

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**

In the Matter of the Application Of
Joseph Sylvester Sturniolo
For Review of Action Taken By
FINRA
File No. 3-21503

MR. STURNIOLO’S BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

INTRODUCTION

Applicant, Joseph Sylvester Sturniolo (“Mr. Sturniolo”) seeks Commission review of a determination by the Director of FINRA Dispute Resolution Services (“Director”) to deny Mr. Sturniolo access to the Financial Industry Regulatory Authority, Inc. (“FINRA”) arbitration forum, under FINRA Code of Arbitration Procedure for Industry Disputes (“FINRA Rules”) Rule 13203. Even in the wake of the Commission’s opinions in *Cynthia Mary Couyoumjian*, Exchange Act Release No. 97179, 2023 WL 2596892 (Mar. 21, 2023) (hereinafter “*Couyoumjian Order*”) and *Shaun Perry Nicholson*, Exchange Act Release No. 97604 (May 26, 2023) (hereinafter “*Nicholson Order*”), FINRA continues to improperly deny advisors access to its arbitration forum in violation of FINRA’s rules and the Securities Exchange Act of 1934 (the “Exchange Act”), and continues to cause unnecessary and unjustified delays and expenses in advisor’s path to seeking justice.

After FINRA improperly denied Mr. Sturniolo access to its arbitration forum, Mr. Sturniolo submitted his Application for Review to the Commission, pursuant to Section 19(d) of the

Exchange Act of 1934¹, challenging the Director’s determination that Mr. Sturniolo’s claim is ineligible for arbitration in FINRA’s Dispute Resolution Forum (“FINRA’s Forum”).

FACTUAL BACKGROUND

FINRA is a not-for-profit Delaware corporation and self-regulatory organization (“SRO”) registered with the U.S. Securities and Exchange Commission (the “SEC” or “Commission”) as a national securities association. FINRA has established the FINRA Dispute Resolution Services (“DRS”), which carries out the sole function of operating an arbitration and mediation forum to resolve securities industry disputes. The DRS’s authority is limited to administration of the forum, not regulatory policy decisions.

FINRA maintains an electronic database called the Central Registration Depository (“CRD”) and a public reporting system known as BrokerCheck. 15 U.S.C. 78o-3(i)(1). This online, publicly marketed reporting system includes the wide-spread publication of certain information for each Associated Person of a FINRA-member firm, including customer dispute disclosures. The purpose of the CRD and BrokerCheck systems are to: (1) to create a regulatory system for financial advisors to improve overall regulation of advisors, (2) to make information about financial advisors available to the public, and (3) to provide financial advisors an efficient automated filing system. FINRA requires member firms to report all customer complaints that meet specific requirements to FINRA, which FINRA then reports on the CRD and publicly discloses some of these occurrences on BrokerCheck, absent any determination of merit or factual basis. FINRA provides only one viable remedy for almost all Associated Persons to remove false or misreported customer complaints: expungement.

¹ 15 U.S.C. § 78s(d).

Mr. Sturniolo (CRD #1094557) is a resident of Centennial, Colorado. He has been a financial services professional since January of 1983. Mr. Sturniolo is currently a registered representative with Geneos Wealth Management, Inc. (CRD #120894) in Denver, Colorado. CR² at 1.

On May 3, 2002, a former customer of Mr. Sturniolo's filed complaint against him and his broker-dealer, First Allied Securities, Inc. ("First Allied"), alleging "breach of fiduciary duty, unsuitable investments, [and] negligence." CR at 117. Mr. Sturniolo denied these allegations. *Id.* Without admitting liability and with no findings that these allegations had any merit, First Allied and Mr. Sturniolo settled with the Customer. *Id.* These allegations were reported by First Allied to FINRA as a customer dispute disclosure, occurrence number 1094519 (the "Occurrence"), that FINRA then published on Mr. Sturniolo's CRD and BrokerCheck records where it has remained since. CR at 1559-1560.

