, and offer. We also understand that portions of the film were spliced together, with some segments showing the host or Fernandez alone, others showing the host with the couple, and still others showing Fernandez with the entire group.²⁸⁰ However, we do not believe that the producers edited the footage to make it seem that Fernandez made the \$1 million offer when he did not. Furthermore, the couple appeared overjoyed and clearly thought they had received a \$1 million offer. Finally, as the couple left the studio, the host reiterated that KB was now a “millionaire” inventor.

Furthermore, Fernandez’s behavior after the show aired is not consistent with his assertion that the video was unfairly doctored. Fernandez admits that, at least initially, he posted the video clip on Twitter with the \$1 million offer included.²⁸¹ He attempts to explain this action by saying he was required by contract to publicize the show. But the written contract he provided to the Panel to prove his point did not require him to post the video or do anything else to publicize the show. Rather, the producers provided him with the video clip and *permitted* him to use it for publicity.²⁸²

Moreover, if the portion of the video showing Fernandez making the offer was a distortion of what he said, he could have edited out the offer. He testified that such manipulations are relatively easily done, and he claimed he took down the Twitter posting with the offer after a few hours and replaced it with a truncated or edited version, deleting the scene in which he made the offer. He claims that he put the truncated version on the Portal’s website (which we do not find credible).²⁸³ But even in his own version of the story, he chose initially to post the video with the offer included.

After the show aired, articles were published about KB and Company C receiving a \$1 million investment.²⁸⁴ In one article posted online on April 9, 2017, KB described how his invention was selected to appear on the show and how the show was filmed. “We were the only

²⁷⁹ Tr. (Fernandez) 284-86, 318-19, 869, 1202-04; Tr. (remarks of Respondents’ counsel) 873-74.

²⁸⁰ Respondents’ counsel pointed out at the hearing that the host wore a green checked shirt in most of the video, but in one brief portion, at the beginning of the show, he wore a red patterned shirt. Apparently, the producers separately filmed that brief introduction. Tr. (remarks of Respondents’ counsel) 1590-91.

²⁸¹ Tr. (Fernandez) 318-20.

²⁸² CX-81, at 4 (“I may make incidental, non-derogatory mention of the program only in my personal publicity.”).

²⁸³ Tr. (Fernandez) 595.

²⁸⁴ CX-79; CX-80; CX-81.

ones on the show out of the 14 inventors,” he said, “who secured an investment for \$1 million.” He then declared, “My investor, Manny Fernandez, the co-founder of DreamFunded, is located in San Francisco.”²⁸⁵ We do not believe that KB would have made such statements if Fernandez had not made an offer of \$1 million on the show.

d. Fernandez Asserts Video Clip with Offer Is Not False or Misleading

Fernandez asserts that in any event the video clip is not false or misleading because the show was just acting. In his Answer, Fernandez described himself as a paid performer who simulated making an offer.²⁸⁶ According to Fernandez, everyone understands that such shows are not real, but, to the extent that someone does not, it is not his fault. “Some[] people believe in Star Trek. That’s fiction. A reality show is fiction. . . . This [show with a \$1 million offer] is fiction.”²⁸⁷ “I’m sure there’s . . . people out there that believe Superman can fly. I can’t help that.”²⁸⁸

When asked whether he ever told anyone that it was just acting or that he did not make the offer he was portrayed as making, he said yes. He remembered telling SV, the MAP examiner, “[T]hey really make you fly in Hollywood,” even though “you don’t know how to fly.” He continued, “[T]hey can make you look like you can fly when you can’t fly.”²⁸⁹ That comment is a general expression of assumed modesty, as even Fernandez recognized when he said, “I was just trying to humble myself saying this . . . that’s just not reality.”²⁹⁰ The vague expression of modesty did not disclose that Fernandez never made the offer and never invested in Company C.

The video clips and screenshots entered into evidence contain nothing to indicate that Fernandez was just acting. Indeed, the written contract Fernandez entered into evidence provided that the investor retained the right to conduct due diligence before making a firm commitment to invest.²⁹¹ That suggests that the program was not intended to be just acting, but, rather, was intended to be about an expression of real, but preliminary, investment interest.

e. Fernandez Asserts That He Is Not Responsible for Any Version of the Video Clip That Contains the Offer

Fernandez claims that, although he posted the video with the offer on social media not long after the show aired, he is not responsible after that for any of the appearances online of the

²⁸⁵ CX-78, at 3.

²⁸⁶ Ans. ¶¶ 36-38.

²⁸⁷ Tr. (Fernandez) 322.

²⁸⁸ Tr. (Fernandez) 322.

²⁸⁹ Tr. (Fernandez) 1770.

²⁹⁰ Tr. (Fernandez) 1770.

²⁹¹ Tr. (Fernandez) 1204-06; CX-81, at 1.

video clip with the offer. As noted above, he claims that SV told him almost immediately to take down the video clip with the offer and that he did. He claims that afterward he only posted a truncated version without the offer. According to Fernandez, to the extent that the video clip with the offer was available online, it was only because someone else put it there.²⁹²

SV testified that all the versions of the video clip she saw in the course of her surveillance through the fall of 2016 and into the spring of 2017 contained the scene of Fernandez making the \$1 million offer. She remembered people shaking hands on the deal.²⁹³

We do not credit Fernandez's uncorroborated story of taking down the initial posting with the offer in it and reposting a truncated version without the offer. His testimony is inconsistent with SV's testimony, which we find credible. Furthermore, as discussed in the credibility section, his assertion that the video clip with the offer was posted on a "clone" DreamFunded Portal website by his former employee, AH, is uncorroborated speculation that is inconsistent with the facts.

F. Regulatory Oversight and the Rule 8210 Request at Issue

1. MAP Staff Review and Surveillance

As discussed above, SV is a principal examiner in FINRA's MAP group. She reviews funding portals' applications for FINRA membership, conducts surveillance after portals become FINRA members, works on first-year cycle inspections of the portals, and investigates the portals, as necessary, in for cause examinations.²⁹⁴ She did all these things in connection with the DreamFunded Portal.²⁹⁵

The nature of SV's work changed over the course of her review and surveillance of the DreamFunded Portal. While reviewing the Portal's application for FINRA membership, SV advised Fernandez of aspects of its website that were inconsistent with regulatory requirements, and Fernandez made changes to the website in response. In working together to make the website compliant, they corresponded by email, spoke by telephone, and developed a friendly rapport.²⁹⁶ Fernandez found SV helpful in their discussions.²⁹⁷ After the DreamFunded Portal became a

²⁹² Tr. (Fernandez) 1193-96.

²⁹³ Tr. (SV) 1384-86, 1592-95.

²⁹⁴ Tr. (SV) 1352, 1355-56.

²⁹⁵ Tr. (SV) 1360-64, 1366-67, 1401-03.

²⁹⁶ Tr. (Fernandez) 1640-43; Tr. (SV) 1363-64, 1367-70, 1410, 1578, 1639-43. Fernandez frequently referred to SV by her first name, and she frequently referred to him as "Manny." Tr. (Fernandez) 1266, 1275, 1637-38; Tr. (SV) 1410, 1471, 1593, 1596.

²⁹⁷ Tr. (Fernandez) 1049.

FINRA member, however, SV was assigned to conduct surveillance, a different kind of activity.²⁹⁸

When conducting surveillance, SV and other MAP staff would review a funding portal's website, looking for exaggerated, promotional, or misleading language. They would also review social media. Sometimes they would sample offerings on a funding portal's website to see if they met the disclosure requirements of the Crowdfunding Rules. They would take screenshots of what they looked at so that they had a record of what they were seeing.²⁹⁹ MAP staff opened a for cause examination when SV saw the video clip of Fernandez making an offer to invest in Company C.³⁰⁰

Once MAP staff opened their for cause examination of the DreamFunded Portal, SV was an investigator. Her purpose was to probe and gather information to determine whether Fernandez and the Portal might have committed potential violations. Beginning with the November 15, 2016 letter asking about the fifteen issuers posted on the Portal's website, SV was operating in a different mode from before. Rather than helping Fernandez establish a compliant website, she by then was questioning whether a violation had occurred. She expressed regret at the hearing that she had not made it more clear to Fernandez that MAP staff had opened a for cause examination.³⁰¹ Fernandez may not have appreciated the change in SV's role.

In early March 2017, MAP staff found the video of Fernandez talking with the CEO of Company B about his \$50,000 investment in that company. The staff became concerned that there were two instances of Fernandez making an investment in an issuer, even though a Crowdfunding Rule prohibited an officer of a funding portal from having an interest in an issuer using the funding portal's services.³⁰² After Fernandez told SV that he did *not* invest in either Company B or Company C, MAP staff became concerned that the video clip of the offer to Company C's CEO violated the communication rules applicable to the offering because the video was both misleading and promotional.³⁰³

²⁹⁸ Tr. (SV) 1362.

²⁹⁹ Tr. (SV) 1356-57, 1367-72; CX-75; CX-76.

³⁰⁰ Tr. (SV) 1367. SV explained that during the new member application process she would review the Portal's policies and procedures simply to see that they addressed certain rules. In the examination process, she would have reviewed the policies and procedures and then, if the Portal had not withdrawn from FINRA membership, she would have provided comments. Tr. (SV) 1376-77. The cycle examination was an overall study of the Portal and whether it complied with the rules; the for cause examination focused on the narrow issue of whether Fernandez had invested in Company C in violation of the rule against having a financial interest in an issuer on the Portal's platform. Tr. (SV) 1401-03.

³⁰¹ Tr. (SV) 1367, 1397-98. SV's inquiries pursuant to the for cause examination, however, were not issued pursuant to FINRA Rule 8210. Tr. (SV) 1567-69, 1573.

³⁰² Tr. (SV) 1410-12, 1544; CX-19.1.

³⁰³ Tr. (SV) 1397, 1403.

SV dealt with Fernandez regarding the video clip and other matters through spring 2017.³⁰⁴ When MT introduced himself as Respondents' attorney in late April 2017, she began corresponding with him.³⁰⁵

2. OFDMI Surveillance

PD, an OFDMI investigator, explained the division of responsibility between different FINRA departments for funding portals and crowdfunding offerings. MAP is responsible for onboarding funding portals when they register and for conducting surveillance and examinations of funding portals. The PIPE (private investment in public entities) surveillance group in OFDMI has responsibility for surveillance of offerings conducted pursuant to regulation crowdfunding.³⁰⁶ OFDMI uses the SEC's EDGAR filing system to conduct their surveillance. The PIPE surveillance group receives an automated link to new crowdfunding filings on EDGAR every day.³⁰⁷

In August 2016, PD noticed that RH, the co-founder of the DreamFunded Portal, was the sole owner of an issuer conducting a crowdfunding offering on the Portal. RH was at the same time the COO of the portal. This raised a concern about a potential violation of the Crowdfunding Rule that prohibits officers of a portal from having a financial interest in an issuer using the portal's platform. PD spoke with RH, who informed PD that he was no longer with the DreamFunded Portal, and, in any event, the offering never went live. PD confirmed what RH had told him in a conversation with Fernandez. After that, PD closed the matter.³⁰⁸

In fall 2016, the DreamFunded Portal became more active, posting more than a dozen crowdfunding offerings on its website between October 2016 and February 2017. OFDMI staff had concerns about the Portal's offerings, including concerns about high valuations, unsupported and high revenue projections, and inconsistent statements within the Form C filings.³⁰⁹ OFDMI monitored the offerings but did not take additional steps because by February 2017 none of the offerings had closed.³¹⁰

In March 2017, as OFDMI was continuing to monitor the Portal's offerings on its website, it received an anonymous letter accusing Fernandez of various types of wrongdoing. The allegations did not seem to concern a crowdfunding or funding portal rule violation. PD did

³⁰⁴ Tr. (SV) 1399-1400.

³⁰⁵ Tr. (SV) 1364-65, 1393-95; CX-84.

³⁰⁶ Tr. (PD) 1830-32.

³⁰⁷ Tr. (PD) 1833-35.

³⁰⁸ Tr. (PD) 1836-37.

³⁰⁹ Tr. (PD) 1837-38.

³¹⁰ Tr. (PD) 1839-40.

a background check on Fernandez for disqualifying events and found none. He did not pursue the allegations further.³¹¹

In June 2017, PD viewed the DreamFunded Portal's website. It no longer showed any of the offerings for which Form Cs had been filed. Instead, PD saw some pictures of single-family homes and captions claiming that deals on the homes had yielded 10% returns, which were favorably compared to bank CDs. The real estate "tombstones" had no relation to the crowdfunding offerings that had previously been displayed on the website.³¹²

According to the Form C filings on file in the SEC's EDGAR database, the crowdfunding offerings were supposed to be live and ongoing, but the staff could not be sure of their status. Taking the crowdfunding offerings down from the website made it impossible for OFDMI to monitor them. The staff could not see whether any had successfully closed, or how many investors invested in an offering, or how much money had been raised.³¹³ Company A's offering closed after the offerings were removed from the Portal's platform, on June 26, 2017,³¹⁴ but, as discussed below, the staff did not know the status of the offering and had to ask in a July 7, 2017 Rule 8210 letter about it.³¹⁵

PD explained that it was important that any offerings made through the portal appear on the Portal's website, both because it was otherwise impossible to monitor the offerings, and because "it's kind of a fundamental basis of crowdfunding that the offerings are to be displayed on the website. If they're conducted, they're to be conducted through a crowdfunding portal."³¹⁶

3. MAP Defers to OFDMI

MAP and OFDMI had a meeting in early July 2017 in which they discussed their overlapping concerns with the DreamFunded Portal. They determined that the PIPE surveillance group in OFDMI would investigate.³¹⁷ MAP ceased its own investigation in connection with the for cause examination, but continued preparations for a cycle examination marking the Portal's one-year anniversary as a FINRA member.³¹⁸

³¹¹ Tr. (PD) 1840-43.

³¹² Tr. (PD) 1844-46.

³¹³ Tr. (PD) 1844-47; CX-52; CX-75.

³¹⁴ CX-30, at 2; Tr. (PD) 1844.

³¹⁵ Tr. (PD) 1847-48.

³¹⁶ Tr. (PD) 1844.

³¹⁷ Tr. (PD) 1848, 1959-61.

³¹⁸ Tr. (SV) 1359-60, 1366-67, 1401-03, 1561, 1563-65, 1570-73.

4. OFDMI's Initial Investigatory Steps

On July 7, 2017, PD sent Fernandez a letter requesting information pursuant to FINRA Rule 8210, its first of several Rule 8210 requests. PD informed Fernandez that OFDMI was conducting a review of the crowdfunding offerings for which the DreamFunded Portal was acting or had acted as the intermediary. The initial questions focused on Company A and Company B. The Rule 8210 request asked for a copy of the Portal's due diligence file for each company, a detailed explanation of steps taken to reduce the risk of fraud, copies of documents relating to the companies and their offerings, and a list of investors and how much each had agreed to invest. In particular, the staff asked for copies of all notices sent to investors in connection with Company A's three amendments to its Form C, and a detailed explanation of the business rationale for the change in the minimum target amount for the offering by Company A. The Rule 8210 letter also asked the current status of the two offerings, the date the offerings were removed from the website, and for an explanation of the reason for their removal.³¹⁹

On July 19, 2017, Respondents' attorney, MT, sent a response to the Rule 8210 request.³²⁰ Among other things, MT wrote that the Portal "believes" that offerings by Company A and Company B "were ended and removed on or around April 30, 2017."³²¹ He represented that Company A had "terminated and removed its offering at the request of [the Portal] based upon its failure to provide the required financial information."³²² This statement was untrue. As noted above, Company A's offering closed on June 26, 2017, and funds were disbursed to its CEO. As for Company B, MT wrote that the Portal had "terminated and removed the offering" because the minimum target amount had been reached and investor activity was lacking.³²³ The response obscured that Company B's offering had actually closed and the funds had been disbursed to the issuer.

The July 19, 2017 response raised several new concerns for OFDMI staff. In response to questions about due diligence on Company A and Company B, Respondents produced a screenshot of a profile of Company B's CEO and founder, RM. But the screenshot was dated July 11, 2017.³²⁴ It appeared to the staff that Respondents were conducting due diligence after receiving the staff's request for the due diligence file, and not prior to listing the company on the platform. Similarly, MT produced a Crunchbase profile for Company A that indicated a 2017 copyright date, but Company A had filed its Form C to initiate its offering on the Portal in 2016.

³¹⁹ CX-29.

³²⁰ CX-30.

³²¹ CX-30, at 3.

³²² CX-30, at 3.

³²³ CX-30, at 3.

³²⁴ CX-30, at 13.

Again, the proffered due diligence” was gathered long after the offerings were put on the Portal’s platform, and only in response to the staff’s request.³²⁵

On August 1, 2017, PD sent Fernandez a second FINRA Rule 8210 request, asking for the production of a host of additional materials for Company A and Company B, and adding requests related to other companies making offerings on the Portal’s website, including Company C.³²⁶ MT responded on Respondents’ behalf on August 23, 2017.³²⁷

OFDMI sought copies of the early closing notices sent in connection with the early closing of the offerings by Company A and Company B. MT responded that the Portal had no records of early closing notices sent to the investors when the offerings closed early.³²⁸ In an earlier letter to the staff, MT had represented that investors had received email notices of the early closings of the offerings. He did not explain in his later response why Respondents had no record of the purported email notices. In the course of the investigation, OFDMI staff never saw any early closing notice sent to investors prior to the closing of an offering on the DreamFunded Portal.³²⁹

OFDMI also sought notices of investment commitments sent to investors in Company A and Company B. This type of notice is required to be sent when an investor has sent funds to be held in escrow. Respondents produced documents in response, and we have two examples in the record. The documents signify receipt of funds. They do not contain the required language advising the investors of their right to cancel their investment commitment up until 48 hours of the closing deadline.³³⁰

OFDMI sought copies of the confirmations of the transactions that Respondents sent to investors in the Company A and Company B offerings. Respondents produced documents through their attorney, MT, that originated with FundAmerica. The samples introduced into evidence confirmed the closing of the offering and the amount of money the investor had invested. They did not inform the investor of the number of securities purchased, the price of the securities, or how much money was raised in the offering—information that Crowdfunding Rule 303(f)(1) requires to be disclosed in a confirmation of a crowdfunding securities transaction.³³¹

³²⁵ Tr. (PD) 1853-57; CX-30, at 19-22.

³²⁶ CX-31.

³²⁷ CX-32.

³²⁸ CX-32, at 1.

³²⁹ Tr. (PD) 1858; CX-32, at 1.

³³⁰ Tr. (PD) 1858-60; CX 32, at 1, 6-11.

³³¹ Tr. (PD) 1860-62; CX-32, at 12-17.

OFDMI reiterated its request for material change notices issued in connection with the three amendments to Company A's Form C. MT responded on behalf of Respondents, "The notices of material change were not provided by the Funding Portal."³³²

On August 30, 2017, OFDMI sent MT and Fernandez a third rule 8210 request for information and documents. Fernandez responded on September 28, 2017, by email. "I [am] 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."³³³ The next day, MT advised OFDMI by email that Fernandez intended to cooperate fully with the investigation and would provide additional documents shortly.³³⁴

5. Fernandez's Initial OTR

On September 11, 2017, FINRA staff issued a Rule 8210 request for Fernandez to testify under oath in an OTR.³³⁵ OFDMI and Enforcement staff took his testimony on October 20, 2017.³³⁶

Although Respondents' attorney, MT, had been corresponding with FINRA staff on Respondents' behalf, Fernandez appeared at his OTR without counsel. When asked at the beginning if he was represented by counsel, he said, "Not today."³³⁷ He offered no explanation.³³⁸ The staff informed him that he had a right to be represented by counsel and asked him if he was still willing to proceed without counsel. He indicated that he was.³³⁹

The staff proceeded with some customary preliminaries, including asking him whether he was suffering from any medical disabilities or using any medications that would interfere with his ability to answer truthfully and accurately. Fernandez said, "Little sleeping medication I'm still on, but I drank a Red Bull, I should be fine."³⁴⁰ He told them he had taken ZZZQuil, an over-the-counter sleeping medication, around 11 p.m. the night before and said that he also was on prescription medicine for back pain, a muscle relaxer. The staff asked if he was still feeling

³³² CX-32, at 2.

³³³ CX-34, at 2.

³³⁴ CX-34, at 1.

³³⁵ CX-72 (Fernandez OTR), at 5.

³³⁶ CX-72 (Fernandez OTR), at 4.

³³⁷ CX-72 (Fernandez OTR), at 4.

³³⁸ CX-72 (Fernandez OTR), at 4-5.

³³⁹ CX-72 (Fernandez OTR), at 4-5. Fernandez did try to call his attorney, MT, once during a break in the testimony. CX-72 (Fernandez OTR), at 87-88.

³⁴⁰ CX-72 (Fernandez OTR), at 6.

the effects; he said, “I don’t believe so.”³⁴¹ The staff asked if the medications would affect his ability to testify that day; he said, “I don’t think so.”³⁴² They proceeded with the OTR.

Fernandez’s OTR testimony revealed several new areas of concern to FINRA staff. It appeared that he had raised nearly \$1 million from roughly 30 investors to start the DreamFunded Portal,³⁴³ but that the money may have flowed into the Parent³⁴⁴ and been dissipated by Fernandez without adequate recordkeeping and accounting. He testified that he had only around \$100 of the money left,³⁴⁵ and that he had paid independent contractors with cash based on his “memory.”³⁴⁶ Fernandez made those payments mostly pursuant to “verbal agreements,” not written contracts.³⁴⁷ He claimed he had made a capital contribution, but that he did not keep track of it.³⁴⁸ He also said that he had paid some of the money to his wife and daughter to help with social media and online marketing.³⁴⁹ OFDMI staff became concerned about how Fernandez had used the money intended for investment in the DreamFunded Portal.³⁵⁰

It further appeared to the staff that Fernandez had not been forthright in his dealings with investors in the DreamFunded Portal. Fernandez testified that he had told a couple of his big investors that he needed another \$2 million round of investing in order to build the business, but he did not tell them or any of the other investors the amount of money left or the specifics of the firm’s financial condition.³⁵¹ He told one person, “[T]his is more expensive than I realized to get this off the ground.”³⁵²

It also appeared to the staff that Fernandez did not routinely review issuers’ Forms C before posting them on the DreamFunded Portal. He testified, for example, that he was certain he did *not* review the Form C for Company A before it was posted on the Portal’s website.³⁵³ Some other issuers’ Forms C also were put up on the Portal’s website before he reviewed them.³⁵⁴ In

³⁴¹ CX-72 (Fernandez OTR), at 6-7.

³⁴² CX-72 (Fernandez OTR), at 7.

³⁴³ CX-72 (Fernandez OTR), at 53-54, 58-59, 61-65.

³⁴⁴ CX-72 (Fernandez OTR), at 53-54, 58-59, 61-65, 81.

³⁴⁵ CX-72 (Fernandez OTR), at 68-69, 81-83, 93.

³⁴⁶ CX-72 (Fernandez OTR), at 82, 93.

³⁴⁷ CX-72 (Fernandez OTR), at 94-95.

³⁴⁸ CX-72 (Fernandez OTR), at 60.

³⁴⁹ CX-72 (Fernandez OTR), at 85-87.

³⁵⁰ Tr. (JD) 419-24, 504-05.

³⁵¹ CX-72 (Fernandez OTR), at 97-98, 100-03.

³⁵² CX-72 (Fernandez OTR), at 109.

³⁵³ CX-72 (Fernandez OTR), at 131.

³⁵⁴ CX-72 (Fernandez OTR), at 130-31, 134-35.

discussing the due diligence he conducted, he was vague about what he did and about whether he saved any records related to his work.³⁵⁵

In his OTR, Fernandez said that he realized he was in over his head, that there were “too many things to cross and watch and I’s to dot and T’s to cross.”³⁵⁶ He did not think he was “mentally able to handle it based on the existing team. And that would be okay if there was a[ny] money that was made, but there is no money that was made.”³⁵⁷ He concluded, “This was a mistake.”³⁵⁸

Although Fernandez’s OTR did not prove that he had done anything wrong, it raised questions for OFDMI and Enforcement staff. They acted promptly to investigate, in part because Fernandez had vaguely indicated that he might soon try to raise additional capital.³⁵⁹

6. The Rule 8210 Request at Issue and Request for Second OTR

a. Nature of Inquiries

On October 24, 2017, OFDMI staff sent Fernandez its fourth Rule 8210 request for information and documents. The staff expanded its list of requested items. This Rule 8210 request asked for more information regarding the crowdfunding offerings on the DreamFunded Portal’s website, but it also asked for the name, address, email address, and telephone numbers of all investors in the Portal and the Parent. It asked for monthly account statements for all bank accounts of the Portal, the Parent, and Fernandez during the period January 1, 2014, to October 24, 2017. It asked for the federal tax returns of the Portal, the Parent, and Fernandez for 2014, 2015, and 2016, and for tax forms relating to payments to employees, independent contractors, interns, and others.³⁶⁰

The response deadline was November 7, 2017.³⁶¹

b. Settlement Discussions

At the beginning of November, FINRA staff spoke to MT, Respondents’ counsel, about the concerns that caused them to issue the October 24, 2017 Rule 8210 request. They also discussed the possibility of settling claims that Enforcement was contemplating bringing against Fernandez and the DreamFunded Portal. In light of the settlement discussions, the response

³⁵⁵ CX-72 (Fernandez OTR), at 129, 146-48, 150-59, 176.

³⁵⁶ CX-72 (Fernandez OTR), at 215.

³⁵⁷ CX-72 (Fernandez OTR), at 215.

³⁵⁸ CX-72 (Fernandez OTR), at 215.

³⁵⁹ Tr. (JD) 423-24, 493-94, 512, 523-24.

³⁶⁰ CX-35.

