BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application Of Norman Thorn Robertson For Review of Action Taken By FINRA File No. 3-21982

MR. ROBERTSON'S BRIEF IN SUPPORT OF HIS APPLICATION FOR REVIEW

Applicant, Norman Thorn Robertson ("Mr. Robertson"), seeks Commission review of a determination by Financial Industry Regulatory Authority, Inc. ("FINRA") to deny Mr. Robertson access to its arbitration forum, under FINRA Code of Arbitration Procedure for Industry Disputes Rule 13203(a) or the Customer Code Rule 12203(a) (collectively, "FINRA Rules"). Mr. Robertson, by and through counsel, timely submitted an Application for Review to the Commission, pursuant to Section 19(d) of the Securities Exchange Act of 1934 (the "Exchange Act")[1], challenging FINRA's action in prohibiting Mr. Robertson's access to its forum. Mr. Robertson respectfully requests the Commission remand his case back to FINRA's arbitration forum so that he may access that fundamentally important service.

INTRODUCTION

FINRA is a not-for-profit Delaware corporation and self-regulatory organization ("SRO") registered with the U.S. Securities and Exchange Commission ("SEC" or "Commission") as a

[1] 15 U.S.C. § 78s(d).

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national securities association. FINRA, through its subsidiary, FINRA Regulation, Inc., has established the FINRA Dispute Resolution Services ("ODR"), which carries out the sole function of operating an arbitration and mediation forum to resolve securities industry disputes. The ODR's authority is limited to administration of the forum, not to making regulatory policy decisions.[2]

FINRA maintains an electronic database called the Central Registration Depository ("CRD") and a public reporting system known as BrokerCheck.[3] This online, publicly marketed reporting system includes the wide-spread disclosure of customer complaints against each Associated Person of a FINRA Member firm, as well as termination events and regulatory disclosures.[4] FINRA provides only one viable remedy for the removal of information from the CRD and BrokerCheck, which is expungement pursuant to FINRA Rules 2080, 13805, or 8312.

On June 27, 2024, Mr. Robertson, who resides in Santa Barbara, California, submitted a Statement of Claim to the FINRA ODR requesting a hearing for the expungement of a Form U6 regulatory action corresponding with Occurrence Number 144491 ("the Occurrence") from his CRD record.[5, 6, 7] On July 1, 2024, counsel for Mr. Robertson received notice (the "Forum Denial Notice") from the Director of FINRA ("Director") that FINRA denied Mr. Robertson access to its forum.[8] The Forum Denial Notice stated that, "this matter is ineligible for expungement because Occurrence Number 144491 involves the same conduct that is the basis of a final regulatory action taken by a securities regulator or self-regulatory organization."[9] FINRA denied forum pursuant to FINRA Rules 12203 or 13203.[10]

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[2] *See generally*, FINRA Dispute Resolution Services Party's Reference Guide.
[3] 15 U.S.C. 78o-3(i)(1).
[4] *See*, FINRA Rule 8312.
[5] This matter was assigned FINRA Case No. 24-01429.
[6] CR at 9.
[7] CR at ___" refers to the page citation for the certified record filed by FINRA in this matter on July 31, 2024.
[8] CR at 23.
[9] *Id.*
[10] *Id.*

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FINRA Rules 12203 and 13203 do not allow for forum denial in this situation. FINRA Rule 12203(a) and 13203(a), which contain identical language, state:

> 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.[11]

On July 22, 2024, Mr. Robertson timely filed his Application for Review of FINRA's decision to deny access it its arbitration forum. On August 21, 2024, the SEC issued its initial briefing schedule. Upon the motion of Mr. Robertson, the SEC issued an updated briefing schedule on October 4, 2024, indicating that Mr. Robertson's Brief in support of the application for review is due on October 7, 2024, FINRA's response is due on November 4, 2024, and Mr. Robertson's reply is due November 18, 2024. Mr. Robertson hereby timely submits his brief in support of his application.

