BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

James Thomas Young

For Review of Action Taken By

FINRA

File No. 3-20905

MR. YOUNG'S OPENING BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

FINRA RULES

OS Received 05/19/2023

COMMISSION DECISIONS AND RELEASES

TABLE OF CASES

ARBITRATION CASES

COURT CASES

RECORD

OS Received 05/19/2023

MISCELLANEOUS

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INTRODUCTION

Applicant, Mr. James Thomas Young ("Mr. Young") respectfully requests that the U.S. Securities and Exchange Commission (the "SEC" or "Commission") review a denial of forum executed by the Financial Industry Regulatory Authority, Inc. ("FINRA") Office of Dispute Resolution ("ODR"). Mr. Young was denied access to the FINRA arbitration forum ("FINRA Forum") to which he filed a request for expungement of a customer dispute disclosure, occurrence number 242259 (the "Occurrence"), from his Central Registration Depository ("CRD") and BrokerCheck Report. FINRA has limited or prohibited Mr. Young's access to a fundamentally important service that it offers – the ability to contest and seek expungement of a termination disclosure published on his CRD and BrokerCheck records – and in doing so, has exceeded its authority under the Exchange Act, its own rules, and has violated fundamental notions of due process.

OS Received 05/19/2023

FACTUAL BACKGROUND

FINRA is a not-for-profit Delaware corporation and self-regulatory organization ("SRO") registered with the SEC as a national securities association. FINRA, through its subsidiary, FINRA Regulation, Inc., has established the FINRA ODR. FINRA ODR's sole function is to operate a neutral arbitration and mediation forum to resolve securities industry disputes. FINRA ODR's authority is limited to the administration of the forum, and it is not permitted to engage in deciding the outcome of an award judgment.[1]

FINRA maintains an electronic database called the CRD and a public reporting system known as BrokerCheck.[2] This online, publicly marketed, reporting system includes the widespread disclosure of customer complaints against each Associated Person of a FINRA member firm. The purposes of the CRD and BrokerCheck systems are (1) to create a regulatory system to improve the overall regulation of advisors, (2) to make information about financial advisors available to the public, and (3) to provide financial advisors with an efficient automated filing system.

Mr. Young filed his Statement of Claim on May 26, 2022 requesting expungement of the Occurrence from his CRD record pursuant to FINRA Rule 2080 and principles of equity. *See*, CR[3] at 000011 and 000012, (Mr. Young requesting "any and all other relief that the Arbitrator deems just and equitable."). Mr. Young also alleged in his Statement of Claim that the Occurrence contains language that is not meritorious and "does not offer any public protection and has no regulatory value." CR at 000011

[1] "FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award." *FINRA Arbitration Overview* https://www.finra.org/arbitration-mediation/overview.
[2] 15 U.S.C. 78o-3(i)(1).
[3] "CR ___" refers to the Certified Record filed by FINRA on July 6, 2022 and the corresponding page number in that record.

OS Received 05/19/2023

On May 27, 2022, FINRA issued a notice to Mr. Young stating that it was denying Mr. Young access to the FINRA Forum (the "Denial Notice") because his request was allegedly "ineligible for expungement from CRD because an adverse 1934award against Claimant was rendered, and Claimant was held liable for damages to the customer." CR at 5. FINRA also stated in the Denial Notice that "A liability finding by a prior arbitrator or arbitration panel precludes a subsequent arbitrator from making one of the required findings under FINRA Rule 2080(b)(1)." FINRA therefore denied Mr. Young access to the FINRA Forum "pursuant to FINRA Rule 13203." CR at 5.

On June 22, 2022, Mr. Young timely submitted his Application for Review to the Commission, under Section 19(d) of the Securities Exchange Act of 1934 (the "Exchange Act")[4], challenging FINRA's determination that Mr. Young's claim is ineligible for arbitration and its decision to deny him access to its forum. On July 7, 2022, FINRA filed a motion seeking to Consolidate Mr. Young's case into the *Consolidated Arbitration Applications Matter. In the Matter of the Consol. Arb. Applications for Rev. of Actions Taken by FINRA* Release No. 97248 at 6 n.19 (Apr. 4, 2023). On April 4, 2023, in footnote 19, the Commission denied FINRA's Motion to Consolidate. *Id*. Mr. Young now timely files his Opening Brief in Support of his Application for Review.