³⁶¹ CX-35, at 2.

deadline for the Rule 8210 request passed and Enforcement did not renew its request. The settlement discussions, however, fell apart. On December 6, 2017, MT informed the staff that he no longer represented Respondents.³⁶²

c. Renewed Request for Documents and Second OTR

Fernandez retained new counsel, SA. On December 15, 2017, Enforcement sent SA a copy of the Rule 8210 request dated October 24, 2017.³⁶³ On December 20, 2017, Enforcement sent SA a request for a second OTR of Fernandez.³⁶⁴ SA and Enforcement corresponded by email about a new document production deadline and scheduling the second OTR.³⁶⁵ Enforcement granted a short extension for the document production to January 5, 2018, and set January 18, 2018, for the second OTR.³⁶⁶ Counsel made a partial document production on January 5, 2018.³⁶⁷

In a letter to SA dated January 12, 2018, Enforcement characterized the production as “limited,” with a majority of the requested documents still not produced. On the same day, Respondents’ counsel represented to Enforcement that his clients had not yet provided him any of the additional responsive documents. Enforcement sent a letter the same day to Respondents’ counsel giving a final extension of the deadline for producing documents to January 19, 2018. Enforcement sought to reschedule the second OTR for the week of February 5, 2018.³⁶⁸

d. Fernandez’s Excuses to Avoid Producing Documents and Appearing at Second OTR

On January 19, 2018, Respondents’ counsel produced some more documents and asked for another extension to complete the Rule 8210 document production. SA explained that another extension was necessary because Fernandez had become ill and been diagnosed with stomach flu on Wednesday, January 17, 2018. SA said that the doctor had prescribed bed rest from Wednesday through the weekend. He provided a doctor’s note signed by a physician with Hollywood Urgent Care in Los Angeles. The note said that the patient had “acute gastroenteritis” and “needs rest; fluids.”³⁶⁹ Fernandez explained at the hearing that he had visited the doctor while he was on a business trip in Los Angeles.³⁷⁰ He paid for the medical visit from a business

³⁶² CX-36; CX-37; CX-38.

³⁶³ CX-39.

³⁶⁴ CX-40, at 3.

³⁶⁵ CX-40; CX-41; CX-42.

³⁶⁶ CX-41.

³⁶⁷ CX-43.

³⁶⁸ CX-44.

³⁶⁹ CX-45.

³⁷⁰ Tr. (Fernandez) 987.

bank account.³⁷¹

In the same January 19, 2018 letter, SA selected Tuesday, February 6, 2018, for the second OTR. He also asked to inspect the transcript of Fernandez's first OTR at FINRA's San Francisco office on Monday, February 5, 2018.³⁷²

Over the weekend of January 20–22, 2018, Fernandez engaged in activities that undercut his claim to be unable to comply with the Rule 8210 request. On Saturday, January 20, 2018, during the period of prescribed bed rest, Fernandez posted to his Instagram account that he was at the Sundance Film Festival.³⁷³ On Sunday, January 21, 2018, Fernandez posted to his social media account from Park City, Utah.³⁷⁴ Later the same day, he posted a picture of himself on an airplane with a famous former NFL football quarterback.³⁷⁵ When asked at the hearing for an explanation, he said, "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."³⁷⁶ He testified that CNBC had invited him to attend the film festival.³⁷⁷

On Monday, January 22, 2018, apparently then unaware of Fernandez's weekend travels, Enforcement responded to SA's request for an extension, saying that in light of Fernandez's representation that he had experienced a medical issue it would grant one last extension for the document production to January 29, 2018. It moved the date for the second OTR to the week of February 12 through February 16, 2018.³⁷⁸

On Thursday, January 25, 2018, SA sent Enforcement an email informing the staff that he no longer represented Fernandez or the Portal.³⁷⁹ After receiving that email, Enforcement emailed Fernandez the same day to remind him that his complete response to the pending request for information and documents pursuant to FINRA Rule 8210 was coming due on Monday, January 29, 2018.³⁸⁰

On Friday, January 26, 2018, at just after 5 p.m., Fernandez emailed Enforcement, saying he was ill. He attached a doctor's note dated Tuesday, January 23, 2018. It appeared that the same doctor at Hollywood Urgent Care in Los Angeles signed the note as had signed the prior

³⁷¹ RX-2, at 122.

³⁷² CX-45.

³⁷³ CX-57; Tr. (Fernandez) 989.

³⁷⁴ CX-58.

³⁷⁵ CX-59.

³⁷⁶ Tr. (Fernandez) 991.

³⁷⁷ Tr. (Fernandez) 1697.

³⁷⁸ CX-46.

³⁷⁹ CX-47.

³⁸⁰ CX-48.

physician's note. This second note contained no indication of what the medical problem was, but it said that Fernandez would be sufficiently recovered to resume a normal workload on February 5, 2018.³⁸¹ The bank account statements in the record show no payment for the doctor's services in connection with this second note.³⁸² Fernandez testified at the hearing that the doctor did not charge him for the services.³⁸³ Under the circumstances, we doubt the *bona fides* of the second doctor's note.

Again, Fernandez engaged in activities inconsistent with the representation that he was too sick to comply with the Rule 8210 request. During the period he was supposedly ill, he traveled to Las Vegas and attended a Santana concert on Sunday, January 28, 2018. He posted a picture on Twitter of himself in the crowd at the concert.³⁸⁴ At the hearing, Fernandez claimed that he made the trip and got tickets to the concert in order to comfort an aunt who was upset about the mass shooting at the Mandalay hotel.³⁸⁵ Although he described the trip as a personal trip, he paid for the Mandalay Bay and Luxor hotels during that trip from a business account.³⁸⁶

On Monday, January 29, 2018, Enforcement emailed Fernandez saying he had been given three months and three extensions to respond to the October 24, 2017 Rule 8210 request. Among other things, Enforcement pointed out that Fernandez had traveled and socialized extensively during the period in which he had claimed to be ill. Enforcement told him that it intended to file a complaint if he did not provide a full and complete response to the pending Rule 8210 request by February 6, 2018.³⁸⁷

On February 6, 2018, the due date to make a full and complete production of documents, Fernandez emailed Enforcement. He admitted that he had been traveling. He said that he had thought he felt better, but the traveling made his health worse. He claimed that the illness unspecified in the second doctor's note was "the same as it was in the past." He quarreled with the assertion that he had already had three months to comply with the Rule 8210 request, saying that he and his lawyer had stopped gathering documents during the period when settlement discussions were ongoing. He noted that he had replaced his lawyer and claimed that the DreamFunded Portal had been acquired by Value Setters. Finally, he said, "Today 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."³⁸⁸ He produced no documents.

³⁸¹ CX-49, at 1-2.

³⁸² Tr. (Fernandez) 986-88; RX-2, at 123-24.

³⁸³ Tr. (Fernandez) 988.

³⁸⁴ CX-61.

³⁸⁵ Tr. (Fernandez) 993-95, 1785, 1821-24.

³⁸⁶ RX-2, at 125.

³⁸⁷ CX-50. Enforcement's email contained a typographical error, referring to 2017 instead of 2018.

³⁸⁸ CX-51.

On February 23, 2018, Enforcement filed the Complaint.

G. Summary of Main Factual Findings

1. Company A

Based on all the facts and circumstances, we find the following:

- Fernandez did not read Company A's Form C before posting it on the Portal's platform, and thus did nothing to meet the requirement that he have a reasonable basis for believing that the issuer was in compliance with statutory and regulatory requirements. His hearing testimony regarding review of Company A's Form C was uncorroborated, vague, and inconsistent. In his OTR, he admitted that he did not read the Form C for this company and many other issuers before giving them access to the Portal's platform. His failure to review the Form C is evidence that Respondents did not implement policies and procedures to ensure that the DreamFunded Portal complied with its own statutory and regulatory obligations. It also demonstrates that Fernandez did not have a supervisory system in place to oversee the entity's activities.
- As disparities and deficiencies in disclosures accumulated over the course of Company A's offering, a reasonable person would have had investor protection concerns. The decrease in the target amount and the rushed early closing may not have been motivated by any business purpose. DA, Company A's CEO, was in personal financial straits and in need of cash. Nevertheless, Respondents continued to provide services to Company A and to facilitate the transfer of investor monies directly to DA, rather than to Company A.
- Respondents failed to give investors the required material change notices in connection with the third amendment of the Form C, when the target amount of the offering was reduced.
- Respondents failed to give the required notice of early closing before the offering closed.
- In response to regulatory inquiries, Respondents, through their attorney, MT, supplied FINRA staff with false and misleading information regarding the lack of notices.
- Fernandez fabricated after-the-fact material change notices in an attempt to cover up Respondents' failure to give the required notices.
- Much of Fernandez's hearing testimony regarding Company A's offering was untruthful.

2. Company B

Based on all the facts and circumstances, we find the following:

- Fernandez did not review Company B's Form C before posting it on the Portal's website or at any time before the offering closed. Fernandez testified that he was unaware of the disparities in the document, and that he would have removed the offering from the Portal's website if he had been aware of them. He failed to do anything to satisfy his obligation to have a reasonable basis for believing the issuer to be in compliance with the applicable law and rules. Again, this is evidence that he failed to implement procedures to ensure that the Portal was in compliance with its obligations and that he had no system to manage and oversee the Portal's activities.
- Respondents failed to give investors in Company B the required notice of early closing.
- Fernandez purported to make a \$50,000 investment in Company B, which had an offering on the Portal's platform, and he did nothing to correct the false and misleading impression created by online video clips showing him discussing the investment with Company B's CEO. Given that Company B was circulating what Fernandez knew to be false and misleading information on Company B's social media accounts, Respondents should have ceased giving Company B access to the Portal.

3. Company C

Based on all the facts and circumstances, we find the following:

- The video clip showing Fernandez making a deal to invest \$1 million in Company C was false and misleading. Fernandez used it to exaggerate and publicize his wealth, investment savvy, and prowess at raising capital. The video clip also exaggerated the promise of an investment in Company C and promoted investment in Company C while it had an offering on the Portal's website.
- Fernandez was responsible for posting the false and misleading video clip with the offer on social media and the Portal's website, because it served to publicize him and the Portal.
- Much of Fernandez's testimony regarding Company C and the video clip was untruthful.

4. Respondents' Dealings with FINRA Staff

Based on all the facts and circumstances, we find the following:

- Fernandez knew that the video clip of him making an offer and striking a deal to invest in Company C was available on the DreamFunded Portal’s website in spring 2017, while Company C had a crowdfunding offering on the Portal’s platform, because SV, the MAP examiner, inquired about it in a March 21, 2017 email. When he responded to her inquiry through counsel, MT, he merely told her that the video clip was no longer on the website. Implicitly, the response admitted that the video clip with the offer had been posted on the Portal’s website. That is inconsistent with Fernandez’s testimony at the hearing that he never posted the video clip with the offer on the Portal’s website.
- SV saw the video clip with the offer to invest in Company C on the Portal’s website in September 2017. The representation in spring 2017 that the video had been removed from the website was untrue.
- SV saw the video clip of the offer to invest in Company C on what appeared to be the Portal’s YouTube channel on May 16, 2018.
- The video clip showing Fernandez making the offer and striking a deal to invest in Company C was available on what looked like the DreamFunded Portal’s YouTube channel in September 2018, at the time of the first session of the hearing. We do not credit Fernandez’s testimony that someone created a “clone” of the Portal’s YouTube channel and posted the video clip in order to make him look bad, although we have no doubt that there are people who possess the technical ability to do that. Because the video clip was flattering to Fernandez and made him seem wealthy and well connected, it would make no sense to post the video in an effort to sabotage him.
- We find that Fernandez made the offer that appears on the video clip. We do not credit his hearing testimony. His actions after the CNBC program aired belie his claim that the video clip was “doctored” to make him look bad. He admits that almost immediately after the program aired he posted the video clip with the offer on his Twitter account. He also has continued since the airing of the CNBC show to publicize himself as an “investor” on “Make Me a Millionaire Inventor.”
- We do not credit Fernandez’s claim that SV immediately called him to tell him to take down the video clip. She does not remember doing that, and her actions afterward are not consistent with Fernandez’s story. If she had already told him to remove the video clip from his accounts, she would have asked in November 2016, and again in March and May 2017, why the video clip was still on the Portal’s website. Instead, her inquiries were more general questions regarding whether he had invested in any of the issuers on the Portal’s platform.
- Fernandez made other false and misleading statements to FINRA staff:

- In July 2017, Fernandez told OFDMI staff through counsel, MT, that the offerings by Company A and Company B were ended and removed from the Portal’s website around April 30, 2017. This was misleading. Respondents had taken the information regarding the offerings off the website but had continued with the process of closing the offerings by Company A and Company B.
- In July 2017, through counsel, MT, Fernandez told OFDMI staff that Company A’s offering had been terminated and removed because it had failed to provide required financial information. That was untrue. The offering closed on June 26, 2017, with the distribution of investor funds to DA, the company’s CEO.
- When asked for records of due diligence on the companies on the Portal’s platform, Respondents provided information gathered long after the offerings were posted to the Portal’s platform. The material proffered as evidence of due diligence was only gathered after OFDMI staff requested the information. It was false and misleading to present the information as due diligence in advance of the offerings.
- January 19, 2018, was the deadline for the production of documents responsive to the October 24, 2017 Rule 8210 request. To support an extension of time, Fernandez proffered a doctor’s note saying he had been diagnosed with acute gastroenteritis on Wednesday, January 17, 2018. His attorney represented that Fernandez needed bed rest through the weekend. However, that weekend Fernandez attended the Sundance Film Festival in Park City, Utah. We conclude that Fernandez could have worked on the production of documents, but preferred to attend the festival. He was not truthful with FINRA staff about his ability to respond to the Rule 8210 request.
- The new deadline for responding to the document request pursuant to Rule 8210 was Monday, January 29, 2018. Late on Friday, January 26, Fernandez provided a second doctor’s note to excuse him from complying with the document request. We doubt the *bona fides* of the note, and, moreover, Fernandez engaged in activities that were inconsistent with a doctor’s note. He traveled to Las Vegas and attended a Santana concert.

H. Credibility

1. Fernandez

We have already discussed many specific instances where we found Fernandez’s hearing testimony not credible. In those instances, other more credible record evidence undermined or contradicted his assertions. We also have recounted Fernandez’s pattern of making certain false

and misleading statements to regulatory staff, both in response to the inquiries by MAP staff and in dealing with OFDMI staff during their investigation.

Fernandez's hearing testimony was not credible for additional reasons. At the hearing, he attempted to lay the groundwork for discrediting any testimony with which he was uncomfortable, and he repudiated the entirety of his previous sworn testimony in the initial OTR. He also was evasive, vague, and inconsistent throughout the proceeding. As a result, it appears to us that very little of Fernandez's hearing testimony was candid or true.

a. Fernandez Discredited His Own Hearing Testimony and Repudiated His OTR

Fernandez began his hearing testimony by warning that his testimony might not be reliable because he suffers from ADD (Attention Deficit Disorder) and is dyslexic. He claimed that when under high stress he might mix up numbers and forget things, even things like his attorney's name.³⁸⁹ Then periodically throughout his hearing testimony, Fernandez would call attention to his alleged difficulty.³⁹⁰ It appeared that he wanted to preserve the ability to disclaim his testimony and to avoid being pinned down to any particular fact.

Fernandez repudiated his entire OTR testimony, saying none of it could be relied upon.³⁹¹ He appeared at his OTR without his attorney, and he began his OTR by saying that he was on medication. He had taken an over-the-counter sleeping pill the night before and was taking a prescription muscle relaxant for a bad back. But when asked at the OTR whether his ability to testify was impaired, he said it was not.³⁹² JD, the former Enforcement director, testified that during the OTR Fernandez appeared lucid and unimpaired.³⁹³ Our review of the OTR transcript corroborates that testimony. Fernandez seemed to understand the questions and to provide responsive answers without hesitation. He did not seem confused. Although he said occasionally that he was tired,³⁹⁴ he did not seem impaired.

Fernandez's OTR testimony was closer in time to the events at issue, and perhaps when he gave that testimony he was unaware of the perils of what he was saying. By the time of the hearing, he had a better idea of the potential consequences of his testimony and wanted to make adjustments. Where the OTR and the hearing testimony are inconsistent and where Fernandez

³⁸⁹ Tr. (Fernandez) 51-52.

³⁹⁰ Tr. (Fernandez) 98, 111-12, 176, 217, 611, 743, 1019, 1055, 1075.

³⁹¹ Tr. (Fernandez) 98, 118-20.

³⁹² CX-72 (Fernandez OTR), at 6-7.

³⁹³ Tr. (JD) 432, 548-49; CX-36.

³⁹⁴ CX-72 (Fernandez OTR), at 77, 86-87, 98, 104, 122, 208, 221. At least once when Fernandez said he was tired, FINRA staff suggested taking a break. CX-72 (Fernandez OTR), at 87.

appears to have a reason to change his story, we generally credit Fernandez's OTR testimony, rather than his hearing testimony.

To illustrate, for example, Fernandez testified in his OTR that he had collected \$878,000 to support the "operation, branding, and potential growth of the funding portal."³⁹⁵ At the hearing, he testified that the money was collected for a different purpose,³⁹⁶ apparently in support of his argument that the money was unconnected to the DreamFunded Portal and therefore beyond FINRA's jurisdiction to investigate.

We credit the OTR testimony that the money was intended to be used to build and operate the DreamFunded Portal. The OTR testimony is consistent with Fernandez's lobbying efforts urging the commencement of equity crowdfunding, and consistent with his appearance on the CNBC show "Make Me a Millionaire Inventor," which was filmed in January 2016, prior to the formation of the Portal. Fernandez was introduced on the show as the co-founder of a DreamFunded crowdfunding platform. Fernandez's OTR testimony also is consistent with what Respondents told MAP staff about the Portal's sources of funding in connection with its application for FINRA membership. We find that the \$878,000 was intended for investment in establishing and operating the DreamFunded Portal.

Similarly, in another example, Fernandez testified in his OTR that he did not keep receipts for all the various cash withdrawals he made from the Portal's bank account. He said he did not keep track of cash payments except by memory. He told the staff that a number of his independent contractors wanted to be paid in cash and that he had informal "verbal agreements" with them to do so.³⁹⁷ At the hearing, however, Fernandez maintained that he kept receipts but that he had handed them over to his lawyers to be produced to FINRA staff.³⁹⁸ In effect, he blames the failure to produce any receipts on his lawyers.

We credit the OTR testimony, not the hearing testimony. We believe that OFDMI and Enforcement received no record of expenses in response to their Rule 8210 request because there was no record or because Respondents wanted to conceal what the record of expenses would show.

b. Fernandez Was Evasive, Vague, and Inconsistent

From the outset of his hearing testimony, Fernandez attempted to avoid answering questions, even simple questions that would appear to be uncontroversial. For example, he was shown the operating agreement between the Portal and the Parent, which labeled the Parent the sole member of the DreamFunded Portal, a limited liability company. Fernandez signed the

³⁹⁵ CX-72 (Fernandez OTR), at 62.

³⁹⁶ Tr. (Fernandez) 94-98.

³⁹⁷ Tr. (Fernandez) 160-62; CX-72 (Fernandez OTR), at 81-83, 93-95.

³⁹⁸ Tr. (Fernandez) 159-64.

document on behalf of the Parent under a heading that designated the Parent as the “Sole Member” of the Portal’s limited liability company. He was asked whether the statement that the Parent was the sole member of the Portal’s limited liability company was true. He responded by requesting that Enforcement define the term “sole member.” Then he was asked whether he understood the document when he signed it. He said he did not recall. He avoided giving a direct answer to the question of whether the Parent was the sole member of the Portal’s limited liability company, even though the operating agreement plainly said that it was.³⁹⁹

In some cases, Fernandez was vague and evasive to the point of absurdity. Respondents had represented to MAP staff when applying for FINRA membership that Smarsh, a third party vendor, would be hired to conduct email review and archive emails and social media communications by the Portal and its associated persons. When asked about what Smarsh had done in the way of such archiving of records, Fernandez said he did not recall how long Smarsh did it, or how long the DreamFunded Portal paid Smarsh, or how much Smarsh charged. He did not remember whether he asked Smarsh to prepare an archive of the emails when FINRA requested such documents. When asked whether Smarsh provided recordkeeping services, he responded, “You would have to check with them.” He professed to know nothing about recordkeeping by Smarsh or vendor payments to it, even though he was the Portal’s CEO and the only person at the Portal who had access to the Portal’s bank account.⁴⁰⁰ He had to know whether he actually contracted with and paid Smarsh to provide the services even if he did not recall the details.

Periodically, Fernandez challenged the quality of Enforcement’s questions, rather than answering them. When Enforcement asked whether Fernandez knew if Company A had any business relationships with the six companies it cited as potential strategic acquisition partners, such as Apple and Google, Fernandez responded, “Ridiculous questions. Let me think. How would you define business with them? . . . How would you define a business relationship?”⁴⁰¹ Then Enforcement asked, “[H]ave any of those companies to your knowledge expressed any interest in acquiring [Company A]?” Fernandez chided, “That is another ridiculous question.”⁴⁰² When Enforcement tried to get a clear answer to that question, Fernandez asked in exasperation, “Is that worthy of an answer?”⁴⁰³ Eventually, as the Hearing Officer began to intervene, he said, “No. It’s a startup, sir. No.”⁴⁰⁴

³⁹⁹ Tr. (Fernandez) 60-62.

⁴⁰⁰ Tr. (Fernandez) 68-71; CX-6; CX-72 (Fernandez OTR), at 75. RH, the co-founder, had access to the account until he left the portal in 2016. After that, Fernandez had sole control over the spending from the account. CX-72 (Fernandez OTR), at 75-76.

⁴⁰¹ Tr. (Fernandez) 388.

⁴⁰² Tr. (Fernandez) 388.

⁴⁰³ Tr. (Fernandez) 389.

⁴⁰⁴ Tr. (Fernandez) 389.

Fernandez sometimes refused to answer questions, asking Enforcement to define terms like “misleading,”⁴⁰⁵ and “objective criteria.”⁴⁰⁶ Eventually an answer might be obtained, but not always. Fernandez avoided giving straightforward answers. For example, Fernandez was asked if investor monies raised through the DreamFunded Portal were distributed to Company A and Company B. He responded, “These were [the entrepreneurs’] friends and family members. They weren’t really investors.”⁴⁰⁷ More than once, Fernandez attempted to deflect questions by claiming he had already answered them.⁴⁰⁸ It was often unclear whether he had, which made it difficult to get a clear record.

Fernandez’s hearing testimony was often vague and inconsistent. He first testified vaguely about spreadsheets that might have been projections or might have concerned past expenditures.⁴⁰⁹ Then he acknowledged that he kept no spreadsheets “looking back” at expenses.⁴¹⁰ Almost immediately after that, he claimed that he had kept an ongoing general ledger in electronic format. But he could not remember the program he used for it.⁴¹¹ Then he talked about spreadsheets prepared by his accountant.⁴¹² Eventually, he seemed to provide a clear answer to whether he had kept track of expenses:

Q: Did you create any spreadsheets to determine how DreamFunded had spent money?

A: We were creating a future budget with a business plan. I remember using Excel for that.

Q: What about looking back how you had spent money?

A: I think I answered that question already.

Q: Which is?

⁴⁰⁵ Tr. (Fernandez) 349-50 (Fernandez was asked if it was misleading for him to publicize himself using a video clip that was “doctored.” He replied, “What is misleading?”).

⁴⁰⁶ Tr. (Fernandez) 801-03 (Fernandez was asked what the words “objective criteria” meant in the Portal’s written policies and procedures. After asking that Enforcement define “objective criteria,” he eventually defined it himself, “No one favored over anyone else.”).

⁴⁰⁷ Tr. (Fernandez) 351-53.

⁴⁰⁸ Tr. (Fernandez) 140 (“I think I answered that question already.”); 146-47 (“I think we’ve covered something like this somewhere”); 229 (“Do I feel like this question is the same question said different ways?”).

⁴⁰⁹ Tr. (Fernandez) 123-25.

⁴¹⁰ Tr. (Fernandez) 128.

⁴¹¹ Tr. (Fernandez) 130-31.

⁴¹² Tr. (Fernandez) 138-40.

A: You're asking me did I make an Excel spreadsheet to look back on what we spent?

Q: Yes.

A: No.⁴¹³

Although the last answer seemed definitive, after a lunch break, Fernandez contradicted himself. He testified that he kept two types of spreadsheets, one for projections and one for actual spending.⁴¹⁴ He claimed that he produced both types of spreadsheets to his lawyers and did not know whether the lawyers had produced them to FINRA.⁴¹⁵ His testimony was vague. "Whatever we had that was requested, [SA], [MT], or this gentleman [referring to current counsel] helped me with it and we provided it."⁴¹⁶

In his OTR, Fernandez testified that he was working with his accountant to put together a general ledger. In order to do projections for how much money the business would need in the future, he would put together a review of the past year's expenditures. He was vague about the details.⁴¹⁷

We find that OFDMI and Enforcement received no books and records tracking the expenditure of the \$878,000 either because Fernandez had no spreadsheets or other accounting records tracking his spending of the money, or because he was concerned about what they revealed and did not want to produce the records.

c. Fernandez's Theory That AH Created False Evidence Was Not Credible

Documentary evidence flatly contradicts Fernandez's hearing testimony on at least two critical points. He asserts that, although it appears that he is responsible for those items of documentary evidence, he is not. We reject his assertion in both instances.

First, Fernandez claims that after receiving a telephone call from SV, the MAP examiner, he took down any social media posting of the \$1 million offer within days of the October 6, 2016 airing of the CNBC show, and that no social media site within his control has the video clip with the offer.⁴¹⁸ But in February 2017 SV saw a video clip of him making the \$1 million offer on a Facebook page that appeared to come from a YouTube channel belonging to the DreamFunded

⁴¹³ Tr. (Fernandez) 140.

⁴¹⁴ Tr. (Fernandez) 145-46.

⁴¹⁵ Tr. (Fernandez) 146-47.

⁴¹⁶ Tr. (Fernandez) 146.

⁴¹⁷ CX-72 (Fernandez OTR), at 73-75

⁴¹⁸ Tr. (Fernandez) 249-51, 256-61.