FACTUAL BACKGROUND

Underlying Facts

On April 1, 1991, Mr. Robertson, an advisor at Shearson Lehman Brothers, Inc. ("SLB"), facilitated opening at account at SLB for a customer, SD.[12] The following day, JB, a friend and former co-employee of Mr. Robertson, prepared and presented to Mr. Robertson a letter in connection with a real estate transaction that inaccurately reflected an account balance to which Mr. Robertson signed.[13] On May 2, 1991, Mr. Robertson was presented with a second letter prepared by JB which provided an inaccurate account balance.[14] Mr. Robertson was told that the

[11] *Id.*
[12] CR at 2.
[13] CR at 2-3.
[14] CR at 3.

funds would be deposited in the account, which they were that same day.[15] The day the second letter was presented to and signed by Mr. Robertson, he was in the process of writing a eulogy to present at his family member's funeral the next day, and left later that day to fly to the funeral destination.[16] Mr. Robertson was not otherwise involved in the real estate transaction, and did not gain or stand to gain any benefit from the transaction.[17]

A legal dispute later evolved between JB and another party to the real estate transaction.[18] One of the parties to the real estate transaction submitted a complaint for, among other things, Mr. Robertson's actions in signing the letters ("Customer Complaint").[19]

Customer Dispute Disclosure

The Customer Complaint was reported on April 2, 1993 to Mr. Robertson's CRD and BrokerCheck records as a customer dispute disclosure alleging that the "[customer] claimed that I participated in a conspiracy to defraud him by providing inaccurate account information on a Shearson client to whom he ([customer]) made a loan."[20, 21] This matter was ultimately settled by SLB for $10,000, and without admitting liability, Mr. Robertson was released of all liability.[22]

Mr. Robertson later sought expungement of this customer dispute disclosure in FINRA's Arbitration Forum in FINRA Case No. 20-02721.[23] After a hearing on the merits was held, the FINRA arbitration panel issued an award ("Award") dated May 13, 2021 whereby it recommended expungement of the customer dispute disclosure from Mr. Robertson's CRD and BrokerCheck

[15] *Id.*
[16] *Id.*
[17] CR at 3, 11.
[18] CR at 3.
[19] *Id.*
[20] *See* Exhibit 1 at 3.
[21] A Motion to Adduce Additional Evidence seeking to admit Exhibits 1-6 will be filed, but has not yet been ruled on by the Commission.
[22] CR at 3.
[23] *See* Exhibit 2 at 3.

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records pursuant to FINRA Rule 2080, finding that the customer dispute disclosure was "factually impossible or clearly erroneous."[24] Mr. Robertson then filed for confirmation of the Award, naming FINRA as a party to the case, and FINRA did not oppose the expungement of the customer dispute disclosure and received a court order confirming the expungement of the arbitration award.[25] This matter was then successfully expunged from Mr. Robertson's CRD record.[26]

Regulatory Disclosure

On March 10, 1994, the NASD's District Business Conduct Committee for District No. 2 (the "Committee") filed a complaint with the NASD (No. C02940005) (the "NASD Complaint"), naming Mr. Robertson and alleging violations of Article III, Section 1 of the NASD's Rules of Fair Practice.[27]

A hearing for the NASD Complaint was convened on June 7, 1994.[28] On August 4, 1994, the NASD issued a decision in the matter, finding that Mr. Robertson had violated Article III, Section 1 of the NASD's rules.[29] The NASD also found that mitigating factors existed, and that Mr. Robertson did not benefit, nor did he stand to benefit in any way, from the transaction.[30] The NASD further found that Mr. Robertson had been a disinterested party in the matter, and that he had been preoccupied with other business and personal matters due to the death in his family and other matters.[31] The NASD also found that the letters were of limited significance to the real estate transaction in question.[32]

[24] *Id.*
[25] *See* Exhibit 3.
[26] *See* Exhibit 4.
[27] CR at 1.
[28] *Id.*
[29] *Id.*
[30] CR at 3-4.
[31] *Id.*
[32] CR at 3.