PROCEDURAL HISTORY

On April 9, 2018, Mr. Sturniolo filed a Statement of Claim in FINRA's Forum against First Allied Securities, Inc. (CRD #32444) seeking expungement of the Occurrence that FINRA published on Mr. Sturniolo's CRD and BrokerCheck records. This FINRA arbitration matter was assigned FINRA Case No. 18-01305. CR at 1-96. On October 16, 2018, the sole arbitrator assigned to this case issued an award ("Award") denying Mr. Sturniolo's request for expungement. CR at 97-100.

On March 23, 2020, Mr. Sturniolo filed a Petition to Vacate Arbitration Award ("Petition to Vacate") in the Colorado District Court for Broomfield County ("Colorado Court") seeking to

² "CR at ___" refers to the Certified Record filed by FINRA on or about June 30, 2023 and the corresponding page number cited to.

vacate the Award issued in FINRA Case No. 18-01305. CR at 101-108.³ This matter was assigned Case No. 2020CV30098. CR at 109. On May 22, 2020, the Colorado Court issued an Order vacating the Award (“Vacate Order”). CR at 109-110.

On June 3, 2020, Mr. Sturniolo refiled his Statement of Claim in FINRA’s Forum seeking expungement of the Occurrence, which was assigned FINRA Case No. 20-1767. CR at 111-121. Mr. Sturniolo attached the Vacate Order as an exhibit to his Statement of Claim. CR at 119-121. On June 8, 2020, FINRA denied Mr. Sturniolo access to its arbitration forum based on FINRA Rule 12203 and/or 13203, claiming that his claim was “not eligible for arbitration”. CR at 123. Therefore, FINRA declined to accept the claim and closed the case “**without prejudice**”.⁴ CR at 123 (emphasis added). Notably, FINRA failed to provide any further explanation as to why it was denying Mr. Sturniolo access to its arbitration forum.

Due to FINRA’s denial of forum notice, on July 24, 2020, Mr. Sturniolo sought expungement of the Occurrence in District Court, Denver Colorado (“State Court Case”) and a permanent injunction against FINRA from continuing to disclose the Occurrence. This matter was assigned Case No. 2020CV32546. CR at 127-165.

While both Mr. Sturniolo and FINRA filed cross motions for summary judgment in the State Court Case, on May 7, 2022, the Denver Court granted FINRA’s motion for summary judgment. CR at 1497-1519. The Denver Court found that Mr. Sturniolo had not presented an actionable claim, as expungement is not a recognized cause of action *in Colorado*.⁵ CR at 1502.

³ FINRA only included the Petition to Vacate in the Certified Record, and did not include Exhibits 1-3 that were attached to the Petition to Vacate.

⁴ Black’s Law Dictionary defines, “without prejudice” as “a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided.” This is also the common meaning of the phrase. See, <https://thelawdictionary.org/prejudice/>.

⁵ The Denver Court also granted summary judgment on two other Colorado state law grounds that are not applicable here: (1) Issue preclusion: the court found that issue preclusion barred expungement because it (improperly) refused to recognize the Broomfield Court’s vacate order. CR at 1506. This identical issue has already been reviewed and rejected by the Commission as it applies to FINRA’s rules and the Exchange Act, and is therefore not a valid basis to

On March 21, 2023, the Commission issued its opinion in *Couyoumjian*. Based on that order, and pursuant to the Vacate Order, on April 28, 2023, Mr. Sturniolo refiled his Statement of Claim in FINRA’s Forum seeking expungement of the Occurrence. This matter was assigned FINRA Case No. 23-01163. CR at 1521-1526. In this Statement of Claim, Mr. Sturniolo submitted two claims: (1) Expungement Under FINRA Rule 2080, and (2) Equitable Expungement. CR at 1524-1526. Specifically, Mr. Sturniolo requested relief pursuant to FINRA Rule 2080(b)(1), 2080(b)(2), pursuant to principles of equity, and any other relief that the Arbitrator deemed just and equitable. CR at 1525-1526.