Portal. She took a screenshot, which is in evidence.⁴¹⁹ Fernandez claims that a disgruntled former employee, AH, created false evidence—a “clone” of the Portal’s channel—in order to harm Fernandez.⁴²⁰ We reject the claim as purely speculative and inconsistent with the facts. The video clip with the offer is in fact not harmful to Fernandez (except insofar as it undermines his testimony in the hearing). Rather, the video clip inflates Fernandez’s wealth and importance, as he recognizes when he refers to himself on the Portal’s website as an “investor” on the CNBC show “Make Me a Millionaire Inventor.” He uses his appearance on the show to publicize and promote himself.

Second, Fernandez admitted in an email to SV that he had made the offer to Company C but changed his mind after the CNBC show,⁴²¹ which is contrary to his testimony in the hearing that he never made the offer. Fernandez claims that AH “hacked” into his email and that it was AH impersonating Fernandez who made the admission.⁴²² This claim is difficult to believe, in part because the email chain fits the facts, and in part because the supposed false email does not on its face harm Fernandez. It only harms him because it is inconsistent with his hearing testimony.

2. FINRA Staff

a. SV, MAP Principal Examiner

SV, the MAP Principal Examiner, was credible, although her memory was sometimes uncertain. Whenever she was uncertain about her memory of her conversations with Fernandez or her memory of viewing the video clip of the offer, she said so.⁴²³ She clearly did not want to mislead the Extended Hearing Panel.

When Respondents’ counsel repeatedly suggested to SV that she had had a telephone conversation with Fernandez in early October 2016, almost immediately after the program aired, in which she told him to remove the video clip from his Twitter account, SV did not flatly deny that it happened. But she repeatedly told counsel that she did not remember any such conversation,⁴²⁴ and she explained why such a conversation was inconsistent with the facts. She said that she first saw the video on October 24, 2016, more than two weeks after the program

⁴¹⁹ Tr. (SV) 1380-84; CX-77.

⁴²⁰ Tr. (Fernandez) 668-69, 672-88.

⁴²¹ CX-15.

⁴²² Tr. (Fernandez) 264-83.

⁴²³ Tr. (SV) 1380 (“I’m pretty sure. . . .”), 1381 (“Probably”), 1390 (“I think that . . . but I can’t really remember now.”), 1393 (“Most likely.”), 1411 (“I am not 100% sure”), 1529 (“[I] cannot tell you a hundred percent that I watched the entire video from beginning to end I cannot remember. It was well over a year ago.”).

⁴²⁴ Tr. (SV) 1520-23, 1536-37, 1575-77. When Respondents’ counsel suggested incorrect dates for when the CNBC show aired and for when she first saw the video clip, SV corrected him. Tr. (SV) 1513.

aired and later than Fernandez claimed he had the telephone conversation with her.⁴²⁵ SV testified that she discussed the video clip with MAP staff and they opened a for cause examination.⁴²⁶ She suggested that she would not have directed Fernandez to remove the video clip before MAP staff knew whether there was a violation. Instead, in a written inquiry, she asked a generic question whether the Portal or any of its principals had invested or planned to invest in any of the offerings on the Portal's platform.⁴²⁷ Because she continued to see the video clip with the offer on Facebook, YouTube, and the Portal's website, the suggestion that Fernandez had removed the offer at her suggestion in early October 2016 did not comport with her experience.⁴²⁸ Her testimony was more consistent with MAP staff's conduct of the for cause examination than was Fernandez's.

SV testified that she spoke to Fernandez two times about changing the Portal's website. The first was in the context of the Portal's application to become a FINRA member, when SV was helping Respondents to understand and conform to the applicable rules. The second was in the spring of 2017, when Respondents posted the real estate tombstones.⁴²⁹ Her recollection of these conversations, but not the one that Fernandez described, further undermines his credibility. It seems unlikely that she should remember the other two but forget the one Fernandez described in vivid detail.

b. JD, Former Enforcement Director

JD, the former Enforcement Director, was credible. He clearly described the staffs' concerns that arose after Fernandez's initial OTR. The staff wanted to understand more about Fernandez's fundraising efforts and sources, along with his use of investor monies.⁴³⁰

c. PD, OFDMI Investigator

PD, the OFDMI investigator, was credible. He described the division of responsibility between the OFDMI and MAP groups,⁴³¹ the information he compiled summarizing the 15 crowdfunding offerings that were on the DreamFunded Portal,⁴³² and the history of the staff's concerns as the staff began collecting information about Respondents and the offerings on the

⁴²⁵ Tr. (SV) 1380.

⁴²⁶ Tr. (SV) 1366-67, 1397-99.

⁴²⁷ Tr. (SV) 1521-22, 1597-98.

⁴²⁸ Tr. (SV) 1379-80, 1581-85.

⁴²⁹ Tr. (SV) 1470-71.

⁴³⁰ Tr. (JD) 419-25.

⁴³¹ Tr. (PD) 1831-35.

⁴³² Tr. (PD) 1850-52; CX-66.

Portal's platform.⁴³³ He also explained that the staff did not have the ability to use Dropbox to accept document production in response to a Rule 8210 request.⁴³⁴

PD took care not to mislead the Extended Hearing Panel. He was careful to point out that there was a typographical error in one of his compilations.⁴³⁵

PD reviewed the various bank statements Respondents provided to FINRA—some to MAP staff before DreamFunded Portal became a FINRA member, some to OFDMI and Enforcement in response to the Rule 8210 request, and some to the Office of Hearing Officers shortly before the hearing as proposed hearing exhibits. PD observed that they showed a large number of in-branch cash withdrawals, ATM withdrawals, credit card payments, and payments to Fernandez's family members. None of these bank statements included Fernandez's personal bank statements, although they were subject to the Rule 8210 request.⁴³⁶

I. No Evidence of Unfair Selective Prosecution

Throughout the hearing, Respondents, through counsel, accused Enforcement staff of misconduct and threatened to expose the misconduct by introducing certain evidence, including an audiotaped recording. The Hearing Officer repeatedly requested that Respondents put the charges in writing and that the basis for the charges be submitted in the same manner as other proposed exhibits prior to hearing. She asked Respondents' counsel to submit the evidence to the Office of Hearing Officers and to Enforcement to enable it to respond. Respondents' counsel refused to follow that procedure and did not introduce at the hearing the audiotaped recording, even though he said it would prove the accusation.⁴³⁷

We understand Respondents to be making an argument of unfair selective prosecution.⁴³⁸ From time to time in his testimony, Fernandez made remarks that indicated he thought he was sometimes badly treated and discriminated against because of being a member of a minority group.⁴³⁹

We find no basis for the accusation that Enforcement engaged in unfair selective prosecution. To establish a claim of selective prosecution, Respondents must demonstrate that they were singled out for enforcement while others similarly situated were not, and that such prosecution was motivated by arbitrary or unjust considerations such as race, religion, or the

⁴³³ Tr. (PD) 1835-48.

⁴³⁴ Tr. (PD) 1871-72, 1926-29.

⁴³⁵ Tr. (PD) 1850-52, 1876-81; CX-66.

⁴³⁶ Tr. (PD) 1876-85, 1889-90.

⁴³⁷ Tr. (remarks of Respondents' counsel) 941-49.

⁴³⁸ Tr. (remarks of Respondents' counsel) 499-500; Resp. PH Br. 4.

⁴³⁹ Tr. (Fernandez) 343-44, 378-80, 967-71, 1004, 1077, 1156, 1167-68, 1171-72.

desire to prevent the exercise of a constitutionally protected right.⁴⁴⁰ Although Fernandez suggested that Enforcement staff were motivated by an improper consideration, he declined to provide any evidence of it.

Moreover, Enforcement staff filed the Complaint and pursued the proceeding only after having gathered substantial evidence that Respondents may have committed violations of the securities laws and regulations,⁴⁴¹ and after Respondents had rebuffed the staff's attempts to gather relevant documents and testimony. The staff had reason to think that Fernandez had not told them the truth when seeking extensions to respond to their inquiries on medical grounds.⁴⁴² Enforcement routinely investigates potential violations and brings proceedings when a FINRA member or associated person does not fully and completely respond to a Rule 8210 request.⁴⁴³ The facts and circumstances demonstrate that it was reasonable for Enforcement staff to investigate and for them to bring the proceeding. The claim of selective prosecution lacks any support.

J. Legal Requirements for Crowdfunding Securities Offerings

To provide context for the discussion below of the individual rules Respondents are charged with violating in each separate Cause of Action, we present a broad overview of the law and rules applicable to crowdfunding offerings. The JOBS Act, which was signed into law on April 5, 2012, created the new exemption from registration under the Securities Act and established the regulatory framework for crowdfunding offerings. The Act required the SEC and FINRA to oversee crowdfunding offerings, and they have promulgated rules to do so. The SEC adopted its Crowdfunding Rules on October 30, 2015, but for the most part those Rules did not become effective until May 16, 2016.⁴⁴⁴ The SEC approved FINRA's Portal Funding Rules on January 22, 2016, and FINRA adopted them on January 29, 2016.⁴⁴⁵

It is important in applying the Crowdfunding and Funding Portal Rules in this case to understand Congress's aims in enacting the JOBS Act. Congress authorized crowdfunding offerings and created a new regulatory framework for such offerings in part to open a new source

⁴⁴⁰ See *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *53 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *Dep't of Enforcement v. Casas*, No. 2013036799501, 2017 FINRA Discip. LEXIS 1, at *39-41 (NAC Jan. 13, 2017) (citing *Terrance Yoshikawa*, Exchange Act Release No. 53731, 2006 SEC LEXIS 948, at *28-29 (Apr. 26, 2006)).

⁴⁴¹ Tr. (JD) 419-25, 431, 493, 504-05, 515-16.

⁴⁴² Tr. (JD) 447-53.

⁴⁴³ *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *68 (Sept. 28, 2017); *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *44 (July 27, 2015).

⁴⁴⁴ Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486.

⁴⁴⁵ Funding Portal Rules Approving Release, 2016 SEC LEXIS 262; FINRA Regulatory Notice 16-06 (SEC Approval of FINRA Funding Portal Rules and Related Forms; Effective Date: January 29, 2016).

of financing for small businesses and start-ups,⁴⁴⁶ and in part to allow the general public an opportunity to participate in the early capital-raising activities of start-up and early-stage companies and businesses.⁴⁴⁷ It intended to create a less complex and less expensive regulatory setting for crowdfunding offerings.⁴⁴⁸ Consequently, issuers and intermediaries involved in crowdfunding offerings have fewer and less onerous responsibilities than do participants in other sorts of securities offerings. We are wary of any interpretation or application of the law and rules relating to crowdfunding offerings that would impose unnecessary and inappropriate complications and expense on such offerings.

Nevertheless, participants in crowdfunding offerings have certain responsibilities, and we must enforce them. Congress did not abandon its historical concerns in connection with securities offerings for investor protection and the public interest in market integrity. Title III of the JOBS Act, which deals with crowdfunding offerings, is named the “Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012” or the CROWDFUND ACT.⁴⁴⁹ Deterring fraud and unethical non-disclosures are prominent focal points of the regulatory framework for crowdfunding offerings. That is why Congress empowered the SEC to prescribe by rule such requirements as appropriate “for the protection of investors and in the public interest.”⁴⁵⁰

1. Exchange Act

An investment contract is a security under Section 3(a)(10) of the Exchange Act. The three elements of an investment contract are (i) an investment of money (ii) in a common enterprise (iii) with the expectation of profits produced by the efforts of others.⁴⁵¹ The profits from an investment contract may be variable or fixed.⁴⁵²

⁴⁴⁶ Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *3 & n.2.

⁴⁴⁷ *Id.* See also https://www.sec.gov/oiea/investor-alerts-bulletins/ib_crowdfunding-.html.

⁴⁴⁸ Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *132-33.

⁴⁴⁹ Pub. Law 112-106, 126 Stat. 306 (2012).

⁴⁵⁰ Section 4A(a)(12) of the Securities Act.

At times in Fernandez’s testimony, and more fully in Respondents’ counsel’s remarks, Respondents voiced the view that regulators have placed too heavy a regulatory burden on crowdfunding, preventing it from being the engine for innovation and economic growth that people had hoped it would be. See, e.g., Tr. (Fernandez) 967-71, 1160, 1164-72; Tr. (remarks of Respondents’ counsel) 2035-38. We express no opinion on that subject. We have no authority to rewrite the law and rules. Our limited authority is to interpret and apply the applicable law and rules as written. We perform our responsibilities, nevertheless, bearing in mind that Congress, the SEC, and FINRA all intended to balance the goal of protecting investors and serving the public interest with the goal of freeing crowdfunding offerings from unnecessary complication and expense.

⁴⁵¹ *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946); *Dep’t of Enforcement v. Miller*, No. 2012034393801, 2018 FINRA Discip. LEXIS 13, at *21 (NAC May 23, 2018).

⁴⁵² *SEC v. Edwards*, 540 U.S. 389, 394-97 (2004).

The interests offered through equity crowdfunding qualify as securities under the investment contract analysis. Those who (i) contribute money to a business venture online (ii) join in a common enterprise (iii) with the hope of an investment return from the efforts of others, who develop and manage that venture. Congress understood that equity crowdfunding involves securities offerings because, as discussed below, it created a new exemption from registration under the Securities Act for such offerings, and removed much of the regulatory burden that would otherwise apply.

2. Securities Act

It is unlawful to offer and sell securities without an effective registration statement in place, unless a statutory exemption applies. Sections 5(a) and 5(c) of the Securities Act prohibit the “sale” and “offer for sale” of securities in interstate commerce unless a registration statement has been filed or is in effect, or an exemption from registration applies.⁴⁵³ The prohibition applies to “any person,”⁴⁵⁴ and the Securities Act defines “person” broadly to include both individuals and entities such as corporations and partnerships.⁴⁵⁵ The prohibition also applies to any person who “directly or indirectly” sells or offers to sell securities.⁴⁵⁶ Thus, Section 5 may be violated both by a person who transfers the title to securities, and by a person who markets, facilitates, or assists in the process of offering and selling the securities.⁴⁵⁷

The registration requirements serve to protect investors by promoting full disclosure of information thought necessary to informed investment decisions.⁴⁵⁸ As the preamble to the Securities Act states, the purpose of the Act is “[t]o provide full and fair disclosure of the character of securities . . . and to prevent frauds.”⁴⁵⁹ “Registration exemptions are strictly construed ‘to promote full disclosure of information for the protection of the investing public.’”⁴⁶⁰

⁴⁵³ Sections 5(a) and 5(c) of the Securities Act. *See also* *Ronald S. Bloomfield*, Exchange Act Release No. 71632, 2014 SEC LEXIS 698, at *20-21 (Feb. 27, 2014).

⁴⁵⁴ Sections 5(a) and 5(c) of the Securities Act.

⁴⁵⁵ Section 2(a)(2) of the Securities Act.

⁴⁵⁶ Sections 5(a) and 5(c) of the Securities Act.

⁴⁵⁷ *Pinter v. Dahl*, 486 U.S. 622, 642-47 (1988).

⁴⁵⁸ *ACAP Fin. Inc.*, Exchange Act Release No. 70046, 2013 SEC LEXIS 2156, at *28 (July 26, 2013) (quoting *Pinter*, 486 U.S. at 638); *SEC v. Elliott*, 2012 U.S. Dist. LEXIS 82992, at *1 (S.D.N.Y. June 12, 2012); *Bloomfield*, 2014 SEC LEXIS 698, at *21; *KCD Fin. Inc.*, Exchange Act Release No. 80340, 2017 SEC LEXIS 986, at *46 (Mar. 29, 2017).

⁴⁵⁹ Preamble to Securities Act of 1933, Pub. L. No. 22, § 1, 48 Stat. 74, ch. 38.

⁴⁶⁰ *KCD Fin., Inc.*, 2017 SEC LEXIS 986, at *16-17 (quoting *SEC v. Cavanagh*, 445 F.3d 105, 111 n.13 (2d Cir. 2006)).

3. JOBS Act

a. New Exemption

Title III of the JOBS Act added Section 4(a)(6) to the Securities Act, thereby creating a new exemption from registration for certain small securities offerings.⁴⁶¹ The purpose of the new exemption is to assist start-ups, early stage companies, and small enterprises in raising capital, and to permit small investments by persons who otherwise might be unable to share in the potential gains generated by such ventures.⁴⁶² The exemption is designed to take advantage of the ability to communicate and interact with large numbers of people inexpensively through the Internet.⁴⁶³ Title VII of the JOBS Act directed the SEC to provide information online about the JOBS Act and to conduct outreach to small and medium sized businesses and businesses owned by women, veterans, and minorities to inform them of the changes made by the Act.

The new exemption applies to issuer offerings of a limited size⁴⁶⁴ that are purchased by investors in limited amounts.⁴⁶⁵ Anyone can invest in a crowdfunding offering. There is no requirement that an investor be accredited or have any particular net worth. An intermediary is required to provide investor-education information.⁴⁶⁶ The exemption is only effective, however,

⁴⁶¹ Section 302(a) of the JOBS Act amended the Securities Act by adding a provision creating the new crowdfunding exemption. Section 302(b) amended the Securities Act by adding a whole new section, Section 4A, which sets forth the requirements applicable to the new exemption and the entities that may participate in such exempt offerings. The JOBS Act additionally contains provisions relating to liability for material misstatements and omissions, statutory disqualification, and rulemaking and regulation by the SEC and FINRA. See also Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486; Funding Portal Rules Approving Release, 2016 SEC LEXIS 262.

⁴⁶² 157 Cong. Rec. S8458 (daily ed. Dec. 8, 2011) (statement of Sen. Jeff Merkley) (“Low-dollar investments from ordinary Americans may help fill the void, providing a new avenue of funding to the small businesses that are the engine of job creation. The Crowdfund Act [Title III of the JOBS Act] would provide startup companies and other small businesses with a new way to raise capital from ordinary investors in a more transparent and regulated marketplace.”); 157 Cong. Rec. H7295-01 (daily ed. Nov. 3, 2011) (statement of Rep. Patrick McHenry) (“[H]igh net worth individuals can invest in businesses before the average family can. And that small business is limited on the amount of equity stakes they can provide investors and limited in the number of investors they can get. So, clearly, something has to be done to open these capital markets to the average investor[.]”).

⁴⁶³ Crowdfunding Rules Proposing Release, 2013 SEC LEXIS 3346, at *158, *177.

⁴⁶⁴ When enacted, Section 4(a)(6) of the Securities Act provided that the aggregate amount of securities sold by an issuer in reliance on the crowdfunding exemption during the preceding 12 months could not exceed \$1 million. The JOBS Act further provided that this and certain other dollar amounts set by the statute should be adjusted by the SEC not less frequently than once every five years. Section 4A(h) of the Securities Act.

⁴⁶⁵ When enacted, Section 4(a)(6) of the Securities Act provided that an investor could not invest more than a certain percentage of his or her annual income or net worth in the issue over the course of the preceding 12 months. If the investor’s annual income or net worth was less than \$100,000, then the investor was limited to investing a maximum of \$2,000 or 5%. If the investors’ annual income or net worth was \$100,000 or more, then the limit was 10% or an aggregate maximum of \$100,000. These amounts also are subject to adjustment at least once every five years. Section 4A(h) of the Securities Act.

⁴⁶⁶ Section 4A(a)(4) of the Securities Act.

if the issuer complies with certain requirements⁴⁶⁷ and the offering is made through an intermediary registered with the SEC.⁴⁶⁸ One permissible intermediary is a registered broker-dealer; the other is a new type of entity created by the JOBS Act, a registered funding portal.⁴⁶⁹

b. Issuer's Statutory Responsibilities

Under the JOBS Act, an issuer must make certain disclosures, which are to be provided to the relevant intermediary, filed with the SEC, and made available to potential investors. These disclosures are not as extensive as the disclosures an issuer makes in a registered offering, but they are central to investor protection. They establish the minimum disclosures necessary to allow the “crowd” to discuss, analyze, and evaluate a potential investment. Those disclosures include certain basic information about the issuer, the offering, and the intended use for those funds. As the SEC has said, “For the ‘wisdom of the crowd’ to be effective, members of the crowd should have sufficient information about the issuer’s proposal to discuss its merits and flaws.”⁴⁷⁰

In connection with a crowdfunding offering, the JOBS Act requires disclosure of the name, legal status, physical address, and website address of the issuer. The statute also requires disclosure of the names of directors, officers, and each person holding more than 20% of the issuer’s shares. Under the JOBS Act, the issuer must describe its business and anticipated business plan, along with its financial condition. In addition, the issuer must describe the stated purpose and intended use of the proceeds of the offering, the target offering amount, the deadline to reach the target offering amount, and provide regular updates regarding the progress of the issuer in meeting the target offering amount.⁴⁷¹

The JOBS Act further requires that prior to sale each investor “shall be provided in writing the final price and all required disclosures with a reasonable opportunity to rescind the commitment to purchase the securities.”⁴⁷² This provision creates a window between the making of an investment commitment and the closing of the transaction during which an investor may change his or her mind about the investment. During that window, an investor has the right to rescind and obtain the return of his or her money.

⁴⁶⁷ Section 4A(b)(1) of the Securities Act.

⁴⁶⁸ Section 4A(a)(1) of the Securities Act.

⁴⁶⁹ *Id.*

⁴⁷⁰ Crowdfunding Rules Proposing Release, 2013 SEC LEXIS 3346, at *59.

⁴⁷¹ Section 4A(b)(1) of the Securities Act.

⁴⁷² Section 4A(b)(1)(G) of the Securities Act.

c. Intermediary’s Statutory Responsibilities

The JOBS Act requires that both types of intermediaries—brokers and funding portals—register with the SEC⁴⁷³ and register with a self-regulatory organization, as defined in the Exchange Act.⁴⁷⁴ The Exchange Act defines such a self-regulatory organization as a registered national securities association,⁴⁷⁵ and, currently, FINRA is the only such association.⁴⁷⁶ Accordingly, funding portals—like brokers—are required to register with both the Commission and FINRA.

The JOBS Act imposes certain responsibilities on intermediaries in the context of crowdfunding offerings, but it leaves to the SEC to determine much of the detail regarding how those responsibilities should be carried out.⁴⁷⁷ For example, the statute requires an intermediary to provide investor education materials and risk disclosures, but authorizes the SEC to determine, by rule, what is appropriate.⁴⁷⁸

Congress contemplated that intermediaries, both brokers and funding portals, would perform some gatekeeping functions. The Act provides that an intermediary shall “take such measures to reduce the risk of fraud with respect to such transactions, as established by the [SEC] by rule.”⁴⁷⁹ The statute mandates that the appropriate measures should include, at a minimum, a background and securities enforcement regulatory history check on each officer, director, and person holding more than 20% of the outstanding equity of an issuer.⁴⁸⁰

Under the JOBS Act, an intermediary is responsible for making available to the SEC and to potential investors the disclosures provided by the issuer. The intermediary must make the information available to the SEC and to potential investors “not later than 21 days prior to the first day on which securities are sold to any investor.”⁴⁸¹ The Act thus creates a period of time when information regarding an offering will be available online prior to the completion of any sale to an investor pursuant to the offering. During that period, the “crowd” can discuss and analyze the offering on the intermediary’s website, sharing their views, and no transaction can be completed.

⁴⁷³ Section 4A(a)(1) of the Securities Act.

⁴⁷⁴ *Id.*

⁴⁷⁵ Section 15A(a) and (b) of the Exchange Act.

⁴⁷⁶ <https://www.sec.gov/rules/sro.shtml>.

⁴⁷⁷ *See* Section 4A(a) of the Securities Act.

⁴⁷⁸ Section 4A(a)(3) of the Securities Act.

⁴⁷⁹ Section 4A(a)(5) of the Securities Act.

⁴⁸⁰ *Id.*

⁴⁸¹ Section 4A(a)(6) of the Securities Act. The statute permits the SEC to set a different deadline, but the SEC did not change the deadline when it promulgated its Crowdfunding Rules.

The Act requires an intermediary to “ensure that all offering proceeds are only provided to the issuer when the aggregate capital raised from all investors is equal to or greater than a target offering amount.”⁴⁸² The statute further provides that an intermediary must allow all investors to cancel their commitments to invest as the SEC shall, by rule, determine appropriate.⁴⁸³ Thus, an intermediary plays a key role in protecting investors from a premature distribution of funds to the issuer.

The JOBS Act prohibits the directors, officers, and partners of an intermediary from having any financial interest in an issuer using the intermediary’s services.⁴⁸⁴ In that way, the statute forbids potential conflicts of interest that may arise when the persons facilitating a crowdfunding transaction have a financial stake in the outcome.

Finally, with respect to both types of intermediaries, brokers and funding portals, Congress gave the SEC flexibility to impose “such other requirements as the Commission may, by rule, prescribe, for the protection of investors and in the public interest.”⁴⁸⁵

d. Statutory Provisions Mandating Funding Portal Regulation

Section 304 of the JOBS Act amended the Exchange Act to add a definition of a funding portal. Section 3(a)(80) of the Exchange Act defines a funding portal as an entity acting as an intermediary in a transaction involving the offer or sale of securities for the account of others, pursuant to the new exemption from registration for crowdfunding securities offerings. The statute imposes limitations on a funding portal that differentiate such an entity from a broker. A funding portal must *not* do any of the following:⁴⁸⁶

- Offer investment advice or recommendations;
- Solicit purchases, sales, or offers to buy the securities offered or displayed on its website or portal;
- Compensate employees, agents, or other persons for soliciting or based on sales of the securities on its website or portal;
- Hold, manage, possess, or otherwise handle investor funds or securities; or
- Engage in such other activities as the [SEC], by rule, determines appropriate.

⁴⁸² Section 4A(a)(7) of the Securities Act.

⁴⁸³ *Id.*

⁴⁸⁴ Section 4A(a)(11) of the Securities Act.

⁴⁸⁵ Section 4A(a)(12) of the Securities Act.

⁴⁸⁶ The JOBS Act inadvertently created two Sections 3(a)(80) in the Exchange Act, one defining the term “funding portal” and the other defining the term “emerging growth company.” Crowdfunding Rules Proposing Release, 2013 SEC LEXIS 3346, at *207 & n.306.