On July 7, 1999, the NASD filed a Form-U6 regulatory action (Docket/Case No. CO2940005) corresponding with the Occurrence.[33] The Occurrence was reported to Mr. Robertson's Registration Records.[34] The Occurrence states that Mr. Robertson was sanctioned in the form of a "Monetary/Fine Sanction (Amount: $20,000); Suspension Sanction; Censure Sanction" and that he was "suspended for ninety days, fined $20,000, ordered to requalify by examination."[35] The Occurrence also states that the disclosure was initiated on March 10, 1994 and resolved on September 19, 1994 by a "Decision."[36]

Mr. Robertson now seeks expungement of the Occurrence, pursuant to FINRA rules and/or principles of equity, as outlined in his Statement of Claim filed before FINRA.[37]

ARGUMENT

I. The Commission Has Jurisdiction Over Mr. Robertson's Appeal.

The Commission has jurisdiction over this appeal and should proceed to the merits of Mr. Robertson's application for review. Section 19(d) of the Exchange Act authorizes the Commission to review an action taken by an SRO that "prohibits or limits a person in respect to access to services offered' by the SRO."[38] In determining whether the Commission has jurisdiction under the above standard, the Commission asks "whether the SRO prohibited or limited access to a service that the SRO offers and whether that service is fundamentally important."[39]

As to the first prong, the Commission has already determined that "[b]ecause the Director's decision that a claim is not eligible for arbitration deprives the applicants of the ability to

[33] CR at 9.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] 15 U.S.C. § 78s(d); *see also,* SEC Release No. 72182.
[39] *See, Consolidated Arbitration Applications, Exchange Act Release No*. 89495, 2019 WL 6287506, at 3 (August 6, 2020) (the "Consolidated Matter").

participate in that service with respect to that claim, it effects a prohibition of access to the arbitration forum."[40] Here, the Director did just that – determined that Mr. Robertson's claim is not eligible for arbitration, which therefore deprived Mr. Robertson of the ability to participate in a service that FINRA offers with respect to his claim for expungement.[41] This is a prohibition of access to the arbitration forum that satisfies the first prong of the jurisdictional test.

FINRA offers the service of expungement of regulatory disclosures. FINRA states that "a dispute must be arbitrated under the [FINRA] Code if the dispute arises out of the business activities of a member or an associated person and is between or among Members; Members and Associated Persons; or Associated Persons."[42] Mr. Robertson is an Associated Person and the dispute at issue here arises "out of the business activities of a member of an associated person."[43] Therefore, Mr. Robertson is not only *permitted* to seek relief in FINRA's Forum, but FINRA's rules *require* it. The FINRA Dispute Resolution Task Force has also stated that FINRA's arbitration forum is "for all practical purposes, the sole arbitration forum in the United States for resolving disputes between broker-dealers, associated persons, and customers," and that, as of 2015, FINRA "handle[d] more than 99 percent of the securities-related arbitrations and mediations in the [United States]."[44]

FINRA offers the service (or in the alternative should offer) of regulatory disclosure expungement under both FINRA rules and under theories of equitable relief, and expungement is not limited to customer dispute disclosures. Pursuant to FINRA Rule 8312(g), "FINRA shall not

[40] *Id.* at 4.
[41] CR at 23.
[42] *See*, FINRA Rule 13200(a) (emphasis added).
[43] FINRA Rule 13200(a).
[44] *See,* FINRA Dispute Resolution Task Force, *Final Report and Recommendations of the FINRA Dispute Resolution Task Force* 1 (Dec. 16, 2015), http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf (emphasis added).

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release…information that contains…offensive or potentially defamatory language or information that raises…privacy concerns not outweighed by investor protection concerns."[45] FINRA has also acknowledged that it will "expunge information from the CRD system based on expungement directives contained in arbitration awards rendered in disputes between firms and current or former associated persons, where arbitrators have awarded such relief based on the defamatory nature of the information."[46] Notably, FINRA's directive in Reg. Notice 99-09 specifically references expungement of information from the CRD that does *not* involve customer dispute disclosures, so long as the information is "defamatory in nature." Additionally, FINRA Notice to Members 99-54 ("Notice 99-54") states that "ordering expungement of information from the CRD system that is found to be defamatory, misleading, inaccurate, or erroneous, is equitable in nature."[47] Additionally, "[i]t is widely accepted that arbitrators should have the authority to award equitable relief."[48] "Arbitrators…may base their decision upon broad principles of justice and equity....[and] make their award *ex aequo et bono* [according to what is just and good]."[49] FINRA has also recognized this authority: FINRA "arbitrators [have] broad authority to grant equitable relief".[50]

Although the Commission has previously held that FINRA does not offer the service of expungement of regulatory disclosures, this decision was flawed and should be overturned, and in the alternative, should not be applied to this case.[51] In *DeMaria,* the Commission stated that, because FINRA's rules do not contain an explicit procedure for expunging regulatory disclosures, like it does for customer dispute disclosures under FINRA Rule 2080, it must not offer the