On May 1, 2023, FINRA denied Mr. Sturniolo access to FINRA’s Forum claiming that “the matter is ineligible for expungement because an arbitration panel in FINRA Case No. 18-01305 previously rendered an award denying expungement” and that [t]herefore, pursuant to FINRA Rules 12203 or 13203, the Director denies the use of the forum.” CR at 1527. On May 3, 2023, Mr. Sturniolo filed a notice with FINRA attaching the Vacate Order and requesting that FINRA permit Mr. Sturniolo access to its arbitration forum. CR at 1529-1531. FINRA then accepted Mr. Sturniolo’s case for arbitration and served the Statement of Claim on the opposing party (First Allied). CR at 1533-1536.

However, on May 22, 2023, FINRA issued *another* forum denial letter (the “Denial Notice”), after having already permitted Mr. Sturniolo access to its Forum. CR at 1537. This time, FINRA claimed that Mr. Sturniolo’s request for expungement was “inappropriate for consideration in FINRA’s arbitration forum” because after FINRA denied Mr. Sturniolo access to its forum the

deny Mr. Sturniolo access to FINRA’s Forum. *See, Couyoumjian* Order, at 6-7. (2) Laches: the Denver Court also found that Mr. Sturniolo’s claim *under Colorado law* was barred by the doctrine of laches. CR at 1514. Such a defense to a claim *against FINRA* is clearly not applicable (nor was it ever raised) in Mr. Sturniolo’s expungement request *against First Allied* in FINRA’s Forum, and this ground should not be considered for purposes of this application for review. Notably, the Denver Court never made a determination on the actual merits of Mr. Sturniolo’s claim, and granted summary judgment on procedural grounds.

first time and he filed for expungement in Colorado, the Denver Court granted FINRA's motion for summary judgment. CR at 1537. Had FINRA not improperly denied Mr. Sturniolo access to its Forum in this first place, in 2020, this State Court Case would never have existed.

On June 21, 2023, Mr. Sturniolo filed his Application for Review of FINRA's denial of forum. CR at 1539-1542. Mr. Sturniolo now hereby submits his brief in support of his application for review.

JURISDICTION

The Commission has jurisdiction to hear this Application for Review pursuant to Section 19(d) of the Securities Exchange Act of 1934, since Mr. Sturniolo seeks review of an action taken by an SRO (i.e. FINRA), where those actions prohibited or limited Mr. Sturniolo's access to services offered by the SRO.⁶

LEGAL ANALYSIS

Pursuant to Section 19(f) of the Exchange Act, the Commission reviews an action by FINRA that prohibits or limits a person's access to its services to determine if (1) the specific grounds on which FINRA based the action exist in fact; (2) the action was in accordance with FINRA's rules; and (3) FINRA's rules are, and were applied in a manner, consistent with the Exchange Act's purposes. *See*, 15 U.S.C. § 78s(f). In this case, FINRA's determination that Mr. Sturniolo's claim is "inappropriate" for FINRA arbitration pursuant to FINRA Rule 13203, and its action prohibiting him access to the FINRA Forum, was not based in fact, was not in accordance with its rules, and it was not applied in a manner consistent with the Exchange Act's purposes. CR at 1537.

⁶ *See*, *Consolidated Arbitration Applications, Exchange Act Release No. 89495*, 2019 WL 6287506 (August 6, 2020) (Commission finds jurisdiction to hear claims where 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."); *see also*, *Nicholson* Order at 4.

FINRA Rule 13203(a) states that:

The Director may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the Code, 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. Only the Director may exercise the authority under this Rule.

FINRA's Denial Notice does not align with the required standard of a determination that the "subject matter" is "inappropriate" "given the purposes of FINRA and the intent of the Code."⁷ FINRA's explanation as to why Mr. Sturniolo's request is "inappropriate" simply details the procedural history of Mr. Sturniolo's expungement request (and its previous inappropriate attempts to deny Mr. Sturniolo access to its Forum), and the fact that the Denver Court granted summary judgment in the State Court Case, but it does not actually state *why* the procedural history of this matter makes Mr. Sturniolo's claim "inappropriate" for arbitration its Forum under its rules. CR at 1537. The Exchange Act explicitly requires that "a determination by the association to...prohibit or limit a person with respect to access to services offered by the association or a member thereof shall be supported by a statement setting forth the specific grounds on which the...prohibition or limitation is based." 15 U.S.C.A. § 78o-3(h)(2) (emphasis added). Therefore, this application for review addresses FINRA's stated reasons in the Denial Notice only, and FINRA should be precluded from arguing additional reasons not stated therein. FINRA's stated reasons, as gleaned from its Denial Notice, are that: (A) Mr. Sturniolo previously vacated the Award, and (B) that the Denver Court granted summary judgment.⁸ Neither reason asserted by