Section 304 of the JOBS Act authorizes the SEC to exempt, by rule, a registered funding portal from the requirement to register as a broker-dealer under Section 15(a)(1) of the Exchange Act. Congress imposed three conditions:⁴⁸⁷

- A funding portal must remain subject to the examination, enforcement, and other rulemaking authority of the [SEC];
- A funding portal must be a member of a registered national securities association (currently meaning FINRA); and
- A funding portal must be subject to any other requirements as the SEC determines appropriate by rule.

Section 304 of the JOBS Act additionally provides that a registered funding portal will be treated the same as a registered broker for purposes of the portions of the Exchange Act authorizing FINRA to regulate its members. Congress directed that a funding portal is included in the terms “broker or dealer” and “registered broker or dealer” in Sections 15(b)(8) (requiring a broker to register with a national securities association, *i.e.*, FINRA) and 15A of the Exchange Act (governing the responsibilities of FINRA),⁴⁸⁸ subject to a caveat. Congress provided that FINRA “shall only examine for and enforce against a registered funding portal rules of such national securities association written specifically for registered funding portals.”⁴⁸⁹

By folding funding portals into the structure established by the Securities Act for regulation and discipline, rather than creating a stand-alone regulatory framework, Congress made clear that funding portals are still subject to regulation to serve the purposes of the Securities Act—protecting investors and the public interest.

4. SEC Crowdfunding Rules

As is plain on the face of the JOBS Act, Congress envisioned that the SEC would exercise regulatory authority over crowdfunding offerings and the intermediaries through which such offerings were to be made. In passing the Act, Congress left much of the regulatory detail to the SEC to flesh out in rulemaking. Congress also specifically granted the SEC authority to regulate the new entities, funding portals. The Act requires that funding portals be registered with the SEC, be subject to the SEC’s rulemaking authority, and be subject to the SEC’s powers

⁴⁸⁷ Section 304(a) of the JOBS Act.

⁴⁸⁸ Section 304(a)(1) of the JOBS Act.

⁴⁸⁹ Section 304(a)(2) of the JOBS Act.

of examination and enforcement.⁴⁹⁰ Congress thus did not envision that crowdfunding offerings and funding portals would function free of any restrictions or requirements. Rather, as one of the sponsors of the legislation said, oversight by the SEC is a key protection from predatory behavior such as pump-and-dump schemes.⁴⁹¹

While both types of intermediaries, funding portals and broker-dealers, are subject to many of the same requirements in connection with crowdfunding offerings, registered funding portals are overall subject to less regulation than registered broker-dealers.⁴⁹² This is thought to be in keeping with the more limited activities of a funding portal, compared to a broker-dealer.⁴⁹³

In promulgating its Crowdfunding Rules, the SEC was conscious of the need to balance cost considerations with the need for investor protection. In its adopting release, the SEC said it was “mindful of the limited resources and start-up operations of issuers likely to use security-based crowdfunding,” so it “sought to consider the need to provide investors with relevant information to make an informed investment decision while limiting the compliance costs for issuers.”⁴⁹⁴

a. General Requirements

Crowdfunding Rule 100 sets forth the general requirements for the crowdfunding exemption. The aggregate amount of securities sold by the issuer pursuant to the exemption under Section 4(a)(6) of the Securities Act in the 12-month period preceding the offer or sale is currently limited to \$1,070,000. The aggregate amount of securities sold to any individual investor through crowdfunding offerings during the 12-month period preceding a sale to that investor (including the sale itself) shall not exceed certain annual income or net worth limits. An investor whose annual income or net worth is less than \$107,000 may invest no more than \$2,200 or 5% of the investor’s annual income or net worth (whichever is less). If both annual income and net worth equal or exceed \$107,000, then the limit is larger, but the maximum that

⁴⁹⁰ Section 304(a) of the JOBS Act added Section 3(h)(1) to the Exchange Act. Section 3(h)(1) directs the SEC to promulgate a rule exempting a registered funding portal from having to register as a broker-dealer—but only if the funding portal (i) remains subject to the examination, enforcement, and other rulemaking authority of the Commission; (ii) is a member of a registered national securities association; and (iii) is subject to other requirements that the Commission may determine to be appropriate. Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *506-07.

⁴⁹¹ Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *82.

⁴⁹² *Id.* at *600.

⁴⁹³ *Id.* at *704-05.

⁴⁹⁴ *Id.* at *132-33.

any investor can invest through crowdfunding in any 12-month period is \$107,000. These limits currently are slightly higher than when the JOBS Act was enacted.⁴⁹⁵

Crowdfunding Rule 100 requires that any crowdfunding offering take place exclusively online through a single intermediary's platform. The SEC concluded that this limitation would foster a more effective "crowd" by making their collective wisdom available to everyone online in a single place. Allowing an issuer to use multiple means of engaging with potential investors in the same offering would in effect create multiple "crowds" and fragment their collective wisdom. If an issuer used multiple portals, it would also be more difficult for intermediaries to fulfill their obligations, discussed below, to make sure that issuers adhere to their offering limits and investors adhere to their purchase limits.⁴⁹⁶

Under Crowdfunding Rule 100, certain kinds of issuers are ineligible to use the crowdfunding exemption. Among others, an issuer is *not* eligible to use the exemption if it has no specific business plan or has indicated that its plan is to engage in a merger with or acquisition of an unidentified company.⁴⁹⁷

b. Issuer's Responsibilities

An issuer's primary responsibility is to disclose sufficient information about its principals, business, financial condition, and crowdfunding offering to enable investors to make a reasoned decision whether to invest. Crowdfunding Rule 201 requires an issuer to disclose, among other things, the following information:

- the name, legal status, physical address and website of the issuer;
- the names of directors and officers, along with three years of their business history;
- the names of persons who hold beneficial ownership of 20% or more of the outstanding voting equity of the issuer;
- a description of the issuer's business plan;
- the current number of employees;
- the target offering amount and deadline for reaching it;

⁴⁹⁵ See the SEC's guidance online, Regulation Crowdfunding: A Small Entity Compliance Guide for Issuers ("Compliance Guide for Issuers"), at <https://www.sec.gov/info/smallbus/secg/rccomplianceguide-051316.htm>. Crowdfunding Rule 100 has different limits than were originally enacted by the JOBS Act because the SEC adjusted the figures pursuant to its authority under the JOBS Act to adjust the figures at least once every five years. The current figures reflect inflation adjustments made on April 5, 2017. See Section 4A(h) of the Securities Act for current figures.

⁴⁹⁶ Crowdfunding Rules Proposing Release, 2013 SEC LEXIS 3346, at *46-48, *53; Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *14; Compliance Guide for Issuers.

⁴⁹⁷ Crowdfunding Rule 100(b)(6).

- the maximum amount of investments that will be accepted; and
- the intended use of the offering proceeds.

Crowdfunding Rule 201(t) requires various financial disclosures, depending on the size of the offering and how much money the issuer might have raised within the last 12 months using the crowdfunding exemption. The Rule specifies with respect to offerings of \$107,000 or less (as were the offerings at issue here) that the issuer should disclose the total income, taxable income, and total tax reported on the federal income tax returns, if any, filed by the issuer for the most recently completed year. The issuer's principal executive officer must certify that the information provided accurately reflects the information reported on the issuer's federal income tax returns and financial statements. If financial statements have been reviewed or audited by an independent public accountant, those may be supplied instead of the tax information.

c. Intermediary's Responsibilities

An intermediary serves as a disclosure and communications medium for parties involved in a crowdfunding offering. Crowdfunding Rule 303(a) requires an intermediary to make available to the Commission and to investors the information that an issuer is required to disclose under Crowdfunding Rules 201 and 203. That information includes an issuer's Form C with the SEC, which an intermediary makes available to investors on its platform. Crowdfunding Rule 303(a)(2) requires that the information be available on the platform for a minimum of 21 days before any securities are sold in an offering. Crowdfunding Rule 303(c) requires an intermediary to provide on its platform communication channels by which investors can communicate with one another and with representatives of the issuer, as long as the intermediary does not participate in the communications.

A crowdfunding intermediary also is a gatekeeper, although one with less responsibility than a broker-dealer in a different type of offering. Under the heading "Measures to reduce risk of fraud," Crowdfunding Rule 301(a) mandates that an intermediary have a "reasonable basis for believing" that an issuer on its platform is in compliance with the statutory requirements set forth in Section 4A(b) of the Securities Act, as amended by the JOBS Act. That section of the Securities Act sets forth the requirements for issuers in crowdfunding offerings. Crowdfunding Rule 301(a) expressly permits an intermediary to rely on the representations of the issuer concerning its compliance "unless the intermediary has reason to question the reliability of those representations."

Under Crowdfunding Rule 301(c)(2) an intermediary is required to deny access to its platform if it has a "reasonable basis for believing that the issuer or the offering presents the potential for fraud or otherwise raises concerns about investor protection." If the intermediary only becomes aware of information giving rise to such concerns after it has given access to its platform, it must promptly remove the offering from its platform, cancel the offering, and return (or in the case of a funding portal, direct the return of) any investor funds committed to the offering.

d. Special Requirements for Registered Funding Portals

Crowdfunding Rule 400(a) requires a funding portal to register with the SEC and become a member of a national securities association that is registered under the Exchange Act, currently FINRA. Under Crowdfunding Rule 401, a registered funding portal is exempt from broker registration for its activities as a funding portal as long as it satisfies certain conditions.

The rules specific to funding portals make their gatekeeping role clear. Crowdfunding Rule 402(b)(10) requires a funding portal to deny access to its platform or to cancel an offering pursuant to Crowdfunding Rule 301(c)(2) if the funding portal has a reasonable basis for believing that the issuer or the offering presents the potential for fraud or otherwise raises investor protection concerns. The “reasonable basis” standard is objective. Under this standard, a funding portal may not ignore facts about an issuer such that a reasonable person would have denied access to the platform.⁴⁹⁸

Crowdfunding Rule 404 specifies the records to be made and kept by funding portals. The list is extensive. It includes the following:

- all records related to any investor who purchases or attempts to purchase a security through the funding portal;
- all records related to issuers who offer and sell or attempt to offer and sell securities through the funding portal;
- all records related to the control persons of the issuers;
- all communications on or through the funding portal’s platform;
- all records required to demonstrate compliance with the Crowdfunding Rules specific to intermediaries and funding portals;
- all notices provided by the funding portal to issuers and investors; and
- all written agreements the funding portal has entered into relating to its business.

Under Crowdfunding Rule 404, funding portals must generally keep their records for five years and, for the first two years, in an easily accessible place. If the records are prepared or maintained on behalf of a funding portal by a third party, the agreement with the third party does not relieve the funding portal of its responsibilities. The funding portal must file with FINRA a written undertaking by the third party that such records are the property of the funding portal and will be surrendered promptly on request of the funding portal. Crowdfunding Rule 404 directs that a funding portal must furnish its records to the SEC or FINRA when requested by representatives of the SEC or FINRA.

⁴⁹⁸ Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *565-66.

e. Safe Harbor for Insignificant Deviations

The SEC recognized that unintended and harmless errors might occur in this new regulatory regime. It promulgated Crowdfunding Rule 502 to address such occurrences. Crowdfunding Rule 502 provides that if there is a failure to comply with the Crowdfunding Rules (by the issuer or by the intermediary), an issuer relying on the crowdfunding exemption will not lose the exemption if the issuer can show the following:

- the failure to comply was insignificant with respect to the issuer's offering as a whole;
- the issuer made a good faith and reasonable attempt to comply with all the applicable requirements of the Crowdfunding Rules; and
- where it is the intermediary that fails to comply with the requirements, the issuer did not know of the intermediary's failure, or the intermediary's failure occurred solely in connection with other offerings, not the issuer's offering.

While the safe harbor would protect an issuer from liability under Section 5 of the Securities Act for selling unregistered securities without an exemption, it does not bar the SEC from bringing an action for non-compliance with the Crowdfunding Rules.

5. FINRA Funding Portal Rules

The SEC directed FINRA to promulgate rules regulating funding portals, which it has done. In approving FINRA's Funding Portal Rules, the SEC noted that it was FINRA's intention to minimize the initial potential costs and burdens to the development of the funding portal business.⁴⁹⁹ The Funding Portal Rules implement that intention.

An applicant to become a funding portal member of FINRA must meet fewer requirements than an applicant must meet to become a broker-dealer. An applicant to become a funding portal member must meet five standards, in contrast to the 14 standards that a broker-dealer applicant must meet. The five standards for a funding portal applicant are the following:

- neither the applicant nor any associated person is subject to a disqualifying event described in Section 3(a)(39) of the Exchange Act or is subject to pending regulatory action or investigation;
- applicant has established required business relationships with banks, escrow agents, and the like;
- applicant has a supervisory system in place reasonably designed to achieve compliance with applicable federal securities laws and rules and regulations thereunder, and with the Funding Portal Rules;

⁴⁹⁹ Funding Portal Rules Approving Release, 2016 SEC LEXIS 262, at *53.

- applicant has fully disclosed and established through documentation all direct and indirect sources of funding; and
- applicant has a recordkeeping system that enables it to comply with federal, state, and FINRA regulatory recordkeeping requirements.⁵⁰⁰

When the SEC invited comment on its own proposed Crowdfunding Rules, some people thought that it should require minimum qualification, testing, and licensing requirements for funding portals and their associated persons. In response, the SEC left it to FINRA to determine whether to propose those kinds of requirements for associated persons of funding portals.⁵⁰¹ FINRA decided not to impose any such requirements, although it told the SEC it would reevaluate that decision after it had more experience with funding portals and crowdfunding offerings.⁵⁰²

K. The Charges and the Violations

1. First Cause of Action

a. The Complaint

In the First Cause of Action, the Complaint alleges that Fernandez, in his capacity as CEO of the DreamFunded Portal, failed to respond fully and completely to a Rule 8210 request initially served on October 24, 2017. The staff requested financial records, bank account statements, and investor agreements.⁵⁰³ Enforcement alleges that FINRA staff gave Respondents multiple extensions to respond, but they still did not produce all the documents in their possession, custody, or control. Enforcement alleges that this conduct violated FINRA Rule 8210, as made applicable to funding portals by Funding Portal Rule 800(a), and Funding Portal Rules 800(a) and 200(a).⁵⁰⁴

b. The Rules

FINRA Rule 8210

FINRA Rule 8210(a) requires a “person subject to FINRA’s jurisdiction to provide information orally, in writing, or electronically . . . and to testify . . . with respect to any matter involved in [an] investigation, complaint, examination, or proceeding.” Rule 8210(c) makes clear

⁵⁰⁰ *Id.* at *12-13; Funding Portal Rule 110(a)(10).

⁵⁰¹ Crowdfunding Rules Proposing Release, 2013 SEC LEXIS 3346, at *220; Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *293, *295-96.

⁵⁰² Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *293, *295-96; Funding Portal Rules Approving Release, 2016 SEC LEXIS 262, at *57.

⁵⁰³ CX-35.

⁵⁰⁴ Complaint (“Compl.”) ¶¶ 8-17, 58-63.

that the obligation to provide the requested information or testimony is mandatory. It provides that “[n]o member or person shall fail to provide information or testimony . . . pursuant to this Rule.”

Funding Portal Rule 800(a)

Funding Portal Rule 800(a) provides that funding portal members shall be subject to FINRA’s 8000 Series Rules (with certain exceptions not relevant here). FINRA Rule 8210 is one of the rules made applicable by this provision to funding portal members. As discussed below, Funding Portal Rule 800(a) modifies the notice provisions of Rule 8210 to fit the circumstances of funding portals, and Funding Portal Rule 100(b)(1) defines the term “associated person” of a funding portal for purposes of Rule 8210. FINRA Funding Portal Rule 100(a) provides that associated persons of funding portals “have the same duties and obligations as funding portal members under the Funding Portal Rules.”

Funding Portal Rule 200(a)

Funding Portal Rule 200(a) establishes the ethical obligation of funding portals to “observe high standards of commercial honor and just and equitable principles of trade.” This language is identical to the ethical standard for registered broker-dealers contained in FINRA Rule 2010, and the SEC noted in approving FINRA’s Funding Portal Rules that Funding Portal Rule 200(a) is based in large part on FINRA Rule 2010.⁵⁰⁵

Because Funding Portal Rule 200(a) contains language identical to Rule 2010, we construe this Funding Portal Rule in the same manner as FINRA Rule 2010. We find that under 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.

c. Respondents Violated FINRA Rule 8210 and Funding Portal Rules 800(a) and 200(a)

i. FINRA Has Authority to Issue Rule 8210 Requests to Funding Portals, Including Respondents

Respondents agree that under the JOBS Act the SEC had jurisdiction to inspect and examine the DreamFunded Portal’s books and records relating to the operation of its business while it was registered.⁵⁰⁶ Respondents argue, however, that regulators’ authority to obtain information is limited to that and only that. They contend that FINRA’s information-gathering ability in the funding portal context does not extend as broadly as it does with broker-dealers.⁵⁰⁷

⁵⁰⁵ Funding Portal Rules Approving Release, 2016 SEC LEXIS 262, at *16-18.

⁵⁰⁶ Resp. PH Br. 5-6.

⁵⁰⁷ Resp. PH Br. 5-9.

We reject that argument and conclude that FINRA has authority to issue Rule 8210 requests to funding portals and their associated persons.

While we acknowledge that Congress never intended that funding portals should be subject to the whole panoply of regulatory requirements for registered broker-dealers, Congress made clear that funding portals would be subject to regulation, enforcement, and discipline, by both the SEC and FINRA. Congress specified in the JOBS Act that a funding portal is exempt from registration as a broker if—and only if—the funding portal is subject to the examination, enforcement, and other rulemaking authority of the SEC.⁵⁰⁸ By conditioning a funding portal's exemption on the SEC's ability to oversee the funding portal's activities, Congress emphasized the importance of regulation and oversight. Moreover, Congress gave the SEC open-ended authority to promulgate appropriate rules, trusting the Commission to craft rules to fit the context.

In the JOBS Act, Congress also required that every funding portal be a FINRA member, and subjected funding portals to FINRA's disciplinary and enforcement authority under Sections 15(b)(8) and 15A of the Exchange Act.⁵⁰⁹ It did so by treating funding portals the same as registered broker-dealers, defining the term broker-dealer in those provisions of the Exchange Act to include funding portals. Congress created no separate framework for regulating, investigating, or disciplining funding portals.

Congress has limited FINRA's ability to enforce rules against funding portals in only one way. It declared in the JOBS Act that FINRA can enforce against funding portals only those rules written for funding portals.⁵¹⁰ This prevents the inappropriate imposition of requirements designed for broker-dealers to the more limited activities of funding portals. For example, rules relating to a broker-dealer's handling of customer funds should not apply to a funding portal, because funding portals do not handle customer funds. Nor should net capital rules apply, because funding portals have no net capital requirements.

This limitation could give rise to the argument that FINRA Rule 8210 was not written for funding portals, and, therefore, it cannot be applied to them. That argument, however, is without merit.⁵¹¹

Although FINRA Rule 8210 was not written for funding portals, Funding Portal Rule 800(a) was—and Funding Portal Rule 800(a) expressly provides that Rule 8210 shall apply to funding portals. In addition, Funding Portal Rule 800(a)(4) sets forth notice requirements for Rule 8210 requests to funding portals that are tailored to those entities. Instead of requiring that

⁵⁰⁸ Section 4(a)(6)(C) and Section 4A(a)(1) and (a)(12) of the Securities Act.

⁵⁰⁹ Section 304(a)(1) of the JOBS Act.

⁵¹⁰ Section 304(a)(1) and (2) of the JOBS Act.

⁵¹¹ We note with respect to Funding Portal Rule 200(a) that the same argument could not be made. Funding Portal Rule 200(a) was written specifically for funding portals.

notice be sent to a CRD address, which is maintained by a registered broker-dealer, the funding portal rule provides that notice should be mailed or transmitted to a funding portal's last known business address, as reflected in the portal's filings with the SEC. Similarly, as to a person currently associated with a funding portal, notice is deemed effective if the Rule 8210 request is mailed to the person's last known business address. With respect to a person no longer associated with a funding portal, such as the individual Respondent, Fernandez, notice is deemed effective upon personal service.

Funding Portal Rule 100(b)(1) also addresses Rule 8210 in the context of funding portal regulation. It first defines the term "associated person" to include "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 employee of a funding portal member." Under this definition, both the principals and clerical and ministerial employees are associated persons of funding portals.⁵¹² Then the Funding Portal Rule specifies that for purposes of Rule 8210 the term "associated person" also includes any other person listed in Schedule A of SEC Form Funding Portal.⁵¹³ The broad definition of associated person ensures that all persons associated with a funding portal are subject to regulatory oversight.⁵¹⁴

Thus, FINRA is authorized to write rules especially for funding portals, and it has done so. It has made Rule 8210 applicable to funding portals, and it has modified Rule 8210 where necessary to fit the funding portal context. FINRA also has defined who, as an associated person of a funding portal, is subject to Rule 8210. In enforcing Rule 8210 here, FINRA is enforcing a rule applicable to and tailored for funding portals, just as Congress contemplated that it would.

In fact, Congress could not have intended for FINRA to regulate and discipline funding portals without the use of Rule 8210. It would be impossible for FINRA to carry out its regulatory and disciplinary responsibilities with respect to funding portals if Rule 8210, as modified for such portals, did not apply. Because FINRA lacks subpoena power, and its ability to gather information from its members and associated persons is limited to its ability to obtain documents, information, and testimony pursuant to Rule 8210, that Rule is an essential investigatory tool,⁵¹⁵ and is critical to FINRA's ability to carry out its regulatory mandate.⁵¹⁶ Courts, the SEC, and FINRA have emphasized the key role that Rule 8210 plays in FINRA's

⁵¹² While clerical and ministerial employees are associated persons for purposes of Rule 8210, Funding Portal Rule 110 provides that they are not associated persons for purposes of the member application process.

⁵¹³ Funding Portal Rule 100(b)(1).

⁵¹⁴ Funding Portal Rules Approving Release, 2016 SEC LEXIS 262, at *45.

⁵¹⁵ *E.g.*, *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *21 (Sept. 10, 2010), *petition for review denied*, 436 F. App'x 31 (2d Cir. 2011); *Dep't of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003), *aff'd*, Exchange Act Release No. 49255, 2004 SEC LEXIS 330 (Feb. 13, 2004).

⁵¹⁶ *Dep't of Enforcement v. Saliba*, No. 2013037522501, 2019 FINRA Discip. LEXIS 1, at *43-44 (NAC Jan. 8, 2019).

discharge of its regulatory responsibilities, calling it “indispensable,”⁵¹⁷ “essential,”⁵¹⁸ and “the heart of the self-regulatory system for the securities industry.”⁵¹⁹

As the SEC has repeatedly held, Rule 8210 is “essential to FINRA’s ability to investigate possible misconduct by its members and associated persons.”⁵²⁰ The scope of Rule 8210 is broad, giving FINRA a critical tool to protect investors and markets in the absence of subpoena power. Failing to provide information “frustrates [FINRA’s] ability to detect misconduct, and such inability in turn threatens investors and markets.”⁵²¹ Accordingly, the requirement to respond fully and completely to a Rule 8210 request is “unequivocal,” “unqualified,” and “mandatory.”⁵²²

ii. FINRA Has Authority to Request the Particular Documents and Information at Issue

FINRA Rule 8210 authorizes FINRA staff to issue a Rule 8210 request regarding “any matter” involved in an investigation. Pursuant to the Rule, the staff may seek information in oral, written, or electronic form, and may require a member or associated person to give sworn testimony in an OTR. The recipient of a Rule 8210 request is obligated to produce for inspection and copying all books, records, and accounts within his “custody, control or possession.”

Respondents argue that FINRA cannot inquire about how Fernandez used the money intended to be invested in the DreamFunded Portal prior to its becoming a FINRA funding portal member. Respondents reason that there was no funding portal business until July 2016, and thus the bank statements for Fernandez, the Portal’s Parent, and the two DreamFunded special purpose vehicles created before the Portal became a FINRA member are off-limits to any Rule 8210 inquiry.⁵²³ We reject that argument and conclude that the financing of a funding portal’s business and an investigation into whether those funds were misused are appropriate subjects of a Rule 8210 request. FINRA has authority to issue the particular Rule 8210 request at issue here.

⁵¹⁷ *Dep’t of Enforcement v. Merrimac Corp. Sec.*, No. 2011027666902, 2017 FINRA Discip. LEXIS 16, at *10-11 (NAC May 26, 2017), *appeal docketed*, No. 3-18045 (SEC June 26, 2017).

⁵¹⁸ *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12 (Apr. 11, 2008), *petition for review denied*, 566 F.3d 1172 (D.C. Cir. 2009).

⁵¹⁹ *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008).

⁵²⁰ *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *54-55, 54 n.46 (Sept. 24, 2015).

⁵²¹ *PAZ Sec.*, 2008 SEC LEXIS 820, at *13; *Dep’t of Enforcement v. North Woodward Fin. Corp.*, No. 2010021303301, 2014 FINRA Discip. LEXIS 32, at *20 (NAC July 21, 2014), *aff’d*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867 (May 8, 2015); *see Dep’t of Enforcement v. Jarkas*, No. 2009017899801, 2015 FINRA Discip. LEXIS 50, at *46-47 (NAC Oct. 5, 2015).

⁵²² *Dep’t of Enforcement v. Lundgren*, No. FPI150009, 2016 FINRA Discip. LEXIS 2, at *12 (NAC Feb. 18, 2016) (collecting cases).

⁵²³ Resp. PH Br. 5.

First, Respondents' argument is essentially a challenge to the scope of the investigation pursuant to which FINRA staff issued the Rule 8210 request. It is well established, however, that the recipient of a Rule 8210 request cannot "second guess" FINRA's requests for information, or take it upon himself to determine whether the information is relevant or material or otherwise appropriate as a subject of inquiry.⁵²⁴ Nor do FINRA staff have any obligation to justify their Rule 8210 requests in order to obtain compliance.⁵²⁵

Second, the investigation was in any event within FINRA's jurisdiction. Under Funding Portal Rule 110(a)(10), an applicant to become a funding portal must fully disclose and establish through documentation all direct and indirect sources of funding for a funding portal.⁵²⁶ The financing of a funding portal is thus a subject of regulatory concern even before it becomes registered.