JURISDICTION

The Commission has jurisdiction to hear this Application for Review under Section 19(d) of the Securities Exchange Act of 1934.[5] The Exchange Act authorizes the Commission to review an action taken by an SRO that "prohibits or limits any person in respect to access to

[4] 15 U.S.C. § 78s(d)

[5] *See, Consolidated Arbitration Applications, Exchange Act Release No*. 89495, 2019 WL 6287506 (August 6, 2020) (Commission finds jurisdiction to hear claims when FINRA prohibited applicants' access to its arbitration forum to seek expungement because "FINRA's service of providing arbitration of expungement claims is 'fundamentally important' and central to its function as an SRO.").

services offered" by the SRO. 15 U.S.C. § 78s(d). The Commission has explained, "[a] denial of access involves a denial or limitation of 'the applicant's ability to utilize one of the fundamentally important services offered by the SRO.'" *Eric David Wanger*, Exchange Act Release No. 79008, 2016 WL 5571629, at *4 (Sept. 30, 2016). The Commission has determined that the FINRA Forum for expungement is a fundamentally important service.[6]

A service offered by an SRO is "fundamentally important" if it is "central to the function of the SRO." *Id*. at 5. Mr. Young was denied access to this fundamental service when FINRA prohibited him from using its forum to seek expungement of a disclosure published on his CRD record.

LEGAL ANALYSIS

FINRA's denial of Mr. Young's access to the FINRA Forum is not consistent with FINRA rules, the law, or fundamental notions of due process.

FINRA's determination to deny Mr. Young access to its forum was an abuse of FINRA's authority under Rule 13203. FINRA Rule 13203 clearly outlines the parameters where the Director may decline to permit the use of the FINRA Forum: only where "the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives." The purpose of providing the FINRA Director with authority under Rule 13203 was to "give the Director the flexibility needed in *emergencies*" and to "address circumstances that may require immediate resolution, such as security concerns and other unusual but serious situations." 72 Fed. Reg. 20 at 4580-4601 (2007)

[6] "[G]iven FINRA's chosen structure and the scope of services it offers to members and third parties, we find that FINRA's service of providing arbitration of expungement claims is 'fundamentally important' and central to its function as an SRO." *See*, *Consolidated Arbitration Applications*, Exchange Act Release No. 89495, 2019 WL 6287506 (August 6, 2020) (the "Consolidated Matter").

OS Received 05/19/2023

(emphasis added). This authority was meant to be limited in application "in only a very narrow range of unusual circumstances." *Id.*

FINRA has not met its burden of showing that the determination, in this case, meets the requirements under FINRA Rule 13203, nor can it. There is no evidence in the record that Mr. Young's expungement request "would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives." FINRA Rule 13203. Likewise, there is no evidence that Mr. Young's expungement request is "inappropriate" for FINRA arbitration.

Contrary to FINRA's statements in the Denial Notice, FINRA rules allow for expungement of customer dispute disclosures in more than three instances outlined in FINRA Rule 2080. FINRA Rule 2080(b)(1) outlines three instances where FINRA will waive its requirement to be named in a court proceeding confirming an arbitration award. Nowhere in this rule does it state that a factual finding under FINRA Rule 2080(b)(1)(A) – (C) is *required* for expungement, nor does it state that these are the *only* three instances expungement may be granted. Instead, the rule clearly states the opposite: that there are other instances where expungement may be appropriate, e.g. when "(A) the expungement relief and accompanying findings on which it is based are meritorious; and (B) the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements." *See,* FINRA Rule 2080(b)(2).