⁷ FINRA has not stated that it has made a determination that the expungement request at issue "would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives", and therefore, that standard to deny forum under FINRA Rule 13203 is not applicable and is not addressed here.

⁸ Based on FINRA's vaguely-worded Denial Notice, it is difficult for Mr. Sturniolo to guess what the reason was behind FINRA's determination beyond what is stated in the Denial Notice. Therefore, any attempt by FINRA to deviate from what is stated therein should be deemed waived, and Mr. Sturniolo reserves the right to address any further reasons claimed by FINRA.

FINRA is a valid reason under its own rules or the Exchange Act to deny Mr. Sturniolo access to its Forum.

A. FINRA’s prohibition of Mr. Sturniolo’s request to be heard in the FINRA Forum based on a prior vacated award is not consistent with either FINRA rules or the Exchange Act.

If FINRA claims that it denied Mr. Sturniolo access to its Forum based on the fact that he vacated the Award, this reason is without merit. First, this very issue has already been decided by the Commission in identical matters: *Couyoumjian* and *Nicholson*. In those cases, registered representatives’ requests for expungement in FINRA’s Forum were denied, and those awards were subsequently vacated. After those advisors refiled for FINRA arbitration, FINRA improperly denied them access to its Forum. After *Couyoumjian* sought review with the Commission, the Commission determined that “FINRA’s decision to deny Couyoumjian access to its arbitration forum to obtain a new, final arbitration award was not in accordance with its rules.” *Couyoumjian* Order, at 7. Likewise, in *Nicholson*, the Commission again found that “FINRA has thus prohibited or limited Nicholson’s access to its arbitration forum by preventing him from seeking a new, valid award as to those two expungement claims” and that such denial of forum “was not in accordance with its rules.” *Nicholson* Order, at 5-6.

Just as the applicants in *Couyoumjian* and *Nicholson* did, here, Mr. Sturniolo vacated the Award. Following an arbitration, a party has a right to seek vacatur of the award. *See*, 9 U.S.C. §§ 9, 10. An arbitration award that is subsequently vacated is rendered invalid and is not binding on anyone. *See*, *Couyoumjian* Order; *see also*, *Nicholson* Order; *Lindland v. U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000, 1005 (7th Cir. 2000); *Close v. Motorists Mut. Ins. Co.*, 21 Ohio App. 3d 228, 231, 486 N.E.2d 1275, 1279 (1985) (holding that “[t]he vacation of an arbitration award on procedural grounds leaves the parties as they were at the beginning of the process, and they are each entitled to begin anew.”). Here, Mr. Sturniolo exercised his right to seek vacatur of the

arbitration award that was rendered in FINRA Case No. 18-01305. CR at 101-108. The Broomfield Court granted Mr. Sturniolo's request for vacatur of that award, which entitled Mr. Sturniolo to begin anew with his expungement request. CR at 109-110. That vacatur order was never appealed or further challenged. Following vacatur, Mr. Sturniolo rightly sought to refile his expungement request in FINRA's Forum, when FINRA denied his access to its forum back in 2020. CR at 111-121; 123. FINRA's first denial of forum was issued "without prejudice", so left with little choice, Mr. Sturniolo filed his expungement action in Colorado state court. CR at 123.