Third, under FINRA Rules 8210 and 2010, FINRA's disciplinary authority encompasses any business-related conduct by a member or an associated person that is inconsistent with just and equitable principles of trade. Business-related misconduct reflects on the capacity of the member or associated person to comply with the regulatory requirements of the securities business and to fulfill their duties to investors and other participants in the transactions. The potential misconduct does not even have to involve a security,⁵²⁷ but here, in fact, the potential misconduct under investigation did involve private securities offerings by DreamFunded I and II and the Portal's Parent and the private securities offering by which their funds were invested in the DreamFunded Portal.⁵²⁸

⁵²⁴ *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at *15-16 (Apr. 17, 2014); *Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *18-19 (Nov. 8, 2007); *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993).

⁵²⁵ *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8, 2007) *petition for review denied*, 316 F. App'x 865 (11th Cir. 2008); *Mielke*, 2015 SEC LEXIS 3927, at *47; *Dep't of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *29 (NAC June 3, 2014).

⁵²⁶ Funding Portal Rules Approving Release, 2016 SEC LEXIS 262, at *10-13; Funding Portal Rule 110(a)(10)(d).

⁵²⁷ *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996). *See also Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 SEC LEXIS 3980, at *21 (Sept. 29, 2015); *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *23 (June 14, 2013); *Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *17 & n.18 (Jan. 6, 2012).

⁵²⁸ At the hearing, Fernandez testified that the money raised by the DreamFunded Portal's Parent in advance of its application for FINRA membership was *not* intended to finance the Portal. This testimony appears designed to support Fernandez's argument that FINRA lacks jurisdiction. We find that Fernandez's hearing testimony on this point is not credible.

(Footnote continued on next page)

Fourth, Respondents’ argument is based on a misreading of Crowdfunding Rule 403(c) in the SEC’s Regulation Crowdfunding. That Rule provides, under a heading for “Inspections and Examinations,” that 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 . . . by representatives of the Commission and [FINRA].”⁵²⁹ Respondents highlight certain language in the Rule and characterize it as a limitation. They argue that the Rule limits the information that may be gathered to information that “relate[s] to its activities as a funding portal.”⁵³⁰ They assert that FINRA has exceeded its authority “as so limited by Congress.”⁵³¹ They apparently believe that FINRA can only inquire into the Portal’s business and operations, and not into its prior funding or its founder’s use of funds intended to be invested in the Portal.

We note that Respondents’ argument is based on an SEC Crowdfunding Rule, not a congressional mandate. That rule, Crowdfunding Rule 403(c), contains no language remotely suggesting a limitation on the ability of FINRA to issue Rule 8210 requests to funding portals. The Rule merely directs funding portals to open their books and records to the regulators. Moreover, the language of Crowdfunding Rule 403(c) is broad—it permits inquiries into whatever may “relate to” a funding portal’s activities. The phrase “relate to” is generally interpreted as broad and expansive.⁵³² As explained by the Supreme Court, “relating to” ordinarily means “to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.”⁵³³ We find that whether money intended for

(Footnote continued)

At his initial OTR, Fernandez testified that the money raised in two offerings known as Dreamfunded I and Dreamfunded II was for the creation of the DreamFunded Portal. He testified at his OTR that he had raised approximately \$878,000 for “the operation, branding, and the potential growth of . . . [the] registered funding portal, DreamFunded Marketplace.” CX-72 (Fernandez OTR), at 62. These offerings occurred in 2014 and 2015, during the time that Fernandez and others lobbied the SEC to formulate rules pursuant to the JOBS Act so that funding portals could begin conducting business. RX-25 (letter to Chair of the SEC, which Fernandez signed). When the DreamFunded Portal applied for FINRA membership it was required to disclose its financing. It disclosed that a Reg D offering had been made and that the Parent and DreamFunded Fund I expected to make additional capital contributions, as necessary. CX-6; CX-7. Fernandez’s OTR testimony is consistent with the documentary evidence; his hearing testimony is not.

In any event, even if Fernandez raised nearly \$900,000 in securities offerings for a different business venture, his potential misuse of those funds would still be an appropriate subject for investigation by FINRA. Any such misconduct in connection with investor funds would reflect on his trustworthiness and fitness to be in the securities industry.

⁵²⁹ Crowdfunding Rule 403(d).

⁵³⁰ Resp. PH Br. 5. All letters in the original are capitalized.

⁵³¹ Resp. PH Br. 5.

⁵³² *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). See also *Salko v. Sibelius*, No. 3:12cv515, 2013 U.S. Dist. LEXIS 22265, at *12-14 (M.D. Pa. Feb. 19, 2013) (collecting cases).

⁵³³ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting Black’s Law Dictionary 1158 (5th ed. 1979)).

investment in the Portal was misused sufficiently “relates to” the Portal’s activities for purposes of FINRA Rule 8210.

Fifth, to read Crowdfunding Rule 403(c) as a limitation on the application of Rule 8210 to funding portals would render the other portions of the Funding Portal Rules, which carefully craft the service requirements for Rule 8210 requests to funding portals and their associated persons, superfluous and without meaning. A basic canon of statutory construction is to avoid an interpretation of a statute that would render some portions of it superfluous. That canon of construction also applies to the interpretation of regulations.⁵³⁴ Moreover, the SEC has approved FINRA’s Funding Portal Rules, including the Funding Portal Rule concerning service requirements for Rule 8210. Implicitly, the SEC does not read its Crowdfunding Rule to limit FINRA’s ability to gather information through the use of Rule 8210 requests. Respondents’ interpretation of Crowdfunding Rule 403(c) is not tenable.

iii. Respondents Failed to Respond Fully and Completely to the Rule 8210 Request

Respondents failed to comply fully and completely with the Rule 8210 request dated October 24, 2017. Among other things, the Rule 8210 request sought monthly account statements for all bank accounts of the Portal, the Parent, and Fernandez from January 1, 2014, to October 24, 2017.⁵³⁵ The request covered the years when Fernandez raised money in private offerings for DreamFunded I and II, and from individuals, for the creation of the Portal, as well as when the Portal was operational. At the hearing, FINRA staff identified one personal account for the Parent, three accounts for the Portal, one account for DreamFunded I, and one account for DreamFunded II, and summarized Respondents’ production of bank statements for these accounts in an exhibit.⁵³⁶

Prior to the hearing, Respondents produced (either to MAP in the membership application process or to OFDMI and Enforcement in response to Rule 8210 requests) a patchwork of bank statements that did not appear to be a complete record of the accounts. For example, Respondents provided a few months of statements in three accounts held by the Portal, all prior to when the Portal became a FINRA member, and five bank statements from a single account after the Portal became a member. Although the Portal was operating until its membership was terminated at the beginning of November 2017, Respondents produced no bank statements for any of its three accounts from December 2016 through October 2017.⁵³⁷ From the incomplete set of bank statements, it was impossible to trace the flow of funds between the various accounts with any degree of confidence.

⁵³⁴ See, e.g., *Rosenberg v. XM Ventures*, 274 F.3d 137, 141-42 (3d Cir. 2001) (collecting cases).

⁵³⁵ CX-35.

⁵³⁶ CX-64.

⁵³⁷ CX-35; CX-64.

Furthermore, in response to the Rule 8210 request, Respondents produced no bank statements whatsoever for any personal bank account belonging to Fernandez.⁵³⁸ It was impossible to trace the flow of funds in or out of his personal accounts.

In September 2018, over six months after the filing of the Complaint, Respondents submitted as a hearing exhibit a batch of bank statements that were covered by the Rule 8210 request but had never been produced. Although the exhibit fills in some of the gaps in the prior Rule 8210 response, it also looks incomplete. The exhibit includes a statement for one month (April 2016) for an account belonging to the Portal (account ending in 212), and statements for a different account belonging to the Portal (account ending in 204) from June 2016 through March 2018. The exhibit is missing May 2016 and includes no statements for the third identified account belonging to the Portal (account ending in 786).⁵³⁹

Even if the production of responsive documents on the eve of the hearing could be viewed as remedying the earlier failure to comply—which we do not view it as doing—the production was still deficient. No bank statements for any of Fernandez’s personal bank accounts have ever been produced. We note that Fernandez not only routinely made cash withdrawals from the Portal’s bank account (account ending in 204),⁵⁴⁰ but that he transferred money from that bank account to an account named “Fernandez M Everyday Checking.”⁵⁴¹ So it appears that Fernandez had at least one personal bank account, and it appears that money flowed from the Portal to that account. Fernandez’s personal bank account statements were necessary for FINRA staff to understand the flow of monies and whether Fernandez misused any investor funds.

The Rule 8210 request also sought all accounting or bookkeeping records of the Portal and the Parent. Respondents produced none.

iv. Respondents’ Additional Arguments Have No Merit

Respondents make three additional arguments against liability for violating Rule 8210. They are without merit.

(a) Dropbox

Throughout the hearing, Fernandez repeatedly asserted that he had provided “everything” to his lawyers for production to FINRA and he knows nothing further about what was or was not produced or why.⁵⁴² We do not find his assertion that he gave his attorneys “everything” by

⁵³⁸ CX-35; CX-64.

⁵³⁹ RX-2.

⁵⁴⁰ Tr. (PD) 1889-90; RX-2, at 35-36, 40-44, 49, 50-52, 57-60, 65-67, 74-75, 80-82, 87-88, 105, 109-12, 117-20, 124-25, 129-31.

⁵⁴¹ RX-2, at 35-36, 44, 73, 87, 112.

⁵⁴² Tr. (Fernandez) 132, 152-55, 159, 227-33, 774-76, 780-93, 891-910, 952-53, 1080-81, 1755, 1757-63.

giving them a link to Dropbox and thereafter left it up to them to determine what to produce credible. Fernandez's assertion is inconsistent with the facts.

Respondents' lawyer in December 2016 and January 2017, SA, asked Enforcement for multiple extensions of time to produce documents. He said in various emails that he needed more time "to identify and review responsive materials,"⁵⁴³ that the request was "quite broad," "complicated," and required "a sizeable production,"⁵⁴⁴ and that, because Fernandez was traveling outside the country, the lawyer's ability "to coordinate"⁵⁴⁵ with his client on the response was limited.

Counsel's comments do not reflect that he was sifting through the documents on his own and had everything he needed. Rather, they reflect that he was working with his client in an ongoing process of identifying and reviewing responsive documents together. SA produced some responsive documents on January 5, 2018. He said in his cover letter, "Our search for documents relevant to your requests is continuing."⁵⁴⁶ From this statement—that Fernandez and his lawyer were still searching for responsive documents—we conclude that Fernandez had *not* turned over everything he had to the lawyer, and Fernandez had *not* simply let the lawyer determine what to produce without his input.

On January 12, 2018, the lawyer asked for another extension of time. He represented to Enforcement that his clients had "not yet provided [him] with a majority of the requested documents."⁵⁴⁷ This flatly contradicts Fernandez's hearing testimony.

On January 19, the lawyer asked for another extension of time. He represented to Enforcement that his client was ill and had been prescribed bed rest through the weekend.⁵⁴⁸ If the lawyer had all the documents and was authorized to produce them without input from his clients, he would not have needed an extension of time. He could have produced the documents regardless of whether Fernandez was sick.

On January 25, SA advised Enforcement he no longer represented Respondents. Enforcement then contacted Fernandez directly and reminded him that the remaining documents were due on Monday, January 29, 2018.⁵⁴⁹

⁵⁴³ CX-41, at 1.

⁵⁴⁴ CX-41, at 1; CX-42, at 1.

⁵⁴⁵ CX-42, at 1.

⁵⁴⁶ CX-43, at 2.

⁵⁴⁷ CX-44.

⁵⁴⁸ CX-45.

⁵⁴⁹ CX-48; CX-49, at 3.

On Friday, January 26, Fernandez advised Enforcement by email that he was ill and would not be able to return to work until February 5.⁵⁵⁰ Notably, Fernandez did not say that he had already given everything to his lawyers and assumed that they had produced the responsive documents to Enforcement. Rather, he attempted to delay production once again, implicitly acknowledging that responsive documents had not yet been produced. His action undercuts his hearing testimony.

Finally, when Fernandez responded to Enforcement on February 6, 2018, asking that it “slow down on that formal complaint and allow us to get the docs that you requested,” he did not say that he had already given “everything” to his lawyers through Dropbox. Instead he complained, “[T]his task is burdensome.”⁵⁵¹ We note that Dropbox is an electronic file sharing program. If “everything” had been placed in Dropbox, and the lawyers had been given access to it, the electronic files would still be there ready to produce. Fernandez’s complaint about the “burdensome” nature of the task reveals that he did not have “everything” saved in Dropbox available for review.

We find that Fernandez did not place all the missing documents in Dropbox for his lawyers to review and produce, and he did not leave to his lawyers by themselves the task of sorting through the documents to determine what should be produced. His hearing testimony in this regard was untrue.

(b) Willfulness

Respondents argue that the Rule 8210 violation charged in the First Cause of Action requires proof that Fernandez’s failure to produce documents and information was willful, and they assert that his conduct was not willful. The argument is based on the claim that Fernandez gave “everything” to his lawyers by giving them access to files in Dropbox, and that he thought in good faith that the lawyers had made all requested documents available to FINRA staff.⁵⁵²

We have already rejected the factual assertion that Fernandez gave “everything” to his lawyers through Dropbox. But, regardless, Respondents are also incorrect on the law. Willfulness is not required for a Rule 8210 violation.⁵⁵³

⁵⁵⁰ CX-49.

⁵⁵¹ CX-51, at 1.

⁵⁵² Resp. PH Br. 2.

⁵⁵³ The SEC decision that Respondents cited to support their argument did not involve FINRA Rule 8210 at all. Furthermore, although the SEC found that the violations in that case were willful, it did not treat willfulness as a required element of the violations. *See vFinance Investments Inc.*, Exchange Act Release No. 62448, 2010 SEC LEXIS 2216 (July 2, 2010) (respondents willfully violated Section 17(a) of the Exchange Act and Exchange Act Rules 17a-4(b)(4) and 17a-4(j)).

(c) Records Held by CPA or Bookkeeper

Fernandez denies that he had the ability to provide the accounting and bookkeeping records subject to the Rule 8210 request. In a February 6, 2018 email to Enforcement, Fernandez claimed he had produced all the documents he was able to produce. He claimed the rest of the requested documents were with his CPA or bookkeeper. Later, he reiterated in Respondents' Answer that he had produced all the documents in his possession, custody, or control and that the rest were with his CPA or bookkeeper.⁵⁵⁴ Respondents misapprehend the meaning of the phrase "possession, custody, or control." They could have asked for the accounting and bookkeeping records from their CPA or bookkeeper. The records belonged to Respondents and they could direct that the records be made available to Enforcement pursuant to the Rule 8210 request.⁵⁵⁵

In sum, we find that Respondents violated FINRA Rule 8210 and Funding Portal Rules 800(a) and 200(a).⁵⁵⁶

2. Second Cause of Action

a. The Complaint

In the Second Cause of Action, the Complaint alleges the following: Company A and Company B had no basis for their unrealistic and unwarranted valuations and overly optimistic financial forecasts. When Company A closed early after lowering its fundraising target, it did so in circumstances that gave rise to concerns about a potential issuer fraud or other investor protection concerns. Company B's financials contained internal inconsistencies. Thus, Fernandez and the DreamFunded Portal were aware of facts that would have led a reasonable person to deny access to the platform, but Respondents gave those issuers access to their platform anyway. The Complaint alleges that this conduct violated Crowdfunding Rule 301(c)(2) and Funding Portal Rules 200(c)(3) and 200(a).⁵⁵⁷

⁵⁵⁴ Ans. ¶ 12. *See also* Tr. (Fernandez) 952-54; Tr. (JD) 454.

⁵⁵⁵ *North Woodward Fin. Corp.*, 2015 SEC LEXIS 1867, at *17-21 (even if respondent's records were in third party's hands, respondent could ask for the information).

⁵⁵⁶ Conduct that violates a specific NASD or FINRA standard, or a provision of the securities laws or regulations, also violates the requirement that member firms and associated persons "observe high standards of commercial honor and just and equitable principles of trade" that is set forth in NASD Rule 2110 and FINRA Rule 2010. *See, e.g., Wendell D. Belden*, 56 S.E.C. 496, 505 (2003). We hold that this long-standing principle also holds true for Funding Portal 200(a) because it contains language identical to NASD Rule 2110 and FINRA Rule 2010.

⁵⁵⁷ Compl. ¶¶ 25-30, 64-69.

b. The Rules

Crowdfunding Rule 301(c)(2)

A crowdfunding intermediary must deny access to its platform in certain circumstances. Crowdfunding Rule 301(c)(2) requires an intermediary to do so if it has a “reasonable basis for believing that the issuer or the offering presents the potential for fraud or otherwise raises concerns about investor protection.” If an intermediary becomes aware of such information after it has granted access to its platform, it 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.” This provision establishes one of the gatekeeping functions of a crowdfunding intermediary, whether it is a broker-dealer or a funding portal.

In adopting the Rule, the SEC described the “reasonable basis” standard for denying access to a crowdfunding platform as a “more objective standard” than the standard it had initially proposed, which was simply whether the intermediary “believed” the issuer’s representations. The SEC declared that the “reasonable basis” standard means that “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.”⁵⁵⁸ The SEC further explained that it intended by this language “to give an intermediary an objective standard regarding the circumstances in which it must act to protect its investors from potentially fraudulent issuers or issuers that otherwise present red flags concerning investor protection.”⁵⁵⁹ The SEC viewed the “reasonable basis” standard to make it “easier for an intermediary to determine whether it is in compliance” and to provide regulators with “a clear basis for reviewing an intermediary’s decision not to deny access to its platform or not to cancel an offering was reasonable given the facts and circumstances.”⁵⁶⁰

Funding Portal Rule 200(c)(3)

Funding Portal Rule 200(c) establishes the content standards for funding portal communications with investors. The term “funding portal communication” is defined in Funding Portal Rule 200(c)(1) to mean any electronic or other written communication that is distributed or made available by a funding portal member to one or more investors. The content standards apply to all communications distributed or made available by the funding portal. Thus, the content standards include not only communications created by the funding portal but also communications created by the issuer for the funding portal to give to investors, such as an issuer’s disclosures filed with the SEC.

⁵⁵⁸ Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *339-40.

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

Funding Portal Rule 200(c)(2)(A) prohibits a funding portal from distributing or making available any electronic or written communications to investors that

- are false, exaggerated, unwarranted, promissory or misleading;
- omit any material fact that, in light of the context of the material presented, should be disclosed in order to prevent the communication from being misleading;
- state or imply that FINRA or another self-regulatory organization endorses, indemnifies, or guarantees the portal’s business practices; or
- predict or project performance, or make any exaggerated or unwarranted claim, opinion, or forecast.

Funding Portal Rule 200(c)(2)(B) establishes a general standard for funding portal communications. It provides that “[a]ll funding portal member communications must be based on principles of fair dealing and good faith and must be fair and balanced.”

In limited circumstances, Funding Portal Rule 200(c)(3) relieves a funding portal of responsibility for some, but not all, issuer communications posted on a funding portal’s website. A funding portal is not responsible for false or misleading issuer communications that have been prepared *solely* by the issuer. Only the issuer is responsible for its own false or misleading statements—*unless* the funding portal “knows or has reason to know [that the issuer’s communication] contains any untrue statement of a material fact or is otherwise false or misleading.” Thus, a funding portal is entitled to rely on the issuer to make truthful, non-misleading statements in communications about the offering, but only if the portal has no actual knowledge or reason to know that the communications are false or misleading.

c. Respondents Committed One of the Violations Alleged

i. Respondents Should Not Have Given Company A Continued Access to the DreamFunded Portal

Company A’s initial Form C and the three amendments to it contained a variety of unexplained disparities and deficiencies, including inconsistencies in the ownership disclosures, a change in the number of securities to be sold, and differing dates for the offering deadline. Then the offering concluded with the CEO’s request to lower the target amount of the offering, and shortly thereafter to close it. The CEO sought to have investor funds distributed to his overdrawn personal bank account, giving no business reason for changing the target amount or closing the offering early. Fernandez proffered a vague reason when he fabricated after-the-fact material change notices, saying the money would be used to build a prototype of Company A’s application. But there is no evidence to corroborate Fernandez’s proffered reason. Rather, the facts and circumstances raised the risk that the CEO sought to lower the target amount of the offering and close it within days of doing that because he needed the money for personal expenses.

By the time that the CEO sought immediate access to whatever funds were held in escrow, the facts and circumstances were such that a reasonable person would have had, at a minimum, investor protection concerns.⁵⁶¹ Under Crowdfunding Rule 301(c)(2), Respondents were required to discontinue access to the DreamFunded Portal’s website, cancel the offering, and return investors’ funds. By not doing so, Respondents violated Crowdfunding Rule 301(c)(2), and thereby violated Funding Portal Rule 200(a).

ii. Respondents Were Not Required to Deny Company B Access to the Portal Solely Because of Its Projections and Forecasts

We find that Respondents were not required under Crowdfunding Rule 301(c)(2) to deny Company B access to the DreamFunded Portal *solely* on the basis of its financial projections and forecasts, and we dismiss this portion of the Second Cause of Action. We do not believe that a funding portal has a general obligation to analyze and evaluate an issuer’s financial statements, forecasts, and projections. No such duty appears in the JOBS Act, the Crowdfunding Rules, or the Funding Portal Rules.

Our view is consistent with the general structure of the Crowdfunding Rules. They follow a pattern of allowing an intermediary in most circumstances to rely on the representations made to it by the participants in a crowdfunding offering on its platform. Crowdfunding Rules 301(a) and 301(b), for example, permit an intermediary to rely on representations made by an issuer as to its compliance with regulatory requirements and its means of recordkeeping—unless the intermediary has reason to question the reliability of the issuer’s representations. Crowdfunding Rule 303(b)(1) allows an intermediary to rely on representations made by investors as to their satisfaction of investment limits for crowdfunding offerings—unless the intermediary has reason to question the reliability of the representations. Thus, the Crowdfunding Rules allow an intermediary to accept representations made to it without independent fact-checking.

Congress imposed fewer obligations on intermediaries handling crowdfunding offerings than on broker-dealers in other kinds of offerings out of a desire to create a means of raising capital that is less burdensome and less expensive for small enterprises. It would be contrary to that goal to hold that a funding portal should spend time and money to evaluate the soundness of an issuer’s forecasts and projections.

Furthermore, projections and forecasts have been recognized to be qualitatively different than statements of past performance or current financial condition. Projections and forecasts are necessarily based on estimations, predictions, and intangibles, all of which would be difficult for a funding portal to assess. Statements about the future are inherently uncertain, and the future

⁵⁶¹ The Extended Hearing Panel divided over whether the facts and circumstances raised a potential for fraud but agreed that they raised investor protection concerns. Both conclusions lead to the same result—a reasonable person would not continue to give access to a crowdfunding portal’s platform.

may unfold differently than predicted. A projection or forecast is not fraudulent merely because future events do not occur the way they were predicted to occur.⁵⁶²

In the context of a crowdfunding securities offering, an intermediary is not required to conduct due diligence or to fact check an issuer's representations—even about verifiable statements regarding past performance or current financial condition.⁵⁶³ We view a requirement to evaluate projections and forecasts as inconsistent with the structure of the law and regulatory framework for crowdfunding securities offerings. A funding portal is unlikely to have the experience, tools, or resources to assess whether an issuer has been overly optimistic about its financial future.

Company B certainly had very optimistic projections and forecasts for its financial future, but we are reluctant to impose on Respondents and other funding portals a vague and ill-defined duty to refuse access to their platforms *solely* on the basis of optimistic projections and forecasts.⁵⁶⁴

iii. Respondents Did Not Know or Have Reason to Know That the Two Issuers' Projections and Forecasts Were False and Misleading

Enforcement alleges that Company A's and Company B's projections and forecasts were false and misleading, and that Respondents knew or should have known that. On that basis, Enforcement asserts that Respondents violated Funding Portal Rule 200(c)(3) by posting the communications. As explained in the preceding discussion, we do not find that funding portals have a duty to conduct due diligence or to validate issuers' projections and forecasts. Such projections and forecasts, moreover, do not have the same character as a statement of past fact or current financial condition. It is difficult to say that predictions about the future are false and misleading without knowing how they were created and on what basis they were made. We do not believe that Respondents were required to conclude that the projections and forecasts were false and misleading just by looking at them. We dismiss this portion of the Second Cause of Action.

⁵⁶² *Grassi v. Info. Resources, Inc.*, 63 F.3d 596, 599 (7th Cir. 1995) (“Projections which turn out to be inaccurate are not fraudulent simply because later events show that a different projection would have been more reasonable.”).

⁵⁶³ When the SEC proposed the Crowdfunding Rules for comment, some commenters suggested that a crowdfunding intermediary should be required to conduct due diligence. The SEC specifically rejected that approach. Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *315-16.

⁵⁶⁴ This case is unlike *Lorenzo v. SEC*, 130 S. Ct. 1094 (2019). In *Lorenzo*, an investment banker defendant actually knew that the issuer's technology did not work and did not have the \$10 million intangible value that the issuer had first assigned to it, but the defendant nevertheless sent investors an email that claimed the issuer had “confirmed assets” of \$10 million. *Lorenzo*, 130 S. Ct. at 1096. The Court held that the defendant could be liable for securities fraud under subsections (a) and (c) of Rule 10b-5. In this case, we have no evidence that Respondents actually knew that Company B's video library did not have the intangible value assigned to it.