Additionally, FINRA grants access to the FINRA Forum for claims seeking justice under general principles of equity and the FINRA Forum is not bound by strict pleading requirements. FINRA's own guide for arbitrators, The Arbitrator's Manual, states the following in a quote from Aristotle:

OS Received 05/19/2023

> "Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail." [7]

Therefore, Mr. Young is entitled to a hearing in the FINRA Forum based on his claim that the Occurrence should be expunged pursuant to the principles of equity. There is no rule preventing an arbitrator from finding that (A) the expungement relief and accompanying findings on which it is based are meritorious; or (B) the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements simply because the underlying claim was heard in the FINRA Forum. An arbitrator could find, based on equity, that expungement is appropriate pursuant to FINRA Rules. However, FINRA has decided to deny Mr. Young the opportunity to be heard regarding this claim.

Mr. Young's Statement of Claim is governed by FINRA rules, rather than by rules of civil procedure. Unlike in court, FINRA rules do not require that "claims" or "causes of action" be pled. In fact, in its response to comment letters regarding motions to dismiss, FINRA has stated:

> "FINRA reminds parties that there are no specific pleading requirements under the Codes. Rules 12302 and 13302 require a claimant to supply only "[a] statement of claim specifying the relevant facts and remedies requested" along with the required fees, copies, and signed submission agreement in order to

[7] *FINRA Dispute Resolution Services Arbitration Guide* at 9
See, https://www finra.org/sites/default/files/arbitrators-ref-guide.pdf.

OS Received 05/19/2023

initiate an arbitration.... Parties may obtain further information and documents through the discovery process."[8]

Since FINRA rules do not contain specific pleading requirements, claimants are not obligated to set forth specific names or titles for their alleged rights of recovery. Rather, ample authority establishes that arbitrators have the right to fashion whatever remedy best fits the evidence set before them. This fact has been recognized publicly by both Mark Lackritz[9], former President and CEO of the Securities Industry and Financial Markets Association, and Linda Fienberg[10], former President and Chief Hearing Officer of FINRA Dispute Resolution. Accordingly, Mr. Young was not required to plead specific causes of action to be entitled to a hearing on the merits of his case. Instead, Mr. Young was only required to submit a signed submission agreement and a statement of claim specifying the relevant facts and remedies requested, which he did. *See,* FINRA Rule 13302; *see also,* CR at 00005. Therefore, FINRA

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[8] *Letter dated September 15, 2008 from Mignon McLemore, Assistant Chief Counsel, FINRA Dispute Resolution to Securities and Exchange Commission*, available online at:
https://www finra.org/sites/default/files/RuleFiling/p116990.pdf

[9] Mr. Lackritz testified before the Committee on Financial Services, U.S. House of Representatives, on March 17, 2005 that "[u]nlike in court cases, claimants in arbitration are not held to technical pleading requirements." Mr. Lackritz further stated that while a "plaintiff in a court case may be faced with a daunting gauntlet of obstacles [including] a threshold motion attacking the sufficiency of pleading in a complaint," in contrast, "arbitration allows for a simple statement of claim[.]" *Statement of Marc E. Lackritz, President, Securities Industry Association* (March 17, 2005), GovInfo at 15-17.
https://www.govinfo.gov/content/pkg/CHRG-109hhrg24398/pdf/CHRG-109hhrg24398.pdf.

[10] Ms. Fienberg, formerly the president of NASD Dispute Resolution, was a featured speaker and panelist at the North American Securities Administrators Association ("NASAA") presentation entitled "NASAA Listens Forum," held at the National Press Club in Washington DC on July 20, 2004. She stated: "In arbitration, in SRO NASD arbitration, unlike in court, you get an equitable result. You do not have to have a claim that is cognizable under state or federal law. It can be cognizable under NASD rules. So for example, there's only one cause of action under the federal securities laws, that's l0(B), it's very limited, has a short statute of limitations. The rules that are applied by arbitrators looking for equitable relief are much broader than if they had to strictly follow the law." The import of this statement by the CEO of FINRA-DR is that arbitration is an equitable proceeding, rather than an action strictly governed by law. Indeed, according to Ms. Fienberg, claimants are not even required to have a claim cognizable at law. *See Appendix N. Remarks of Linda Feinberg, Securities Arbitration Desk Reference* (July 20, 2004) http://www.connectlive.com/events/nasaa/.

Rules allow for Mr. Young to be granted an opportunity to be heard based on his submission to the FINRA Forum.