Denying Mr. Sturniolo's access to FINRA's Forum based in part on the fact that he vacated the original arbitration award is inconsistent with the purpose and intent of Rule 13203.⁹ FINRA has, pursuant to its rulemaking procedures, adopted Rules and issued guidance on expungement procedure.¹⁰ None of the adopted rules and guidance state that an application for expungement will be barred or ineligible for arbitration if the claimant obtains an order vacating the original arbitration award. The creation of such a rule by FINRA would effectively render any vacatur order useless and bypasses the rulemaking procedures adopted by FINRA and codified in FINRA Rule 0110 that requires public notice and SEC approval for any new rules or rule changes.¹¹

Having publicly-available disclosures that broadcast allegations of securities practice violations is equated to being a con artist, an unscrupulous financial professional, or a disreputable person. Mr. Sturniolo's disclosure calls into question his good name, reputation, honor, and integrity. Further, FINRA Rule 3110 requires member firms to review and consider an investment

⁹ The purpose of providing the FINRA Director with this authority under Rule 13203 was to "give the Director the flexibility needed in *emergency* situations" 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) (emphasis added). "[T]his authority, which cannot be delegated by the Director...should be limited by application in *only a very narrow range of unusual circumstances.*" *Id.* at 4602. (emphasis added).

¹⁰ See, e.g., FINRA Rules 2080 and 13805; see also, <https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>.

¹¹ See FINRA Rulemaking Process <https://www.finra.org/rules-guidance/rulemaking-process>.

advisor's CRD when making hiring, retention, and advancement decisions.¹² The disclosures have a tangible effect on Mr. Sturniolo's pursuit of his chosen profession. Mr. Sturniolo has the right to an evidentiary hearing to determine whether his disclosure should be expunged; a right that FINRA has continually denied Mr. Sturniolo access to in violation of the Exchange Act and its own rules. *See*, FINRA Rules 13805 and 2080.

FINRA's denial of Forum based on the vacated award is also an inconsistent, arbitrary, and inappropriate application of FINRA Rule 13203 as well as in excess of its authority under the Exchange Act. There are countless cases where a party to a FINRA arbitration was denied their requested relief, sought vacatur and succeeded, and then FINRA allowed their claims to be refiled in FINRA's Forum and proceed to the merits.¹³ If FINRA allows *some* parties to its Forum to refile their claims after successfully obtaining vacatur relief, including requests for expungement relief, but then denied Mr. Sturniolo based on this same reason, FINRA's rules were applied in a manner inconsistent with the Exchange Act's purposes.

Finally, FINRA waived the issue of challenging vacatur of the Award, considering it permitted Mr. Sturniolo access to its Forum after Mr. Sturniolo submitted the Vacate Order from the Broomfield court. *See*, CR at 1527-1533.

B. FINRA's prohibition of Mr. Sturniolo's request to be heard in the FINRA Forum based on summary judgment in the State Court Case is not consistent with either FINRA rules or the Exchange Act.

If FINRA claims that it denied Mr. Sturniolo access to its Forum based on the fact that it obtained summary judgment in the State Court Case, this reason is likewise without merit. CR at

¹² *See, e.g.*, FINRA Rule 3110(e).

¹³ *See, Ling Yung Wu v. J.P. Morgan Securities, LLC*, FINRA Case No. 18-02825 (Claimant Wu sought expungement of a customer dispute disclosure from her CRD record in FINRA's Forum, and after a hearing on the merits, an award was issued denying Wu's request for expungement. Wu vacated that award in state court and refiled her claim in FINRA's Forum, and FINRA allowed the expungement request to proceed to another hearing on the merits where Wu's expungement request was granted.