3. Third Cause of Action

a. The Complaint

In the Third Cause of Action, the Complaint alleges that Fernandez made a false statement and engaged in a deceptive device when he posted a video clip on social media that showed him making a purported \$1 million investment in Company C. It also alleges that Respondents made false and misleading statements on their platform regarding their due diligence and deal flow screening. The Complaint further alleges that they posted real estate tombstones that created the misleading impression that the deals had been funded through the DreamFunded Portal, that investors could expect a 10% return on deals funded through the Portal, and that investments through the Portal were comparable to bank CDs and deposits. The Complaint alleges that this conduct violated FINRA Funding Portal Rules 200(b), 200(c)(2), and 200(a).⁵⁶⁵

b. The Rules

Funding Portal Rule 200(b)

Funding Portal Rule 200(b) prohibits a funding portal from “effect[ing] any transaction in, or induc[ing] the purchase or sale of any security by means of, or by aiding or abetting, any manipulative, deceptive or other fraudulent device or contrivance.” It is based in large part on FINRA Rule 2020,⁵⁶⁶ which in turn is based on the familiar antifraud provision of the Exchange Act, Section 10(b).⁵⁶⁷ We look to the law developed in connection with those familiar antifraud provisions to help us construe Funding Portal Rule 200(b).

Funding Portal Rule 200(c)(2)

As discussed above, Funding Portal Rule 200(c)(2)(A) prohibits funding portal communications that are “false, exaggerated, unwarranted, promissory or misleading.” It also prohibits communications that are misleading because of a material omission, or that predict or project performance, or that contain any exaggerated or unwarranted claim, opinion, or forecast. Finally, it prohibits any communication that states or implies that FINRA endorses, indemnifies, or guarantees a portal’s business practices.

c. Respondents Committed Violations

i. Elements of the Claims

We believe that the elements of a claim under Funding Portal Rule 200(b) are different than the elements of a claim under Funding Portal Rule 200(c)(2). Funding Portal Rule 200(b)

⁵⁶⁵ Compl. ¶¶ 31-38, 70-73.

⁵⁶⁶ Funding Portal Rules Approving Release, 2016 SEC LEXIS 262, at *16-18.

⁵⁶⁷ Section 10(b) of the Exchange Act.

contains language that signifies scienter is required, but Funding Portal Rule 200(c)(2) does not. We believe that Funding Portal Rule 200(c)(2) may be violated without a finding of scienter.

(a) Funding Portal Rule 200(b) Requires Scienter

The phrase “any manipulative, deceptive or other fraudulent device or contrivance,” which is found in Funding Portal Rule 200(b), echoes language found throughout the securities laws and rules, language that signifies that scienter is an element of a violation. Section 17(a)(1) of the Securities Act makes it unlawful “to employ any device, scheme, or artifice to defraud.” Section 10(b) makes it unlawful to engage in “any manipulative or deceptive device or contrivance” in contravention of rules promulgated by the SEC for investor protection. Section 15(c)(1) of the Exchange Act prohibits a broker or dealer from inducing a securities transaction “by means of any manipulative, deceptive, or other fraudulent device or contrivance.” Rule 10b-3(a) prohibits a broker or dealer from using or employing “any act, practice, or course of business” that the SEC may define to be a “manipulative or deceptive device or contrivance.” Rule 10b-5(a) makes it unlawful “to employ any device, scheme, or artifice to defraud.” And Rule 10b-5(c) makes it unlawful “to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit.” Words like manipulative, fraudulent, device, scheme, contrivance, deceit, and deception signify intentional misconduct or a high degree of recklessness. Violations of these statutory provisions and rules require scienter.⁵⁶⁸

FINRA Rule 2020 uses language similar to the statutory and regulatory provisions above: “No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.” A violation of this FINRA Rule also requires scienter.⁵⁶⁹

Funding Portal Rule 200(b) was modeled on and contains identical language to that in FINRA Rule 2020. We have no reason to interpret that phrase any differently in the context of the Funding Portal Rule than it has been interpreted in connection with FINRA Rule 2020 or from the similar language in multiple other securities laws and regulations. To the contrary, we have good reason to think the exact phrase was carefully chosen in order to be clear about the elements of a violation of Funding Portal Rule 200(b). They are the same as for a violation of FINRA Rule 2020. We conclude that a violation of Funding Portal 200(b) requires scienter.

⁵⁶⁸ E.g., *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (in SEC enforcement action, 10b-5 violation requires scienter); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (in private securities action, 10b-5 violation requires scienter); *SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 285 (2d Cir. 2013) (scienter is an element of a violation of Section 17(a)(1)); *Darvin v. Bache Halsey Stuart Shields, Inc.*, 479 F. Supp. 460, 464 (S.D.N.Y. 1979) (the same scienter standard applies to a violation of Section 17(a)(1) of the Securities Act, Section 15(c) of the Exchange Act, and Rule 10b-3); *Fundamental Portfolio Advisors, Inc.*, 56 S.E.C. 651, 669 (2003) (same).

⁵⁶⁹ *Dep't of Enforcement v. Davidofsky*, No. 2008015934801, 2013 FINRA Discip. LEXIS 7, at *30-31, 30 n.31 (NAC Apr. 26, 2013).

(b) Funding Portal Rule 200(c)(2) Does Not Require Scienter

In contrast, Funding Portal Rule 200(c)(2) does not include terms like fraud, manipulation, deception, device, or contrivance. Although this Rule prohibits false and misleading communications, it also prohibits other kinds of communications—exaggerated, unwarranted, or promissory communications. These other types of prohibited communications are described in language that does not necessarily connote fraud or deception. Terms like exaggerated and unwarranted are not used in the securities laws and regulations that deal with fraud. We also note that terms like false, untrue, or misleading do not always signify that scienter is required to prove a violation. For example, Section 17(a)(2) of the Securities Act prohibits untrue or misleading statements, and it can be violated without scienter. Negligence is sufficient.⁵⁷⁰ We conclude that fraudulent intent or scienter is not required to prove a violation of Funding Portal Rule 200(c)(2).

ii. Violation of Funding Portal Rule 200(b) – Video Clip

Fernandez, and through him, the DreamFunded Portal, used the video clip of Fernandez’s offer to Company C’s CEO to create a false and misleading impression. They did so knowing that the video clip would mislead investors or, at a minimum, in reckless disregard for misleading investors. They acted with scienter and in violation of Funding Portal Rule 200(b).

As detailed above and only summarized here, in early October 2016 Fernandez appeared on the CNBC television show called “Make Me a Millionaire Inventor.” He received a video clip of his appearance on the program, which he admits that he posted on his Twitter account a couple of days after the broadcast of the show. In October 2016, information about Company C was on the DreamFunded Portal’s platform in anticipation of the launch of its crowdfunding offering. Company C’s information and information about its offering remained on the Portal’s platform through the end of April 2017.

The video clip contained two falsehoods, and Fernandez was aware of them both. The host of the program introduced Fernandez as the CEO of a crowdfunding platform that had invested over \$100 million in startups. That was untrue. The program also showed Fernandez making Company C an offer to invest \$1 million and the company’s CEO accepting the deal. In fact, Fernandez never made the investment. The video clip thereby created a misimpression that greatly inflated Fernandez’s wealth, ability to raise capital, and investment savvy. It also implied that an investment in Company C would be a good investment.

Although Fernandez denied it, we have found that he posted the false and misleading video clip with the offer to the DreamFunded Portal’s website. SV found it there in March 2017 and asked about it. In response, through Respondents’ then-attorney, MT, Respondents simply said that they had removed the video clip. They did not ask what she was talking about or say

⁵⁷⁰ *Aaron*, 446 U.S. at 685-87, 686 n.6.

that SV was mistaken about having seen it on the Portal’s website. In fact, Respondents did not remove the video clip from the Portal’s website—SV found it there again in September 2017.

We also have found that Fernandez was responsible for having the false and misleading video clip posted on the DreamFunded Portal’s YouTube channel. We have rejected his uncorroborated claim that a disgruntled former employee posted the video clip on a “clone” of the Portal’s YouTube channel. The clip was flattering to Fernandez, not, as he claimed, embarrassing. That is evident from the fact that Fernandez continued at least through September 2018 to publicize his appearance on the show, both in biographical information on the Portal’s website and in marketing brochures for his speaking engagements.

We find that Fernandez, and through him, the Portal, violated Funding Portal Rule 200(b), and thereby violated Funding Portal Rule 200(a). They engaged in a deceptive device or contrivance with scienter by posting the false and misleading video clip on the Portal’s platform and on their social media accounts. Fernandez perpetuated that deceptive device or contrivance by continuing to publicize his appearance on the CNBC show.

iii. Violation of Funding Portal Rule 200(b)—Angel Due Diligence and Deal Flow Screening

Respondents posted on the DreamFunded Portal’s website information that was designed to give investors confidence that Respondents had evaluated the issuers on the platform following a “best practices” screening process. Although as a funding portal, the DreamFunded Portal was not required to conduct due diligence, Respondents represented that they did.

Respondents claimed on the DreamFunded Portal’s website that they followed the due diligence practices of venture capital investors. They represented that they followed the Angel Capital Association’s “strict due diligence guidelines,” the purpose of which was to “mitigate investment risk by gaining an understanding of a company and its market.”⁵⁷¹ They claimed that their “due diligence and deal flow screening team screen[ed] each company” that applied to be on the Portal’s platform.⁵⁷²

Respondents posted on the DreamFunded Portal’s platform information about how crowdfunding works and about how, in particular, Respondents selected offerings for the Portal’s platform. Respondents told investors, “[Our] screening process is detailed and time consuming.”⁵⁷³ “DreamFunded’s due diligence and deal flow screening team screens each company. . . . Our screening team recognizes the best practices guide as outlined by the Angel Capital Association (ACA).”⁵⁷⁴ Respondents touted as a benefit to investing in an offering on the

⁵⁷¹ Respondents admitted in their Answer that this language was on the Portal’s website. Ans. ¶ 32.

⁵⁷² Ans. ¶ 32.

⁵⁷³ CX-70, at 1, 6.

⁵⁷⁴ CX-70, at 2.

Portal’s platform, “We thoroughly vet startups prior to featuring them on our platform.”⁵⁷⁵ They further claimed, “DreamFunded has recruited a world-class investment committee to review the due diligence previously completed by angel groups and VC [venture capital] partners to assure each deal sourced from a third party meets DreamFunded standards for anticipated investment performance.”⁵⁷⁶

In fact, there was no screening team and Fernandez had no system for evaluating issuers or their offerings. At the hearing, Fernandez testified vaguely that “everyone” at the DreamFunded Portal was a member of the due diligence team but that he led the effort. He said there was no list identifying who was on the due diligence team, and meetings of the due diligence team were not documented.⁵⁷⁷ Furthermore, although Fernandez claimed that he followed an ACA checklist for due diligence guidelines, there is no documentary corroboration of that claim. He produced a generic template of a due diligence list,⁵⁷⁸ but no example of it in use. Fernandez testified that, to the extent he took any notes of his due diligence, he later threw them away.⁵⁷⁹ He claimed that he threw away paper records as unimportant but put electronic records in Dropbox.⁵⁸⁰

The way Fernandez described his due diligence in his OTR is likely closer to reality. At his OTR, Fernandez made no mention of any screening team, world-class investment team, angel groups, or venture capital partners involved with due diligence. He testified that he did three things. He had a meeting with the issuer’s founder, if that person was local; he did some online research; and he checked any profile the person might have on LinkedIn. He said he wanted to “figure out how were they as a person.”⁵⁸¹ At his OTR, Fernandez said that he had the ACA due diligence checklist in mind when he conducted due diligence, but he was vague about whether and where he might have records of his due diligence.⁵⁸²

⁵⁷⁵ CX-70, at 6.

⁵⁷⁶ CX-70, at 6.

⁵⁷⁷ Tr. (Fernandez) 190-95, 198-201.

⁵⁷⁸ RX-9.

⁵⁷⁹ Tr. (Fernandez) 189-90.

⁵⁸⁰ Tr. (Fernandez) 190-201. Fernandez claimed to have reviewed more than 840 issuers that had applied to be on the DreamFunded Portal. He said that he rejected many companies because they only had a single founder, their application was incomplete, or they lacked any powerpoint or business plan. Tr. (Fernandez) 1252-56. He said these were “[p]eople that couldn’t get their basics together.” Tr. (Fernandez) 1256. Of the remaining companies, he said he checked whether the experience of the entrepreneurs matched what they hoped to do, whether there was a viable market, and whether they had a business model. Then he would do “back-door references” to check on whether the founders were known as hard workers. Tr. (Fernandez) 1257-61. Fernandez said that he would then ask for documentation such as the articles of incorporation, following the ACA checklist and the background checks required by the SEC. Tr. (Fernandez) 1262-65. There is no documentation in the record of any of these activities.

⁵⁸¹ CX-72 (Fernandez OTR), at 129.

⁵⁸² CX-72 (Fernandez OTR), at 157-59.

In light of the undocumented and unsystematic way in which Fernandez actually reviewed issuers and their founders, Respondents' description of their due diligence on the Portal's website was false and misleading. Respondents 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 Funding Portal 200(b).⁵⁸³

iv. Violation of Funding Portal Rule 200(c)(2)—Real Estate Tombstones

Respondents removed the last of the crowdfunding offerings from the DreamFunded Portal's platform at the end of April 2017.⁵⁸⁴ Fernandez testified that he ended the crowdfunding offerings and was no longer "in business," although the DreamFunded Portal was still a FINRA funding portal member⁵⁸⁵ and Fernandez was still working with DA, the company's CEO, on closing Company A's offering.⁵⁸⁶

In the meantime, Fernandez posted on the Portal's website real estate tombstones from deals transacted during an earlier period, before the DreamFunded Portal was a FINRA member. According to Fernandez, Respondents were working on a non-operative basis to test whether FINRA would "green light" a different kind of business for the Portal. Fernandez portrayed the tombstones as a kind of place-holder while Respondents studied how to revamp their business model.⁵⁸⁷

Each tombstone showed a photograph of a single-family house.⁵⁸⁸ In connection with each house, the tombstone showed an amount of money that had been raised and appeared to suggest that investors earned a 10% annual interest rate. The tombstones compared the return obtained on these deals to CDs, bank products that are federally insured, saying, "Tired of low CD rates? Put your money to work."⁵⁸⁹

Posting these real estate tombstones on the Portal's platform was misleading. It made it appear that the real estate deals were part of the DreamFunded Portal's crowdfunding business when they were not. They had occurred in different circumstances prior to the Portal becoming a FINRA member authorized to serve as an intermediary in crowdfunding offerings. The

⁵⁸³ As noted above, Respondents manufactured examples of their due diligence on Company A and Company B *after* FINRA staff requested documentation of the due diligence Respondents performed. Respondents apparently had no examples of due diligence performed before giving the issuers access to the Portal's platform and closing the offerings with a distribution of investor funds. Tr. (PD) 1853-57.

⁵⁸⁴ CX-66.

⁵⁸⁵ Tr. (Fernandez) 241-42.

⁵⁸⁶ CX-33.

⁵⁸⁷ Tr. (Fernandez) 236-39; CX-52.

⁵⁸⁸ Tr. (Fernandez) 236-39; CX-52.

⁵⁸⁹ Tr. (Fernandez) 238-39; CX-52, at 1.

tombstones also made it seem that investors could count on a high rate of return and that investing in the real estate deals was comparable to investing in CDs, when it was not. The real estate deals were not federally insured.⁵⁹⁰

Although the real estate tombstones were misleading, we cannot conclude that Respondents intended to mislead or were in reckless disregard of the likelihood of misleading investors. We do find, however, that the misleading tombstone advertisements violated Funding Portal Rule 200(c)(2), which does not require scienter, and thereby violated Funding Portal Rule 200(a).

4. Fourth Cause of Action

a. The Complaint

In the Fourth Cause of Action, the Complaint alleges that Company A falsely claimed in its filing with the SEC that it had provided investors with financial statements that were true and complete in all material respects. In fact, no financial statements accompanied the filing. With respect to Company B, the Complaint alleges that it failed to provide a basis for its valuation of its video library, that there were inconsistencies in its SEC filing regarding the value of its assets, and that there were still other inconsistencies between its projections for revenues in its budget and its business plan. As a result, according to the Complaint, Respondents had no reasonable basis for believing that the two companies had complied with their disclosure obligations under the applicable law and rules. The Complaint alleges that this conduct violated Crowdfunding Rule 301(a) and FINRA Funding Portal Rule 200(a).⁵⁹¹

b. The Rule

SEC Crowdfunding Rule 301(a)

SEC Crowdfunding Rule 301(a) provides that an intermediary must have a reasonable basis for believing that a crowdfunding issuer is in compliance with the applicable requirements. The intermediary may rely on the representations of the issuer, however, unless the intermediary has reason to question the reliability of the representations.

c. Cause of Action Dismissed

i. Company A

With respect to Company A, the Fourth Cause of Action focuses on the alleged lack of a financial statement to accompany the Form C. Enforcement charges that, from the lack of a financial statement, Respondents should have known from the outset that Company A was not in

⁵⁹⁰ CX-52, at 1-9.

⁵⁹¹ Compl. ¶¶ 28, 74-79.

compliance. We believe the charge to be founded on a misunderstanding of the regulatory requirements and Company A's SEC filing.

(a) Regulatory Requirements

Crowdfunding Rule 201 sets forth disclosure requirements for an issuer in a crowdfunding offering. Among the long list of required disclosures, Crowdfunding Rule 201(s) requires a company to discuss "the issuer's financial condition, including, to the extent material, liquidity, capital resources and historical results of operations."

The Instructions that accompany Crowdfunding Rule 201(s) distinguish between companies with an operating history and companies without one, like Company A. Instruction 1 to paragraph (s) directs that an issuer discuss its financial condition during each period for which financial statements are provided, along with material changes and trends. This instruction contemplates that financial statements cover past performance and it implicitly applies to an operating company. Instruction 2 to paragraph (s) directs a company with an operating history to focus its discussion of its financial condition on whether historical results and cash flows are representative of what investors can expect in the future. Separately, Instruction 2 to paragraph (s) directs a company with no operating history to focus on financial milestones and challenges.

Crowdfunding Rule 201(t) specifies more precisely the financial information that an issuer must disclose. For offerings with a target amount of \$107,000 or less (Company A's target amount was \$10,000), an issuer must disclose total income, taxable income, and total tax, as reported on the issuer's most recent federal income tax return. An issuer must also provide its financial statements. The principal executive officer of the issuer must certify that all this information is true and complete in all material respects. However, if financial statements are available that have been either reviewed or audited by an independent public accountant, then those must be provided instead. With these requirements, Rule 201(t) presumes that the issuer is an operating company with some past history.

Instructions to paragraph (t) give guidance on the financial statements required under Crowdfunding Rule 201(t). Implicitly, the Instructions also presume that financial statements cover past history. Instruction 3 to paragraph (t), for example, requires that the financial statements must cover the two most recently completed fiscal years or the period since inception, if shorter.

The Form C template that a crowdfunding issuer fills out and files with the SEC also presumes that financial statements relate to companies with an operating history. The Form C requires disclosure of selected financial information for the most recent fiscal year-end and the prior fiscal year-end.⁵⁹² On page 2 of the Form C template, an issuer must disclose for each of the past two fiscal years its total assets, cash and cash equivalents, accounts receivable, short-term debt, long-term debt, revenues and sales, cost of goods sold, taxes paid, and net income.

⁵⁹² Form C template at 2.

The Form C also asks for a description of the financial condition of the issuer, repeating the language of Crowdfunding Rule 201(s), which focuses on liquidity, capital resources, and historical results of operations.⁵⁹³ The Form C directs that an issuer with an operating history should focus on historical results and cash flows, while an issuer without an operating history should discuss financial milestones and operational and liquidity challenges.

Finally, we note that the Form C template requires financial statements “if any.” We construe this to mean that an issuer should attach financial statements to its Form C—*if* there are any financial statements.

(b) Company A’s Financial Disclosures

When Company A filed its Form C, it had no operating history and no prior financial statements to disclose. The absence of a financial statement did not mean that Company A had failed to comply with Rule 201(s) or Rule 201(t). That Company A actually entered zero on its Form C for the itemized list of disclosures on page 2 of the template made clear that it had no financial statement to disclose.

The Complaint points out that Company A’s CEO certified that the financial statements contained in the Form C were true and complete in all material respects when there was no financial statement. We do not view the certification as a sign of non-compliance. It seems to us more a sign of confusion. Company A reported in its Form C selected financial information—it had zero assets, zero revenues, and zero costs. The CEO could have read the Crowdfunding Rules to require certification of that financial information. Respondents were not required to leap to the conclusion that Company A was out of compliance solely on that basis.

ii. Company B’s Expectations for the Future

With respect to Company B, the Complaint alleges that the company projected exponential revenue growth without providing a basis for the projection and without discussing whether its historical results were representative of what investors could expect in the future.⁵⁹⁴ How historical results might relate to what investors could expect in the future involves projections and forecasts and would be difficult to evaluate. As previously discussed above, we do not believe that a funding portal has a duty to analyze and evaluate a crowdfunding issuer’s projections and forecasts. Nor are we persuaded that a funding portal must deny access to its platform solely because of the absence of such a discussion.⁵⁹⁵

⁵⁹³ Form C template at 13.

⁵⁹⁴ Compl. ¶¶ 42, 77.

⁵⁹⁵ In its post-hearing briefing, Enforcement argued that there were other signs that Company B was not in compliance and should have been denied access to the DreamFunded Portal. One of these is described by Enforcement as a “false Oprah Winfrey endorsement.” Enf. PH Br. 39. Company B’s marketing material contained a screenshot from a video clip of Oprah Winfrey. The headline above her picture made it seem that she had endorsed

iii. Dismissal of Claims

We dismiss the Fourth Cause of Action in its entirety, although we recognize that the two issuers' SEC filings had errors and gaps. We are reluctant to hold the Respondents liable for failing to deny the issuers access to the DreamFunded Portal's platform solely on the basis of the errors charged in the Complaint. The applicable law and rules set up a presumption that an issuer's representations of compliance may be relied upon and do not impose a duty on crowdfunding intermediaries to probe those representations. In a different case, an accumulation of errors and gaps in a Form C might be sufficient to conclude that a crowdfunding intermediary had no basis for believing the issuer to be in compliance. But we do not think the errors and gaps alleged here in isolation are sufficient.⁵⁹⁶

5. Fifth Cause of Action

a. The Complaint

In the Fifth Cause of Action, the Complaint alleges that Respondents violated Crowdfunding Rule 301(c)(1) and Funding Portal Rule 200(a) because they did not perform a timely and meaningful background check or perform any securities enforcement regulatory history. According to the Complaint, in some cases Respondents performed a cursory background check, but only after an issuer's offering had been made available on the Portal's platform to investors. In other instances, Respondents only sought background information after FINRA staff pursued evidence that background checks had been performed. Fernandez purportedly obtained a LexisNexis account to perform background checks, but he never learned how to use it, and the account was not opened until after offerings had already appeared on the Portal's platform.⁵⁹⁷

Company B. While that may seem unlikely, without viewing the video clip we can form no judgment whether it is a false endorsement. CX-23, at 6.

In any event, the Complaint's Fourth Cause of Action focuses on Company A's lack of a financial statement and Company B's failure to discuss how its historical results supported the exponential revenue growth projected by the company. Enforcement's theory of the claim did not involve the truth or falsity of the purported Oprah Winfrey endorsement.

⁵⁹⁶ We read the Complaint to allege that certain errors and gaps in the issuers' filings should have alerted Respondents that the issuers were not in compliance, and, once alert to their non-compliance, Respondents should have denied them access to the Portal's platform. We hold that the particular errors and gaps alleged in the Complaint, in isolation and without more, are insufficient to alert Respondents that the issuers were not in compliance.

In fact, Enforcement proved through Fernandez's OTR that he did not look at all the issuers' Forms C before posting them on the Portal's platform, and that the Form C for Company A was one that he posted without looking at it. Arguably, because Fernandez did not even look at the company's Form C, Respondents had no basis for believing Company A was in compliance. But we do not read the Complaint to be based on that theory.

⁵⁹⁷ Compl. ¶¶ 43-46, 80-83.

b. The Rule

Crowdfunding Rule 301(c)(1) requires an intermediary to conduct a background check and a securities enforcement regulatory history on each issuer whose securities are to be offered through the intermediary. A background check and regulatory history must also be done on each officer or director (or persons occupying a similar status or performing a similar function), and on any beneficial owner of 20% or more of the issuer's outstanding voting equity securities. The JOBS Act mandates the background check and securities enforcement regulatory history.

In Crowdfunding Rule 301(c)(1), the background check and regulatory history are linked to the requirement for the intermediary to develop a reasonable basis for believing that the issuer and its principals are not subject to disqualification under Crowdfunding Rule 503. In order to have the required reasonable basis for believing that there is no disqualification, the intermediary must perform, at a minimum, the required background check and regulatory history.

Crowdfunding Rule 503 identifies a number of disqualifying events, including having been convicted within the last ten years of a felony or misdemeanor in connection with a securities transaction or in connection with conducting a securities business as a broker, dealer, or funding portal. If the SEC suspends or revokes an entity's registration as a broker, dealer, or funding portal, the entity is disqualified; if the SEC bars a person from associating with any registered entity, the person is disqualified. If an issuer or principal is suspended, expelled, or barred from FINRA membership, that also is a disqualifying event under Crowdfunding Rule 503.

c. Violation

There is no evidence that Respondents conducted the required background checks and securities enforcement regulatory histories on the issuers making offerings on the Portal's platform, or that any third party did so on their behalf, so that they had a "reasonable basis" for believing that issuers and their principals were not disqualified from participating in a crowdfunding securities offering. We find that Respondents violated Crowdfunding Rule 301(c)(1), and thereby violated Funding Portal Rule 200(a).

i. Fernandez

Fernandez testified that he did background checks in connection with every offering.⁵⁹⁸ As discussed below, he also claimed that he outsourced some background checks to a private investigator, and that FundAmerica did background checks on the issuers' founders and anyone who had 20% or more interest in the issuers.⁵⁹⁹ At the hearing, Respondents' counsel asked

⁵⁹⁸ Tr. (Fernandez) 801. As noted above, the only examples of due diligence by Fernandez were created after the offerings by Company A and Company B commenced and closed, in response to FINRA staff's request for documentation of the Respondents' due diligence. Tr. (Fernandez) 1853-57.