Finally, the standard of proof in an underlying arbitration is also not the same as in an expungement hearing, and therefore, the fact that a registered representative has a "prior adverse award" does not equate to the inability to plead a valid basis for expungement. Arbitrators may issue awards or judgments against registered representatives and in favor of investors for many reasons. Neither FINRA nor the Exchange Act specifies a standard of proof that must be met in the arbitration of claims in the FINRA Forum. Nor does FINRA mandate to its arbitrators that a complaining customer must meet a burden of proof before an award may be made. This lack of specificity gives the arbitrator discretion to accept a lower burden of proof such that, even if the comparative fault of the customer is greater than the fault attributed to the respondents, the arbitrator may still issue an award in favor of the customer. To say it another way, as long as there is some credible evidence supporting an award to the complaining customer, even if that evidence does not meet a preponderance of the evidence standards, an arbitrator may find in the customer's favor.

FINRA has equated a finding in the customer's favor to a finding that a permanent disclosure on a representative's record is necessary for investor protection. That is simply not the case. A finding in favor of a customer does not mean that the associated disclosure will always be more beneficial to the investing public than harmful to the registered representative. Mr. Young asserts that the disclosure itself is more harmful to him than beneficial to the investing public, which is a valid basis for expungement and access to the FINRA Forum.

FINRA Rules are silent as to whether a claim that is tied to a prior award or settlement is eligible for expungement. Although the Commission has recently approved a rule change that

may prohibit these types of expungement claims, that rule has not taken effect and was not in effect at the time Mr. Young filed his Statement of Claim here. Interpreting the FINRA Rules is a question of contract, and those questions are under the exclusive domain of the arbitrator. *See, e.g. Livingston v. John Wiley & Sons, Inc.*, 313 F.2d 52, 59 (2d Cir. 1963), aff'd, 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964). FINRA's act of usurping the fact-finding role of the arbitrator undermines decades of law as well as notions of fundamental fairness. FINRA's denial of the forum in this case was an inconsistent and arbitrary application of Rule 13203, the Exchange Act, and fundamental notions of justice and equity.

Mr. Young's expungement claim is eligible for submission to FINRA's Forum and is not a collateral attack on the prior award.

Mr. Young's claim for expungement is eligible for arbitration. Mr. Young did not seek in his Statement of Claim to overturn or attack the underlying arbitration award. Instead, Mr. Young sought to remove the subsequent *publication* of the disclosure resulting from that award from his *CRD record*, which would have no effect on the underlying arbitration award or the damages or liability that was assessed in that case. FINRA provides access to this expungement process, which is separate and distinct from the underlying case.[11]

The Commission has recently issued an opinion on the use of FINRA's Forum when seeking expungement of adverse awards in *Consolidated Arbitration Applications.*[12] In that case, the Commission found that "FINRA acted in accordance with its rules when denying the applicants access to the arbitration forum because the applicants' expungement requests constituted collateral attacks on final adverse FINRA arbitration awards, which the Director

[11] FINRA expungement refers to the process of removing or deleting certain information from a broker's record in the CRD system. *See,* https://www.finra.org/rules-guidance/key-topics/expungement.

[12] *Consolidated Arbitration Applications, Exchange Act Release* No. 97248 (April 4, 2023).

OS Received 05/19/2023

could properly conclude were not consistent with the intent of the FINRA Arbitration Codes." *Consolidated Arbitration Applications,* at 10. The Commission clarified that, in that case, the applicants claim for expungement constituted a collateral attack on an adverse arbitration award because their claims rested on challenges to the merits of the underlying award. *Id.*

The Commission did however recognize instances where a person would have the ability to access the FINRA Forum even if seeking expungement of an adverse award. *Id.* (Had the applicants "argue[d] that the data reported about the award in the CRD was false or clearly erroneous—such as the date, outcome, or description of the award" or if they had "argue[d] that the award reported in the CRD had actually been issued against a different person", those "would be permissible uses of the arbitration forum."). In those instances, it would not be a collateral attack on the adverse award. In other words, if there are claims beyond challenging the merits of the underlying award, such an expungement request is permissible under FINRA rules.