1537. First, Mr. Sturniolo would not have been in the position of needing to file a complaint in state court had FINRA not improperly denied Mr. Sturniolo access to its Forum in 2020. *See*, CR at 123. Regardless, Mr. Sturniolo never had the opportunity to be heard on the merits in state court. In Colorado, summary judgment is proper when there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” C.R.C.P. 56(c). The Denver Court never made a determination on the merits of Mr. Sturniolo’s claim, and instead, determined only that Mr. Sturniolo did not state a recognized cause of action *in Colorado*. CR at 1502 (stating that the court’s research “revealed no authority recognizing equitable expungement as a valid cause of action in Colorado[.]”). Specifically, the Denver Court found that “there are no disputes of fact relating to the *procedural history* of the case” and granted summary judgment based solely on Colorado state law (i.e. no cause of action in Colorado, collateral estoppel, and laches). *Id.* (emphasis added). However, each of these legal theories for summary judgment are not applicable in FINRA’s arbitration Forum for a basis to deny Mr. Sturniolo access to it. There *is* a cause of action for expungement in FINRA (i.e. pursuant to FINRA Rule 2080 and under equitable principles of expungement), and Mr. Sturniolo pled each of these separate causes of action in his Statement of Claim. CR at 1524-1526. As for the collateral estoppel issue, this has already been addressed, and rejected, by the Commission under identical circumstances, as addressed above. *See, Couyoumjian Order*, at 7; *see also, Nicholson Order*, at 5-6. Finally, the affirmative defense of laches is a potential defense that may be asserted by a *party* to the arbitration proceeding, and is not a valid reason under FINRA rules or the Exchange Act for denying a claimant access to FINRA’s Forum. *See*, FINRA Rule 13303. FINRA has failed to establish, or even state, how the summary judgment order renders Mr. Sturniolo’s Statement of Claim “inappropriate” for submission to its Forum under its rules and the Exchange Act – because it does not. Therefore, the

Denver Court's finding that there is no cause of action in Colorado does not equate to Mr. Sturniolo's expungement claim in the FINRA Forum not being actionable.

The Commission has found that "FINRA's service of providing arbitration of expungement claims is fundamentally important and central to its function as an SRO." *Consolidated Arbitration Applications, Exchange Act Release No. 89495, 2019 WL 6287506, at 5* (August 6, 2020). Mr. Sturniolo has been attempting to access that fundamentally important service for years now, and has been continually and inappropriately denied access and prevented from doing so by FINRA.

C. Mr. Sturniolo should be subject to the FINRA Rules of Arbitration Procedure in effect at the time he filed his Statement of Claim.

During the pendency of Mr. Sturniolo's attempts to access FINRA's Forum, FINRA has since indicated that, effective October 16, 2023, it will be changing its rules regarding expungement. The new rule change will likely significantly change Mr. Sturniolo's ability to seek expungement. Mr. Sturniolo should not be prejudiced by FINRA's obstruction and respectfully requests that an order for remand from the Commission be accompanied by an order, *nunc pro tunc*, to FINRA that Mr. Sturniolo be entitled to proceed under the FINRA rules that were currently in existence at the time he filed his Statement of Claim, either on June 3, 2020 (the date that Mr. Sturniolo initially refiled his claim after obtaining vacatur¹⁴), or on April 28, 2023 (the date that Mr. Sturniolo filed his Statement of Claim that is subject to this application for review¹⁵).

CONCLUSION

The Commission is required to review an action of a SRO if the action is final, prohibits or limits a person's access to services offered to any person by the SRO, and an application by an aggrieved party is filed. Mr. Sturniolo is an Associated Person, who is provided access to the

¹⁴ CR at 1.

¹⁵ CR at 1521.

service of FINRA arbitration forum. FINRA's decision to deny Mr. Sturniolo's access to its arbitration forum is a final action by FINRA, which prohibits Mr. Sturniolo's access to the service of FINRA arbitration, limits his access to request any relief at all, and his application for review was filed with the Commission within 30 days of receiving the Denial Notice from FINRA. Therefore, Mr. Sturniolo respectfully requests an order allowing Mr. Sturniolo to bring his expungement claim through FINRA's Forum under the currently-existing expungement rules.

Dated: August 28, 2023

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Colby Phay, hereby certify that on this 28th day of August 2023, a true and correct copy of the foregoing *Applicant's Brief In Support of Application for Review* has been filed through the SEC's eFAP system and served by electronic mail as follows:

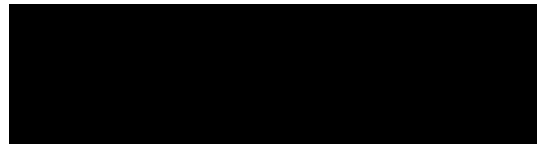
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[X] (STATE) I certify (or declare) under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct.



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