⁵⁹⁹ Tr. (Fernandez) 209, 226-27, 233-36, 600-07.

Fernandez, “[D]id you and/or FundAmerica conduct background and security enforcement regulatory history checks with respect to the issuers?” Fernandez responded, “Yes.”⁶⁰⁰

There is no corroborating evidence to bolster Fernandez’s claim that he did the required background checks and securities enforcement regulatory histories. To explain the absence of any documentary evidence that he did any background checks or regulatory histories, he testified that he documented some but not all of his online searches, and that he only kept some of what he documented. “If it wasn’t important I didn’t keep it.”⁶⁰¹

The background checks and securities enforcement regulatory histories, however, were important. They were required by the JOBS Act itself. The lack of even a scrap of paper or any digital record evidencing any background check or regulatory history renders Fernandez’s testimony utterly devoid of credibility.⁶⁰²

Fernandez was more candid and less guarded at his OTR. When asked at his OTR, “Did you conduct a background check or did DreamFunded conduct a background check” on people associated with issuers on the Portal’s platform, he testified, “I don’t believe so.”⁶⁰³ We find his OTR testimony more consistent with the facts. We believe that Fernandez did not conduct the required background checks or securities enforcement regulatory histories.

ii. Private Investigator

Fernandez offered into evidence an email he sent in December 2016 to a person he identified at the hearing as a private investigator. Fernandez’s purpose was to demonstrate that he had outsourced some of Respondents’ due diligence and background checking responsibilities. In the email, Fernandez indicated that he wanted to hire the investigator to help “make sure that the companies [are] vetted correctly to protect investors interest.” He invited the investigator to “chat” on the telephone about it.⁶⁰⁴

Fernandez offered no proof that Respondents actually hired the investigator or that the investigator actually conducted any investigation, much less that the investigator conducted the kind of background check and securities enforcement regulatory history required by Crowdfunding Rule 301(c)(1). We have no contract between the investigator and Respondents, and we have no written reports documenting any investigation. Fernandez testified, somewhat

⁶⁰⁰ Tr. (Fernandez) 1299.

⁶⁰¹ Tr. (Fernandez) 208-09.

⁶⁰² The lack of documentation for the required background checks and regulatory histories likely violated Respondents’ duty under Crowdfunding Rule 404 to make and retain records. The Complaint, however, does not charge a violation of this Rule.

⁶⁰³ CX-72 (Fernandez OTR), at 144-45.

⁶⁰⁴ RX-15, at 1.

vaguely and inconsistently, that the private investigator did not provide any written reports on issuers but that whatever Respondents had was in Dropbox:

Q: And did [the private investigator] perform any background searches for you?

A: Yes.

Q: How were those documented?

A: He never provided—somewhere over the phone. He wanted something about liability. He wanted to keep information on his end. I think there was an earlier time that he emailed me something about [one of my backers]. So he—the first version was emails, second version he decided to keep some of it and tell me that he thought it was a green light, that it was—there was no issues regarding the issuer.

Q: You said the issuer. Did he do backgrounds on more than one issuer?

A: Yes.

Q: Any of those searches—is there documentation in writing that he performed those searches?

A: I don't recall. Whatever I had I had in Dropbox.⁶⁰⁵

We conclude that the private investigator conducted no background check or securities enforcement regulatory history for the issuers with crowdfunding offerings on the Portal's platform. Fernandez could not remember any concrete details about it, and there is no corroborating documentary evidence.

iii. FundAmerica

We have closely examined Respondents' claim that FundAmerica conducted the required background checks on their behalf. The evidence suggests that FundAmerica may have done some kind of background and anti-money laundering review of some unknown persons, but the evidence does no more than hint that some such review might have been done. It does not demonstrate that it actually was done. Moreover, even if FundAmerica conducted some kind of background or anti-money laundering review, the evidence does not demonstrate that it did so on Respondents' behalf or that it conducted the kind of background check and securities enforcement regulatory history that Crowdfunding Rule 301(c)(1) requires.

In applying for FINRA membership, Respondents represented that FundAmerica would provide "certain administrative and compliance functions with respect to each offering."⁶⁰⁶ Among other things, FundAmerica was to provide each issuer with a click button interface embedded in its offering page on the Portal's platform that would enable investors to subscribe

⁶⁰⁵ Tr. (Fernandez) 227.

⁶⁰⁶ CX-6, at 5.

to the offering, provide the escrow agent with an accounting for funds transmitted to the escrow agent, and transmit subscription data to the transfer agent at the closing of each offering. Respondents also told MAP staff that FundAmerica would conduct “anti-money laundering reviews,” and “bad actor verifications”.⁶⁰⁷ The representation contains no detail as to how such reviews and verifications would be conducted or whether they would track the requirements of Crowdfunding Rule 301(c)(1). We also know from this only what was planned, not what was done.

Respondents introduced into evidence website pages from the DreamFunded Portal’s account with FundAmerica, which apparently Fernandez printed out on October 13, 2017, shortly before his initial OTR. Each page contains a number of buttons at the top, which presumably Fernandez could click to track various aspects of the offerings on the DreamFunded Portal’s platform. So, for example, there is a button for “offerings,” a button for “investors,” a button for “escrow \$,” and a button for “disbursements.” Fernandez printed out what appears to be an “escrow ledger” report on each issuer in an unsuccessful offering on Respondents’ platform. In some cases, the report showed that a few investors had put money into the escrow account but that the money was returned. In other cases, the report showed that there were no investors.⁶⁰⁸ Respondents did not produce the pages relevant to the two offerings that successfully closed, the offerings by Company A and Company B. So we have no information regarding those two offerings, including no information about the disbursement of funds when the offerings closed.

As pertinent here, on the first page of a group of pages related to a single issuer, at the top, there is one button with the title “background checks” and another with the title “AML exceptions.” This mirrors what Respondents told MAP staff that FundAmerica would do. However, we still do not know from this what FundAmerica actually did in connection with “background checks” and “AML exceptions.” The record contains no example of a FundAmerica background check or anti-money laundering review.

Accordingly, there is no evidence that whatever FundAmerica actually did complied with the requirements of Crowdfunding Rule 301(c)(1) or that FundAmerica actually conducted background checks and regulatory histories on all the persons covered by the Rule. The Rule requires a background check and a securities enforcement regulatory check of particular persons involved with the issuer, including the officers, directors, and persons holding similar responsibilities or status, along with owners of more than 20% voting equity. Fernandez vaguely claimed that FundAmerica performed its background search on “[e]veryone.”⁶⁰⁹ He explained that he meant “[e]very founder and anyone that had 20 percent interest of any company that

⁶⁰⁷ CX-6, at 5.

⁶⁰⁸ RX-14. Respondents produced the page relevant to Company C, which showed that there were no investors.

⁶⁰⁹ Tr. (Fernandez) 234-36.

[they] listed on Dreamfunded.”⁶¹⁰ Even if Fernandez’s testimony were true, his definition of “everyone” does not clearly include all the persons covered by Crowdfunding Rule 301(c)(1).

When asked if he had shared with FundAmerica the requirements of the Crowdfunding Rule with respect to background searches, Fernandez said he could not recall. So there is no evidence that FundAmerica was instructed on what needed to be done under the Crowdfunding Rules. In fact, at one point, Fernandez revealed that FundAmerica’s background checks were “for their own due diligence” and that FundAmerica focused on different matters than Crowdfunding Rule 301(c)(1)—such as a credit report and check system.⁶¹¹

We do not know from the copies of FundAmerica pages provided by Respondents whether any of the information that FundAmerica may have gathered was available to Respondents if Fernandez clicked the button for “background checks” or “AML exceptions.” In fact, Fernandez testified that FundAmerica would *not* release the information it had gathered in its background checks to him because of privacy concerns.⁶¹²

Fernandez’s testimony that FundAmerica would *not* release the information to him means that Respondents had no “reasonable basis” for believing that the issuers on the Portal’s platform were not subject to disqualification under Crowdfunding Rule 503. Respondents simply had no background information at all, and therefore had no basis on which to formulate a belief. That is a violation of Crowdfunding Rule 301(c)(1).

6. Sixth Cause of Action

a. The Complaint

In the Sixth Cause of Action, the Complaint alleges that Company A filed three Form C amendments that included material changes, but that Respondents did not provide any notices of material change to investors. The Complaint charges that this conduct violated Crowdfunding Rule 304(c)(1) and Funding Portal Rule 200(a).⁶¹³

b. The Rule

Crowdfunding Rule 304(c)(1)

Crowdfunding Rule 304(c)(1) provides that if there is a material change to the terms of an offering or the information provided by the issuer, then the intermediary must give notice of the material change to any investor who has made an investment commitment. The notice must inform the investor that the investment commitment will be canceled unless the investor

⁶¹⁰ Tr. (Fernandez) 235-36.

⁶¹¹ Tr. (Fernandez) 1263-64.

⁶¹² Tr. (Fernandez) 798.

⁶¹³ Compl. ¶¶ 49, 84-87.

reconfirms the commitment within five business days of receiving the notice. If an investor fails to reconfirm his or her investment within those five business days, then within five business days after that the intermediary must provide notice that the commitment was canceled, the reason for the cancellation, and the amount of money the investor should expect to receive as a refund.

c. Charge Proven in Part

We cannot find that Respondents violated this Crowdfunding Rule in connection with the first two amendments to Company A's Form C filed on January 12 and 24, 2017, which disclosed that ownership of the company had changed and it had a new CEO. As noted above, Respondents did not give notices of material change in connection with either the first or second amendment, but we do not know whether they were required to do so. This is because we do not know whether at the time there were any investors who had made investment commitments and were entitled to notice.

Respondents violated Crowdfunding Rule 304(c)(1) in connection with Company A's offering, and thereby violated Funding Portal Rule 200(a). They sent no notice of material change in connection with the third amendment to Company A's Form C filed on June 19, 2017, when the company did have investors. The amendment was marked as containing a material change in the terms of the offering, so there could be no confusion about whether a notice of material change was required.

7. Seventh Cause of Action

a. The Complaint

In the Seventh Cause of Action, the Complaint alleges that Respondents failed to give investors notice of the early closing of two offerings and their right to cancel their investment commitments for any reason until 48 hours before the new offering deadline. Company A's offering was initially scheduled to be open until September 26, 2017, but it closed and investor funds were distributed to the issuer on or around June 26, 2017. Company B's offering was initially scheduled to be open until June 30, 2017, but it closed on or around April 14, 2017. Enforcement alleges that this conduct violated Crowdfunding Rule 304(b)(2) and Funding Portal Rule 200(a).

b. The Rule

Crowdfunding Rule 304(b)(2)

Crowdfunding Rule 304(b)(2) provides that if an issuer reaches its target offering amount prior to the deadline specified in its offering materials, it may close the offering on an earlier date, as long as the offering is open a minimum of 21 days. The intermediary is required to provide notice to any potential investors and any investors that have made investment commitments. That notice must inform them of the new, anticipated deadline of the offering and tell them that they have a right to cancel their investment commitments for any reason until 48

hours prior to the new offering deadline. The new offering deadline must be at least five business days after the notice to investors is provided. The offering cannot close if at the time of the new offering deadline the issuer does not meet or exceed the target offering amount.

c. Violation

Respondents violated Crowdfunding Rule 304(b)(2) in connection with the offerings of Company A and Company B, and thereby violated Funding Portal Rule 200(a). As discussed above, Respondents gave no early closing notice when Company A closed early or when Company B closed early. Respondents deprived investors in both offerings of their right to cancel their investment commitments up until 48 hours of the closing.

8. Eighth Cause of Action

a. The Complaint

In the Eighth Cause of Action, the Complaint alleges that, in connection with the offerings by Company A and Company B, Respondents failed to provide information to investors that they were required to provide. They did not include in their notices of investment commitment the price of the securities or the date and time by which the investors could cancel their investment commitments.⁶¹⁴ Enforcement charges that this conduct violated Crowdfunding Rule 303(d) and Funding Portal Rule 200(a).

b. The Rule

Crowdfunding Rule 303(d)

Crowdfunding Rule 303(d) provides that upon receiving an investment commitment an intermediary must promptly give notice to an investor of the following: (i) the dollar amount of the commitment; (ii) the price of the securities, if known; (iii) the name of the issuer; and (iv) the date and time by which the investor may cancel the investment commitment.

c. Violation

Respondents violated Crowdfunding Rule 303(d) in connection with the offerings of Company A and Company B, and thereby violated Funding Portal Rule 200(a). The notices sent to investors to memorialize their investment commitments did not inform investors of their right to cancel the investment commitment up until a certain date and time.⁶¹⁵ Because investors were never told of their right to cancel, or the conditions under which they could exercise it, they were deprived of the right to change their minds.

⁶¹⁴ Compl. ¶¶ 48, 92-95.

⁶¹⁵ Tr. (PD) 1857-60.

9. Ninth Cause of Action

a. The Complaint

In the Ninth Cause of Action, the Complaint alleges that Respondents did not provide investors confirmations when the offerings for Company A and Company B closed. Consequently, Respondents did not provide investors information to which they had a right. Enforcement charges that this conduct violated Crowdfunding Rule 303(f) and Funding Portal Rule 200(a).⁶¹⁶

b. The Rule

Crowdfunding Rule 303(f)

At or before the completion of a transaction under the crowdfunding exemption, Crowdfunding Rule 303(f) requires an intermediary to provide a notification to each investor that contains certain specific information. As relevant here, the Rule requires the following: (i) the date of the transaction; (ii) the type of security that the investor is purchasing; (iii) the identity, price, and number of securities purchased by the investor, along with the total number sold by the issuer in the transaction and the price at which the securities were sold.

c. Violation

We find that Respondents violated Crowdfunding Rule 303(f) in connection with the offerings of Company A and Company B, and thereby violated Funding Portal Rule 200(a). When OFDMI asked in one of its Rule 8210 requests for confirmations sent to investors upon the closing of the offerings for Company A and Company B, Respondents provided the staff emails generated by FundAmerica. An example of one sent to an investor in Company A is in the record. The email clearly identifies itself as “your investment confirmation.”⁶¹⁷ It announces in the subject line “Offering Escrow Successful.” The email states that the investor has invested \$60 in Company A.⁶¹⁸

The FundAmerica email, however, lacks most of the required information. It does not disclose the kind of securities the investor has purchased or how many. It does not disclose the price of the securities. It does not disclose the number of securities sold in the offering. The email further states that no paper confirmation or stock certificate would be mailed to the investor. In effect, the confirmation simply tells the investor that the \$60 that was in escrow has been disbursed. It provides none of the information necessary to protect and enforce the investor’s rights.

⁶¹⁶ Compl. ¶¶ 51, 96-99.

⁶¹⁷ RX-33.

⁶¹⁸ RX-33.

In adopting its Crowdfunding Rules, the SEC said, “Transaction 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. Each of the required items of information is intended to assist investors in memorializing and assessing their transactions.”⁶¹⁹

10. Tenth Cause of Action

a. The Complaint

In the Tenth Cause of Action, the Complaint alleges that although the DreamFunded Portal had written policies and procedures they lacked substance, were not provided to the Portal’s employees, and were rarely referred to or implemented. As a result, Respondents did not reasonably supervise the Portal’s activities or its associated persons. Enforcement charges that this conduct violated Crowdfunding Rule 403(a) and FINRA Funding Portal Rules 300(a) and 200(a).⁶²⁰

b. The Rules

Crowdfunding Rule 403(a)

Crowdfunding Rule 403(a) requires a funding portal to implement written policies and procedures reasonably designed to achieve compliance with applicable law, regulations, and rules.

Funding Portal Rule 300(a)

FINRA Funding Portal Rule 300(a) requires a funding portal member to establish and maintain a system for supervising its associated persons that is “reasonably designed” to achieve compliance with the applicable securities laws and Funding Portal Rules. At a minimum, a funding portal should establish and maintain written procedures to supervise the activities of the funding portal member and its associated persons and should designate a person with authority to carry out the funding portal’s supervisory responsibilities. The Rule directs a funding portal to make “reasonable efforts” to determine that supervisory personnel are qualified by experience or training to perform their assigned responsibilities.

c. Charges Proven

We conclude that Respondents failed to implement policies and procedures reasonably designed to achieve compliance. In part, that failure derives from the failure to establish written policies and procedures to review issuer filings and to issue notices to investors and the like. But

⁶¹⁹ Crowdfunding Rules Adopting Release, 2015 SEC LEXIS 5486, at *440.

⁶²⁰ Compl. ¶¶ 52-56, 100-05.

it is the failure to implement appropriate policies and procedures that is significant here. Respondents violated Crowdfunding Rule 403(a), and thereby violated Funding Portal Rule 200(a).

As Fernandez testified, the DreamFunded Portal's written policies and procedures were provided by Respondents' first attorney, KL, as part of a "package deal" when KL guided Respondents through the FINRA membership application process.⁶²¹ Drafted at what might be called a very high level, the policies and procedures made Fernandez responsible for all aspects of the Portal's business. He was the only person identified as having any responsibilities for the Portal's conduct of its business.⁶²² He had responsibility for communications with the public, for the collection and retention of information about investors, for background checks and review for potential fraud, for seeing that issuer disclosures were reviewed prior to commencement of an offering, for taking reasonable measures for reducing fraud but without conducting substantive due diligence, and for investor education.⁶²³ The first copy of the written policies and procedures, provided by KL, was dated 2016 (without any more specific date) and was never signed.⁶²⁴

In June 2017, Fernandez signed a slightly modified version of the original written policies and procedures.⁶²⁵ At that time, MT was Respondents' attorney. Again, Fernandez was the only person identified as having responsibilities for the Portal's business activities and compliance. Again, the document was drafted at a very high level. It did not mention notices or confirmations at all, much less address when they were required, the information they should contain, or who was responsible for sending them.

Fernandez himself asserted that the policies and procedures were not well designed for the Portal's business. When he looked at them, he testified that they looked "more like [a] brokerage firm[']s [document] or something. I don't think it really applies here."⁶²⁶

We also conclude that Respondents failed to establish and maintain a supervisory system reasonably designed to achieve compliance. Our focus is not on whether Fernandez trained his employees or provided the written policies and procedures to them. It is not clear that their job duties were relevant to the matters covered by the written policies and procedures. Our focus is on Fernandez's failure to establish any concrete, practical system for supervising the Portal's conduct of its business to ensure compliance with its legal and regulatory duties. It is apparent from his testimony that Fernandez adopted no systematic review of the issuers' disclosures in

⁶²¹ Tr. (Fernandez) 751-52.

⁶²² Tr. (Fernandez) 750-54; CX-11; CX-12.

⁶²³ CX-11, at 4, 9-10, 14, 19, 26, 28.

⁶²⁴ CX-11, at 1-2.

⁶²⁵ CX-12.

⁶²⁶ Tr. (Fernandez) 769-73.

order to formulate a reasonable basis for believing them in compliance with their legal and regulatory duties. He had no system for conducting background checks or regulatory histories of the issuers, and he retained no records of the Portal’s activities (including no records of expenses and cash flows). Fernandez developed no system for managing and overseeing Portal’s business. He did nothing to make sure he understood the Portal’s obligations and acted to carry them out.⁶²⁷ This misconduct violated Funding Portal Rule 300(a), and thereby violated Funding Portal Rule 200(a).

IV. SANCTIONS

A. Sanction Guidelines

FINRA has promulgated Sanction Guidelines (“Guidelines”) for adjudicators in FINRA disciplinary proceedings to consider in determining the appropriate sanction for a particular violation.⁶²⁸ The Guidelines are intended to be applied with attention to the regulatory mission of FINRA—to protect investors and strengthen market integrity.⁶²⁹ They are part of a disciplinary process designed to protect the investing public, support and improve the overall business standards in the securities industry, and decrease the likelihood of a recurrence of misconduct by the disciplined respondent.⁶³⁰

The Guidelines cultivate consistency and fairness in sanctions determinations, and ensure that sanction determinations are the product of a thorough analysis of relevant factors.⁶³¹ FINRA has published the Guidelines so that its members and their associated persons, along with their counsel, may become familiar with the types of disciplinary sanctions that may be applicable to various violations.⁶³²

The Guidelines recommend a range of sanctions for specific violations, and those ranges are usually quite broad, allowing for the exercise of discretion within the suggested range, depending on the circumstances. Moreover, the recommended ranges are not absolute. The Guidelines suggest, but do not mandate, a range of sanctions to be applied.⁶³³ The Guidelines

⁶²⁷ Although Funding Portal Rule 300(a) speaks of establishing and maintaining a supervisory system, that may mean something different in the context of crowdfunding offerings through a funding portal—which does not solicit transactions—than it means in the context of a broker-dealer supervising registered representatives, who do solicit transactions. Fernandez was the only person named in the DreamFunded Portal’s written policies and procedures. He had responsibility for establishing and maintaining a system that helped him ensure the Portal was in compliance with its statutory and regulatory obligations.

⁶²⁸ FINRA Sanction Guidelines (2019), <http://www.finra.org/industry/sanction-guidelines>.

⁶²⁹ *Id.* at 1.

⁶³⁰ Guidelines at 2, General Principle 1.

⁶³¹ Guidelines at 1, Overview.

⁶³² *Id.*

⁶³³ *Id.*

encourage adjudicators to tailor sanctions to the particular facts and circumstances of a case. One size does not fit all.⁶³⁴ Thus, adjudicators have discretion to decide based on the facts and circumstances of a particular case to impose a sanction above or below the recommended range, or even no sanction at all.

To further assist adjudicators, the Guidelines also contain overarching Principal Considerations and General Principles, which are applicable in all cases, and which are used to analyze aggravating and mitigating factors. Those factors add an additional layer of nuance to the sanctions analysis.⁶³⁵ Those overarching factors also can help in cases where the Guidelines contain no recommendation as to the particular violation. Where there is no specific recommendation for the particular violation, the Guidelines further suggest that an adjudicator consult the specific recommendation for any analogous violation.⁶³⁶

The Guidelines further encourage close analysis of the particular facts and circumstances of a case by expressly stating that adjudicators may “consider aggravating and mitigating factors in addition to those listed in these [G]uidelines.”⁶³⁷ In many ways, the Guidelines offer both predictability and flexibility when determining the sanction for a particular violation in a particular case.

B. Application of the Guidelines in This Case

In this case, the Guidelines contain no specific recommendations for any of the violations of the SEC’s Crowdfunding Rules or FINRA’s Funding Portal Rules. Furthermore, to the extent that FINRA Rule 8210 is a familiar Rule for which there are specific recommendations, and other FINRA Rules might seem analogous to some of the violations here, there are no guidelines and no precedents applying the sanctions for those violations to a funding portal member and the portal’s associated person.

The lack of specific guidance for most of the violations in this case, and the lack of precedents in the context of crowdfunding, cause us to proceed cautiously. In analyzing sanctions, we are conscious that the SEC’s Crowdfunding Rules and FINRA’s Funding Portal Rules are new, and that at the beginning of the new regulatory regime participants in the nascent crowdfunding industry may make mistakes that could be remedied without draconian measures.

We emphasize that the sanctions we impose here, which are significant for some violations, are based on our analysis of the facts and circumstances of this particular case. Consistent with one theme of the Guidelines, we have tailored the sanctions to the particular

⁶³⁴ Guidelines at 2, General Principle 1; Guidelines at 3-4, General Principle 3.

⁶³⁵ Guidelines at 1-8.

⁶³⁶ Guidelines at 1, Overview.

⁶³⁷ *Id.*

case, and we do not make generalizations regarding other, different cases involving crowdfunding offerings that might arise in the future.

Despite the lack of specific guidance and precedents, we are confident that our determinations regarding sanctions in this case are well grounded. The Guidelines have provided us with ample tools for our analysis. Their overarching themes and statements of purpose and intent, and their myriad General Principles and Principal Considerations have assisted us in determining the sanctions we impose. In addition, we have consulted SEC decisions regarding how to assess remedial sanctions. The SEC has stated that its decision to impose “any remedial sanction” is rooted in its “broad discretion,” and that a remedy must merely have a “reasonable relation” to the record and the violation at issue.⁶³⁸ In performing a sanctions analysis, the SEC “traditionally ha[s] balanced a variety of mitigating and aggravating circumstances, such as the harm caused by the violations, the seriousness of the violations, the extent of the wrongdoer’s unjust enrichment, and the wrongdoer’s disciplinary record.”⁶³⁹ We do likewise here.

C. Enforcement’s Request

Enforcement’s position with respect to the Rule 8210 violation is based on the Guidelines. The Guidelines provide that where an individual makes a partial but incomplete response to a Rule 8210 request, a bar is standard unless the person can show substantial compliance. In an egregious case, a firm should be expelled.

Enforcement seeks to bar Fernandez and expel the DreamFunded Portal for their failure to respond fully and completely to the Rule 8210 request for documents and information. Enforcement argues that the Respondents’ partial production cannot be considered substantial compliance because the information that has not been produced “could hardly be more important.”⁶⁴⁰ The documents at issue—business bank account statements, personal bank account statements, and spreadsheets and other records—were needed to investigate the flow of investor funds and whether they had been misused.⁶⁴¹ Enforcement also notes that it made multiple requests for the information over the span of four months, and that Respondents provided no valid reason for the deficiencies in their production.

With respect to all the other violations in the aggregate, Enforcement seeks separately to bar Fernandez and expel the Portal. Enforcement notes that under the Guidelines for a FINRA Rule 2020 violation—the Rule on which Funding Portal Rule 200(b) is modeled—adjudicators

⁶³⁸ *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1184 (2001), *petition for review denied*, 289 F.3d 109 (D.C. Cir. 2002).

⁶³⁹ *Id.* See also *Gateway Int’l Holdings, Inc.*, Exchange Act Release No. 53907, 2006 SEC LEXIS 1288, at *34 (May 31, 2006) (nonexclusive factors to consider for sanctions include the seriousness of the violation and whether it was isolated or repeated, the degree of culpability, efforts to remedy the violation and ensure future compliance, and the credibility of assurances against future violations).

⁶⁴⁰ Enf. PH Br. 47.