Here, although Mr. Young's Statement of Claim does make allegations regarding the merits of the underlying award, those allegations are not the *only* allegations made in support of his request for expungement. *See*, e.g. CR at 000011 and 000012, (Mr. Young requests "any and all other relief that the Arbitrator deems just and equitable" and that publication of the Occurrence "does not offer any public protection and has no regulatory value."). Therefore, Mr. Young sought expungement both pursuant to FINRA Rule 2080 and/or pursuant to principles of equity.

Even if it is determined that principles of equity were not alleged in Mr. Young's Statement of Claim, and *were required* to be alleged, Mr. Young's claims were still not an impermissible collateral attack whereby he can be barred *by FINRA* from having access to its

OS Received 05/19/2023

arbitration forum. A collateral attack is an act seeking to reverse a prior judgment.[13] In contrast, expungement through FINRA does not challenge the prior judgment at all: any liability will remain unchanged and damages that were awarded to the customer will remain. In the totality, the final award is wholly unaffected.[14] The process for challenging a prior arbitration award remains vacatur. Mr. Young is not required to seek vacatur under FINRA rules before seeking expungement of the publication of the disclosure on the CRD.[15]

Furthermore, no order of expungement from a FINRA arbitration panel requires FINRA to remove all records from its FINRA Award system. The underlying original award judgment and the order granting expungement are neither removed nor restricted from FINRA's system. The Commission has even noted that the prior adverse awards were still viewable in the FINRA Arbitration Portal.[16]

The Commission has noted in the *Consolidated Arbitration Applications* opinion that "Courts have similarly held that seeking expungement of a prior conviction **can** amount to a collateral attack on the conviction even if the relief would not overturn the conviction itself."[17] (emphasis added). Even if that were true however, as mentioned above and as acknowledged by the Commission, where the allegations *do not* challenge the merits of the underlying award itself,

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[13] "Collateral attack" on judgment may be defined as attempt to avoid, defeat or evade judgment, or to deny its force and effect, in some judicial proceeding not provided by law for express purpose of reviewing it. *In re Lesh*, 253 B.R. 849 (Bankr. N.D. Ohio 2000); *see also, JGR, Inc. v. Thomasville Furniture Indus., Inc.,* 505 F. App'x 430, 434 (6th Cir. 2012).

[14] *See,* NYSE #1995-00486, case from 1996 where the customer was granted an award judgement that remains available in the FINRA portal despite being expunged in 2022 in FINRA Case No. #21-02316.

[15] *See, e.g.,* FINRA Rules 2080 and 13805; *see also,* https://www finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance.

[16] At footnote 11 in the *Consolidated Arbitration Applications* opinion the Commission noted that, "Arbitration awards are also available on another portion of FINRA's website. See https://www finra.org/arbitration-mediation/arbitration-awards. Applicants are not requesting that FINRA remove prior award information from that portion of FINRA's website." *Consolidated Arbitration Applications, Exchange Act Release No. 97248 at* 4 n.11 (Apr. 4, 2023)

[17] *Consolidated Arbitration Applications, Exchange Act Release No. 97248 at* 11 and n.38 (Apr. 4, 2023) , ("[T]he expungement of arrest or conviction records is a form of collateral attack").

but seek expungement under principles of equity – e.g. that the benefit to the public of the continued publication of the disclosure is outweighed by the harm it causes the advisor – such a claim for relief would *not* be a collateral attack.[18] [19] There is a similarity here with criminal expungement in Ohio where Mr. Young is domiciled. The state has established that even where a person is convicted of a crime, they are permitted to seek expungement of it under principles of equity on the basis that the benefit to the public is outweighed by the harm caused to the petitioner. *State v. Hilbert,* 145 Ohio App. 3d 824, 764 N.E.2d 1064 (2001).

The legislative purpose expungement of being that "people make mistakes, but that afterwards they regret their conduct and are older, wiser, and sadder, and thus, the current statute is, in a way, a manifestation of the traditional Western civilization concepts of sin, punishment, atonement, and forgiveness. *Id*. The standard to be applied in an expungement case is: the court must weigh the interest of the public's need to know as against the individual's interest in having the record sealed, and must liberally construe the expungement statute so as to promote the legislative purpose of allowing expungements. *Id*.

The contrast here with criminal expungement and FINRA expungement is that criminal expungement goes further than FINRA expungement and actually nullifies the effects and consequences of the prior case. Expungement in Ohio is defined, under § 2953.32(B)(1)(b) as "To destroy, delete, and erase a record as appropriate for the record's physical or electronic form or characteristic so that the record is permanently irretrievable."[20] This is where criminal

[18] 03-00741, and 10-05479/22-00105**,** In the mentioned awards the panel granted an expungement of the occurrences, but the award itself was not removed from the public system by FINRA or the panel. See https://www finra.org/arbitration-mediation/arbitration-awards.

[19] "Collateral attack" on judgment may be defined as attempt to avoid, defeat or evade judgment, or to deny its force and effect, in some judicial proceeding not provided by law for express purpose of reviewing it. *In re Lesh*, 253 B.R. 849 (Bankr. N.D. Ohio 2000)

[20] OH §2151.355, Expunged or sealed records defined: (A) "Expunge" means to destroy, delete, and erase a record, as appropriate for the record's physical or electronic form or characteristic, so that the record is permanently irretrievable. (B) "Seal a record" means to remove a record from the main file of similar records and to secure it in a

OS Received 05/19/2023

expungement can be seen as a clear collateral attack upon the prior case involving the petitioner. Whereas with Mr. Young and others seeking expungement of arbitration awards, such permanent record deletion and undermining of the original case does not occur.

The Commission should grant a remand to the Forum with the rules that were in place at the time of filing the SOC and/or Equitable Relief.

Due to the protracted duration of this process, Mr. Young respectfully requests that, as a part of any remand to the FINRA forum, the Commission directs the forum to employ the rules that were in place at the time of the filing of the Statement of Claim. The recently approved rule changes will substantially prejudice Mr. Young. *Securities Exchange Act Release* 34-97294 (April 19, 2023), 88 FR 24282 (April 19, 2023) (File No.SR-FINRA-2022-024) ("Notice"). These changes were not in place when Mr. Young first sought expungement in the forum, they are extremely detrimental to Mr. Young's interests, and they were not reasonably foreseeable at the time that Mr. Young endeavored to pursue expungement relief.

The Commission, according to Section 21(d)(5) of the Exchange Act, has the authority to grant this type of equitable relief as a way to provide fairness and justice in a particular case. Moreover, the Commission has the authority to grant exemptions, waivers, and no-action relief under certain circumstances. 15 U.S.C. § 78u. Mr. Young is deserving of an exemption that grandfathers him given the length of the process and the prejudicial effect that has had on his claim.

separate file that contains only sealed records accessible only to the juvenile court. See *Ohio Rev. Code Ann*. § 2151.355

CONCLUSION

FINRA violated its own rules, the Exchange Act, and principles of due process and equity when it denied Mr. Young access to its forum. The Commission must review the action of an SRO where the SRO issues a final action; prohibits or limits a person's access to services offered to any person by the SRO; and where an application by an aggrieved party is timely filed. FINRA's action in denying Mr. Young access to FINRA Forum is a final action by FINRA which prohibits Mr. Young's access to the service of FINRA arbitration and limits Mr. Young's access to request and obtain the relief he seeks. Furthermore, Mr. Young's Application for Review was timely filed with the Commission within 30 days of receiving the Denial Notice from FINRA.

For these reasons, Mr. Young submits this Opening Brief to the Commission requesting that he be permitted to have his expungement request resubmitted to the arbitration panel and to allow the arbitration panel to hold a hearing and issue a ruling under the rules in place at the time of the filing of his Statement of Claim. In the alternative, Mr. Young requests such other relief that is appropriate and ordered by the Commission.

OS Received 05/19/2023

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OS Received 05/19/2023

CERTIFICATE OF SERVICE

I, William R. Bean certify that on May 19, 2023, I caused a copy of the foregoing Opening Brief in Support of the Application for Review in the matter of James Thomas Young, Administrative Proceeding File No. 3-20905 to be filed through the SEC's eFAP system and served by electronic mail on:

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[X] (STATE) I certify (or declare) under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct.

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