⁶⁴¹ Enf. PH Br. 24, 47.

are advised to strongly consider barring an individual for intentional or reckless misconduct and expelling a firm where aggravating factors predominate. Enforcement also refers to the Guidelines for FINRA Rule 2210 regarding communications with the public. Those Guidelines advise that adjudicators may consider barring an individual and expelling the firm in cases involving numerous acts of intentional or reckless misconduct over an extended period of time.⁶⁴² In closing argument, Enforcement condemned Respondents' misconduct as systemic and lasting the entirety of the DreamFunded Portal's existence as a FINRA funding portal member.⁶⁴³

D. Respondents' Position

Respondents mainly argue that FINRA overstepped its authority in the crowdfunding context when the staff used FINRA Rule 8210 to seek information from Respondents.⁶⁴⁴ They also assert that, in any event, they did not violate the Rule. With respect to sanctions, they briefly assert that even if their defenses are rejected, the sanctions sought by Enforcement are "grossly excessive and unwarranted."⁶⁴⁵ They refer to the sanctions as "penalties." They also note in connection with sanctions that the DreamFunded Portal raised very little money for issuers on its platform, a combined total of less than \$15,000, perhaps to imply that little harm was done and that the misconduct resulted in little or no gain to Respondents.⁶⁴⁶

E. Sanctions

We separately sanction Respondents for their failure to comply fully and completely with the Rule 8210 request, but we reject Enforcement's suggestion that we aggregate all the other violations. We think certain violations should be separately discussed so that we can distinguish between what we think was a truly culpable violation—Respondents' own deceptive use of the false and misleading video clip from the CNBC program on the Portal's website and on social media—from some of the other, lesser violations. We do aggregate, however, the notice violations, which are of a similar nature. We separately discuss the sanctions for Respondents' failure to establish and implement policies and procedures reasonably designed to achieve compliance, and for the lack of a system of to manage and oversee the Portal's activities that was reasonably designed to achieve compliance.

The Guidelines contain a number of overarching Principal Considerations and General Principles applicable in all cases that are relevant here. Some may be aggravating and others mitigating. Many of the aggravating factors and potentially mitigating factors apply to all of the violations, but some may have particular force in connection with particular violations. We

⁶⁴² Enf. PH Br. 48-49.

⁶⁴³ Tr. (Enf. Counsel) 1998.

⁶⁴⁴ Resp. PH Br. 5.

⁶⁴⁵ Resp. PH Br. 17.

⁶⁴⁶ *Id.*

discuss most of the aggravating and potentially mitigating factors just once, in connection with the First Cause of Action.

1. First Cause of Action

We have found, as charged in the First Cause of Action, that Fernandez (and through him, the DreamFunded Portal) failed to respond fully and completely to the staff's October 24, 2017 request pursuant to FINRA Rule 8210 for documents and information, and that Respondents' conduct violated Rule 8210 and FINRA Funding Portal Rules 800(a) and 200(a). The Guidelines contain specific recommendations for FINRA Rule 8210 violations.⁶⁴⁷

a. Guidelines for Rule 8210 Violations

The Guidelines provide that where an individual fails to respond at all to a Rule 8210 request, a bar is standard. The Guidelines further provide that a bar is the standard sanction for a partial but incomplete response, unless the person can demonstrate that the information provided substantially complied with all aspects of the request. A lesser sanction, a suspension of up to two years, may be warranted where mitigation exists or the response was simply untimely. As to firms, the Guidelines recommend that a firm be expelled in an egregious case, or, where mitigation exists, suspended for up to two years. For an untimely response, a firm may be suspended for up to 30 business days. The Guidelines also provide for escalating fines if a Rule 8210 response is untimely, incomplete, non-existent, or untruthful.

To assist in evaluating the degree of misconduct, and whether aggravating or mitigating factors should shift adjudicators' view of the appropriate sanction, the Guidelines set forth specific Principal Considerations to consider in connection with a Rule 8210 violation. Three specific Principal Considerations apply where, as here, the Rule 8210 violation involves a partial but incomplete response. First, adjudicators should consider the importance of the information that was requested but not provided as viewed from FINRA's perspective, and whether the information that was provided was relevant and responsive to the request. Second, adjudicators should consider the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response. Third, adjudicators should consider whether the respondent thoroughly explained one or more valid reasons for the deficiencies in the response.

We have considered whether a more lenient approach might be appropriate here, both because this is the first time sanctions are to be imposed for a Rule 8210 violation in the context of equity crowdfunding, and because the sanctions that would ordinarily be imposed for such a violation—an expulsion and a bar—may be described as “the securities industry equivalent of

⁶⁴⁷ Respondents violated Funding Portal Rules 800(a) and 200(a) by virtue of their violation of FINRA Rule 8210. The violations of Funding Portal Rules 800(a) and 200(a) do not warrant any separate sanctions from the sanctions for the Rule 8210 violation.

capital punishment.”⁶⁴⁸ In this particular case, however, the violation was egregious and aggravating factors far outweigh any mitigating factors. Respondents were proven unfit to continue in the securities industry. There is no basis for taking a more lenient approach.⁶⁴⁹

b. Application of the Guidelines

i. No Substantial Compliance

Under the Guidelines, a respondent may avoid a bar for making a partial but incomplete response to a Rule 8210 request if the respondent can show substantial compliance with all aspects of the request.⁶⁵⁰ In this case, Respondents have not shown substantial compliance.

The Rule 8210 request sought monthly bank account statements from January 1, 2014, through October 24, 2017, for Fernandez’s personal bank accounts and bank statements for the Portal, the Parent, and the two special purpose vehicles (DreamFunded I and II). According to a “Source of Funds Reconciliation” Respondents provided in response to the Rule 8210 request, one investor wrote a check for \$450,000, which was converted to a cashier’s check and deposited (minus a bank fee of \$15) on February 2, 2016, into the Parent’s bank account.⁶⁵¹ Respondents, however, provided no bank statement for the Parent’s bank account in February 2016 to either MAP or OFDMI.⁶⁵² Thus, it was impossible for Enforcement to trace what happened to the investor’s funds.

Fernandez also failed to produce *any* of his personal bank account statements, even though it was apparent from the business account statements in the record that Fernandez had a personal checking account to which he transferred money from one of the Portal’s bank accounts. Respondents also failed to produce any monthly bank account statements for the Portal’s three bank accounts from December 2016 through October 2017, the period when offerings were live and the offerings for Company A and Company B closed.

Respondents’ submission of some 2016-2018 bank account statements for the Portal shortly before the hearing as a proposed hearing exhibit did not satisfy Respondents’ obligation to respond to the Rule 8210 request fully, completely *and* timely. In fact, it showed that Respondents had previously withheld responsive documents. The submission still did not contain the February 2016 bank statement for the Parent’s bank account, which might have enabled

⁶⁴⁸ *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013), *petition denied in part and remanded*, 873 F.3d 297, 310 (D.C. Cir. 2017) (citing *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007)).

⁶⁴⁹ *See Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *53-54 (Dec. 7, 2010) (“A bar and expulsion are severe sanctions. Applicants’ demonstrated lack of fitness to be in the securities industry, however, supports the remedial purpose to be served by such sanctions. Applicants represent a clear danger to the investing public if they remain in the securities industry . . .”).

⁶⁵⁰ Guidelines at 33.

⁶⁵¹ CX-8, at 1.

⁶⁵² CX-64.

FINRA staff to trace what happened to a \$450,000 cashier's check an investor provided for investment in the Portal.⁶⁵³

The Rule 8210 request also sought all accounting or bookkeeping records of the Portal and the Parent. Respondents produced none.

ii. Missing Information Was Critical to Investigation

From FINRA's perspective, the information sought by the Rule 8210 request was important. The request sought information to determine whether Fernandez had misused investor funds intended for investment in the DreamFunded Portal. From the patchwork of bank statements, even including the ones Respondents produced only on the eve of the hearing, it is impossible to trace the flow of funds between the entities and Fernandez. Fernandez's transfer of funds from one of the business accounts to his personal checking account suggests that he may have treated business and personal accounts as interchangeable, but one cannot know without all the bank statements. The failure to produce the documents impeded FINRA's ability to perform its regulatory mission.

iii. High Degree of Regulatory Pressure Needed

A high degree of regulatory pressure was necessary even to obtain partial compliance with the Rule 8210 request. Enforcement sent multiple requests and gave multiple extensions of time over the course of several months. Even after it became evident to Fernandez that Enforcement knew about his travel during the period covered by his medical excuse, he continued to resist production, arguing it was unreasonable to expect him to produce the documents on his first day back at work. The submission of withheld documents as proposed hearing exhibits confirmed that Respondents had withheld responsive documents.

iv. No Valid Reason for Failure to Respond

Fernandez had no good excuse for his failure to respond fully and completely with the Rule 8210 request. To the contrary, the record reflects that he twice claimed that he was too sick to respond when he was actually traveling, first to the Sundance Film Festival in Utah, and later to attend a Santana concert in Las Vegas. He also incorrectly claimed that the documents were not in his possession, custody, or control because they were with his bookkeeper/accountant.

v. Aggravating Factors

(a) Blame Shifting

We are troubled by Fernandez's pattern of disclaiming responsibility. Of particular relevance to the Rule 8210 violation, he blamed his lawyers for failing to make documents available to FINRA staff, as though he had nothing to do with the process. His testimony that he

⁶⁵³ RX- 2.

had made everything available to his lawyers through Dropbox and expected them to respond appropriately without more guidance from him was demonstrably untrue. As noted above, in January 2018, his lawyer asked for an extension of time to respond to the Rule 8210 request because his clients still had not provided him a majority of the documents. Under the Guidelines, it is aggravating that a respondent fails to accept responsibility or even to acknowledge his misconduct.⁶⁵⁴

(b) False and Misleading Responses to Regulators

We have found that on numerous occasions Respondents provided false and misleading information to regulatory inquiries. Through counsel, in the spring of 2017, Respondents told SV, the MAP examiner, that the video clip of Fernandez's offer to the CEO of Company C had been removed from the Portal's website. But SV saw it there again in September 2017. In July 2017, through counsel, Fernandez told OFDMI staff that Company A's and Company B's offerings were ended and removed from the Portal's website around April 30, 2017. This was misleading because he failed to explain that the offerings had actually closed with the release of investor funds from escrow to the issuers (or, in the case of Company A, to its CEO). When asked for the records of due diligence on the companies on the Portal's platform, the Respondents provided information gathered long after the offerings were posted to the Portal's platform. The information did not constitute due diligence prior to giving the issuers access to the platform.

The Guidelines provide that it is aggravating that a respondent provides inaccurate or misleading information to FINRA staff.⁶⁵⁵ Fernandez was untrustworthy in his dealings with regulators.

(c) Attempts to Delay Investigation

Fernandez provided dubious medical excuses to Enforcement for why he could not comply with the Rule 8210 request for documents and sought extensions of time. He then traveled to entertainment events during the period of his supposed illness instead. The attempt to delay FINRA's investigation was aggravating.⁶⁵⁶

vi. Potentially Mitigating Factors

(a) Lack of Experience and Training

To some degree, Respondents' violations may be partly attributable to the lack of experience and training. It became clear at the hearing that, despite several years of promoting the creation of the equity crowdfunding marketplace, Fernandez did not have a good grasp of

⁶⁵⁴ Guidelines at 7, Principal Consideration 2.

⁶⁵⁵ Guidelines at 8, Principal Consideration 12.

⁶⁵⁶ Guidelines at 8, Principal Consideration 12.

even the most basic rules governing crowdfunding and funding portals. He testified, for example, that he never understood that he was an associated person of the DreamFunded Portal until his current attorney told him that a couple of months before the hearing.⁶⁵⁷ The notice violations occurred in part because, as discussed above, Fernandez was unaware of his responsibilities in connection with giving material change and early closing notices.

This potentially mitigating factor is outweighed, however, by Fernandez's pattern of providing false and misleading information to regulators. It does not appear to us that he had much interest in truly engaging with regulators and learning how to conform his conduct to the statutory and regulatory requirements.

(b) Little or No Investor Harm, and Little Reward for Respondents

Respondents attempt to minimize the significance of their misconduct. They point out that only two offerings closed and that they garnered a relatively small amount from investors in those offerings, approximately \$15,000, implying that investors suffered little to no harm.⁶⁵⁸ They also note that Fernandez withdrew the Portal from FINRA membership because the enterprise was not financially successful and he did not make money from it.⁶⁵⁹ We reject Respondents' attempt to trivialize the violations in this case.

We do not actually know whether the investors in the two offerings that closed suffered any financial harm. There was no evidence as to what happened to their investments after the offerings closed. But customer harm is not required in order for a violation to be found or a sanction imposed.⁶⁶⁰ In the context of a Rule 8210 violation that is particularly true. The Guidelines specifically state that lack of customer harm does not mitigate a Rule 8210 violation.⁶⁶¹ As explained by FINRA's National Adjudicatory Council ("NAC"), "[i]t is rare that a respondent's obstruction . . . [of an investigatory request for information] would directly result in financial harm to a customer."⁶⁶²

⁶⁵⁷ Tr. (Fernandez) 184-85.

⁶⁵⁸ Tr. (Fernandez) 1270-71; Resp. PH Br. 17.

⁶⁵⁹ CX-72 (Fernandez OTR), at 215-16.

⁶⁶⁰ *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *68 (Nov. 15, 2013) ("The absence of . . . customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally.") (internal quotation omitted). See also *Coastline Fin., Inc.*, 54 S.E.C. 388, 396 (1999) (rejecting absence of customer harm as a mitigating factor in sanctions).

⁶⁶¹ Guidelines at 33 n.2.

⁶⁶² *Dep't of Enforcement v. Asensio Brokerage Services, Inc.*, No. CAF030067, 2006 NASD Discip. LEXIS 20, *51-52 (NAC July 28, 2006) (quoting *Dep't of Enforcement v. Dieffenbach*, No. C06020003, 2004 NASD Discip. LEXIS 10, at *40 (NAC July 30, 2004), *aff'd in relevant part*, *Michael A. Rooms*, Exchange Act Release No. 51467, 2005 SEC LEXIS 728 (Apr. 1, 2005), *aff'd*, 444 F.3d 1208 (10th Cir. 2006)).

We also observe that the failure to respond fully and completely to a Rule 8210 request is significant beyond the money involved. A Rule 8210 violation damages the integrity of the markets and the ability of FINRA to protect the public. FINRA cannot fulfill its regulatory mission if its members and their associated persons can refuse to provide the documents, testimony, and information necessary to determine whether a violation has occurred.⁶⁶³ “The harm in such instances, as here, is to the self-regulatory process and to investors’ confidence in that process.”⁶⁶⁴

In fact, Respondents impeded an investigation that included an inquiry into whether Fernandez had misused \$878,000 in investor funds intended to be used to establish and operate the DreamFunded Portal. The potential investor harm under investigation was substantial.

Finally, whether Respondents made little money from their misconduct is not mitigating. A sanction may be imposed even if the respondent obtained little or no benefit from misconduct. The focus of the analysis is on the nature and degree of misconduct.⁶⁶⁵

(c) Disqualification as Collateral Consequence

We recognize that any bar we impose on Fernandez may result in his inability in the future to raise money in a Regulation D private offering such as the ones he used to raise money for the DreamFunded Portal. SEC Rule 506(d) of Regulation D provides that a covered person who is barred from the securities industry by FINRA becomes disqualified to participate in Regulation D offerings. Covered persons include, among others, an issuer; an officer, director, or 20% owner of an issuer; or a promoter connected to the issuer.

We do not view disqualification as a mitigating factor. If the bar we impose on Fernandez results in his inability in the future to raise money in a Regulation D offering, that is a collateral consequence of our sanction that the SEC purposely imposes by including a bar from the securities industry in its list of disqualifications from participation in Regulation D offerings.

vii. Special Considerations

In the Overview to the Guidelines, FINRA has declared “the building of public confidence in the financial markets” an important element of its regulatory mission.⁶⁶⁶ To build public confidence, and to be an effective regulator, FINRA believes that “it must stand ready to

⁶⁶³ *PAZ Sec. Inc.*, 566 F. 3rd 1172 (SEC did not abuse its discretion in determining that lack of direct harm or benefit does not mitigate complete failure to respond to Rule 8210 request.); *Kent Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *34-35 (Feb. 20, 2014).

⁶⁶⁴ *Id.*

⁶⁶⁵ Under the Guidelines, a potential for monetary gain from misconduct may be an aggravating factor, but the absence of a potential for monetary gain is not considered mitigating for purposes of sanctions. *Dep’t of Enforcement v. Griffith*, No. 2010025350001, 2015 FINRA Discip. LEXIS 55, at *19 (NAC Dec. 22, 2015).

⁶⁶⁶ Guidelines at 1 (Overview).

discipline member firms and their associated persons by imposing sanctions when necessary and appropriate to protect investors, other member firms and associated persons, and to promote the public interest.”⁶⁶⁷

We think that building public confidence is particularly critical in the newly created market for crowdfunding securities offerings. Compared to other securities offerings, crowdfunding offerings involve relatively smaller businesses seeking smaller investments from less sophisticated investors. Small businesses and less sophisticated investors may be reluctant to participate in crowdfunding offerings, and this new market may be stunted, if potential issuers and investors are not confident that the market is appropriately regulated and policed. Because Rule 8210 is FINRA’s basic tool for investigating potential misconduct, a failure to impose appropriate sanctions for a violation of that Rule would detract from public confidence that funding portals are well regulated and well policed.

In this case, aggravating factors outweigh any mitigating factors. We are particularly concerned that Respondents were not candid and truthful when responding to regulatory inquiries and that Fernandez’s hearing testimony was evasive, vague, and inconsistent. We also observe that Enforcement proved that Respondents engaged in multiple violations in a systemic compliance breakdown. We have no confidence that Respondents would comply with legal and regulatory requirements if permitted to continue in the securities industry. In sum, for their failure to comply fully and completely to the Rule 8210 request, we expel the DreamFunded Portal from FINRA membership as a funding portal and bar Fernandez from association with any funding portal FINRA member.

2. Second Cause of Action

We have found that Respondents gave Company A access to the DreamFunded Portal despite investor protection concerns that would cause a reasonable person to deny access, in violation of Funding Portal Rule 301(c)(2). For this misconduct, we would suspend the Portal for 30 days. We would impose a more stringent sanction on Fernandez because of aggravating factors. We find it aggravating that he facilitated the early release of investor funds to the overdrawn personal account of the issuer’s CEO without any business rationale. We find it further aggravating that he did so without giving investors the notices required to protect their rights. We would suspend Fernandez for six months and fine him \$10,000. However, in light of the expulsions and bars imposed for other violations, we do not impose these sanctions.

3. Third Cause of Action

We have found that Respondents violated Funding Portal Rule 200(b), which prohibits effecting a securities transaction by any manipulative, deceptive, or fraudulent device or contrivance.

⁶⁶⁷ Guidelines at 1 (Overview).

First, we have found that Fernandez posted on social media and the Portal's website a video clip of his appearance on the CNBC television show called "Make Me a Millionaire Inventor." The posting showed Fernandez offering a \$1 million investment in Company A, which left the impression with potential investors that he had great confidence in the issuer's prospects and that he was a wealthy, savvy investor they should emulate. In fact, Fernandez did not make the investment. He suggested at the hearing that the CEO of Company A was incapable of presenting the product in a persuasive way and he would never have invested in Company A. Nevertheless, SV, the MAP examiner, periodically saw the misleading video clip on the Portal's website from the fall of 2016 through spring of 2018. It is aggravating that the video clip remained on the website even after, in spring of 2017, SV spoke with Fernandez about it and, through counsel, he represented that it had been removed.

Second, we have found that Respondents falsely represented on the Portal's website that they had a team of people carefully reviewing issuers' applications to make offerings on the platform. They falsely purported to conduct the same type of due diligence as sophisticated venture capitalists do in private offerings. In fact, there was no team and there were no records to support this claim.

For these two violations, which involve no reliance on others, we expel the DreamFunded Portal and bar Fernandez. The sanctions are proportional to the misconduct because the misconduct involved scienter, a high level of culpability.

In this Cause of Action, we have also found that Respondents made misleading statements about real estate transactions, in violation of Funding Portal Rule 200(c)(2), which does not require scienter. Separately, for a first-time stand-alone violation of this Rule, we would find a Letter of Caution appropriate. However, in light of the expulsions and bars imposed for other violations, we do not impose any sanction for this violation.

4. Fifth Cause of Action

We have found that Respondents failed to conduct background checks and securities enforcement regulatory histories, in violation of Crowdfunding Rule 301(c)(1). The violation is significant. Congress mandated that an intermediary perform background checks and securities enforcement regulatory histories as the minimum necessary to protect investors. The SEC made clear in Crowdfunding Rule 301(c)(1) that background checks and regulatory history served the purpose of ensuring that an issuer and its principals are not disqualified from making a crowdfunding offering. For this misconduct, we would suspend both Respondents for 30 days. In light of the expulsions and bars imposed for other violations, however, we do not impose the sanctions.

5. Sixth, Seventh, Eighth, and Ninth Causes of Action

We have found that Respondents failed to give investors required notices and information, in violation of Crowdfunding Rules 304(c)(1), 304(b)(2), 303(d), and 303(f). Collectively, these violations were significant. They revealed that Respondents had no system in

place for complying with the notice requirements. As a result, Respondents deprived investors of information necessary to protect their rights. For these violations in the aggregate, we would suspend both Respondents for 30 days. In light of the expulsions and bars imposed for other violations, however, we do not impose these sanctions.

6. Tenth Cause of Action

We have found that Respondents failed to implement written policies and procedures reasonably designed to achieve compliance, in violation of Crowdfunding Rule 403(a). We have further found that Respondents violated Funding Portal Rule 300(a), which requires a funding portal to establish and maintain a supervisory system reasonably designed to achieve compliance. Fernandez was responsible for all aspects of the entity's business but he never implemented procedures to ensure that the Portal conducted its business in a compliant manner. For this misconduct, we would suspend Respondents for 30 days and direct them to create a plan for remedying the deficiencies we have found in this Cause of Action. We would direct them to submit the plan to FINRA at the end of the suspension and work with the staff until it is acceptable. In light of the expulsions and bars imposed for other violations, however, we do not impose these sanctions.

V. ORDER

We find that Respondent Manuel Fernandez, and, through him, Respondent DreamFunded Marketplace, LLC committed the following violations, for which we impose the following remedial sanctions:

- First Cause of Action: Respondents violated FINRA Rule 8210, and FINRA Funding Portal Rules 800(a) and 200(a). For this misconduct, we expel DreamFunded Marketplace, LLC from FINRA membership as a funding portal member and bar Manuel Fernandez from associating with any FINRA funding portal member in any capacity.
- Third Cause of Action: Respondents violated Funding Portal Rules 200(b) and 200(a). For this misconduct, we expel DreamFunded Marketplace, LLC from FINRA membership as a funding portal member and bar Manuel Fernandez from associating with any FINRA funding portal member in any capacity. For violating Funding Portal Rule 200(c)(2), as also charged in the Third Cause of Action, Respondents would be issued a Letter of Caution. In light of the expulsions and bars imposed for other violations, however, we do not impose this requirement.

With respect to the other violations found, we find the following sanctions to be appropriate. But, in light of the expulsions and bars imposed for the violations in the First and Third Causes of Action, these sanctions are *not* imposed.

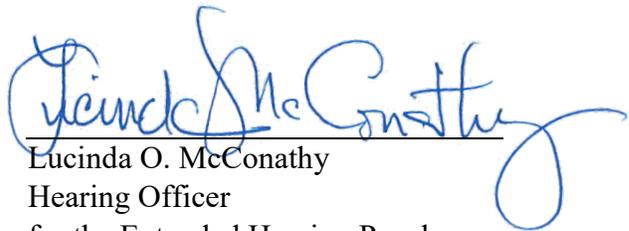
- Second Cause of Action: Respondents violated Funding Portal Rules 301(c)(2) and 200(a). For this misconduct, we would suspend the DreamFunded Portal for 30 days,

and would suspend Fernandez for six months and fine him \$10,000. With respect to the charge that Respondents violated Funding Portal Rule 200(c)(3), we find no violation and dismiss the charge.

- Fifth Cause of Action: Respondents violated Funding Portal Rules 300(c)(1) and 200(a). For this misconduct, we would suspend both Respondents for 30 days.
- Sixth, Seventh, Eighth, and Ninth Causes of Action: Respondents violated SEC Regulation Crowdfunding Rules 304(c)(1), 304(b)(2), 303(d), and 303(f), and FINRA Funding Portal Rule 200(a). For this misconduct, we would suspend Respondents 30 days.
- Tenth Cause of Action: Respondents violated SEC Regulation Crowdfunding Rule 403(a) and FINRA Funding Portal Rules 300(a) and 200(a). For this misconduct, we would suspend Respondents for 30 days and direct them during that period to create a plan to remedy the deficiencies we have found in this Cause of Action. We would direct them at the end of the suspension to submit the plan to FINRA and work with the staff until it is acceptable.

With respect to the Fourth Cause of Action, alleging that Respondents lacked a reasonable basis for believing that two issuers were in compliance with their legal and regulatory obligations, and that Respondents therefore violated Crowdfunding Rule 301(a) and FINRA Funding Portal Rule 200(a), we dismiss the charges.

If this Decision becomes FINRA's final disciplinary action, the expulsions and bars shall become effective immediately. Respondents are ordered to pay costs in the amount of \$15,889.03, which includes a \$750 administrative fee and \$15,139.03 for the cost of the transcript. The fine and costs shall be due on a date set by FINRA, but not sooner than 30 days after this Decision becomes FINRA's final action.⁶⁶⁸


Lucinda O. McConathy
Hearing Officer
for the Extended Hearing Panel

Copies to:

Manuel Fernandez (via email, overnight courier, and first-class mail)
DreamFunded Marketplace, LLC (via overnight courier and first-class mail)

⁶⁶⁸ The Extended Hearing Panel has considered and rejected without discussion all other arguments of the parties that are inconsistent with this decision.

Todd A. Zuckerbrod, Esq. (via email, overnight courier, and first-class mail)
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