[45] FINRA Rule 8312(g).
[46] NASD Notice to Members 99-09 ("Reg. Notice 99-09").
[47] NASD Notice to Members 99-54 ("Reg. Notice 99-54").
[48] *Id.*; *citing Southland Corp. v. Keating,* 465 U.S. 1, 13 (1984).
[49] *Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert*, 194 Cal. App. 4th 519 (Cal. Ct. App. 2011).
[50] *Id.*
[51] *Opinion of the Commission*, In the Matter of Michael Andrew DeMaria, Release No. 97511, at *5-6 (May 16, 2023) ("*DeMaria* Opinion").

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service.[52] However, as explained above, FINRA's rules do not contain an explicit subsection of expungement for other types of disclosures on the CRD – like U5 termination disclosures – but FINRA has long-recognized and allowed expungement requests for such disclosures time and time again.[53] Significantly here, there is nothing in FINRA's rules that *prohibit* an applicant to seek expungement of a regulatory disclosure. Neither FINRA, nor the Commission in *DeMaria,* provide any reasoning why the expungement of a regulatory disclosure is any different from seeking expungement of a customer dispute disclosure, or a termination disclosure, or a criminal disclosure,[54] or any other type of information for which FINRA has *already* offered the service of expungement. The purpose of expungement is to allow an individual to remove information disclosed on a public database based on principals of equity, and that is exactly what Mr. Robertson is doing here. The ability to seek removal of this information is consistent with the provisions of Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade...and in general, to protect investors and the public interest."

In addition to the authority cited above, in this matter, a neutral arbitrator in FINRA's arbitration forum issued a finding that the facts in the underlying the Occurrence are based on factually impossible and/or clearly erroneous information[55]. The underlying facts of the now-expunged customer dispute disclosure are the exact same facts that resulted in the regulatory disclosure and the reporting of the Occurrence. As such, expungement of the Occurrence falls squarely under the standard delineated under Rule 8312. Further, absent the use of FINRA's forum, Mr. Robertson would have no alternative forum in which to bring such an expungement request,

[52] *Id.* at 6.
[53] *See generally* Exhibit 5.
[54] *See* Exhibit 6.
[55] *See* Exhibit 2 at 3.

thereby depriving him of due process and principles of equity that already exist in the vast majority of jurisdictions throughout the country with respect to criminal charges and convictions.[56] Therefore, the first prong of the Commission's test is satisfied.

Mr. Robertson's claim for expungement of the disclosure of the Occurrence on his Registration Records is also not an attack on the NASD order itself. In *U.S. v. Carey*, expungement of a prior criminal conviction was sought and the Sixth Circuit considered whether a motion for expungement would be considered a collateral attack on the conviction itself.[57] The Court specifically stated that Carey did not seek relief from the punishment or to reverse the prosecution against him, and found that "a motion for expungement, which is not brought as an attempt to couch a challenge to a conviction, is not considered a collateral attack on that conviction."[58] The Nineth Circuit has also weighed in on this issue, stating that expungement is when a defendant "asks that the court destroy or seal the records of the fact of the defendant's conviction, and not the conviction itself."[59] The Court further differentiated expungement relief from vacatur by stating that, "[w]hen a court vacates a conviction, it sets aside or nullifies the conviction and its attendant legal disabilities."[60]

The second prong is also satisfied here – that the service FINRA denied Mr. Robertson access to is "fundamentally important service" offered by FINRA.[61] Again, the Commission has also already determined that FINRA's arbitration forum is a fundamentally important service it

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[56] Collateral Consequences Resource Center, 50-State Comparison: Expungement, Sealing & Other Record Relief (accessed October 5, 2024), https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/.
[57] *U.S. v. Carey*, 602 F.3d 738, 740 (6th Cir. 2010).
[58] *Id.*; *see also*, *United States v. Fourtounis*, 2018 WL 6267757, at *3 (N.D. Ohio Nov. 30, 2018) (Finding that, where Fourtounis is not seeking to vacate a conviction, the court will not consider his motion to expunge a prior conviction as a collateral attack.).
[59] *U.S. v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004) (emphasis added) (citations omitted).
[60] *Id.*
[61] *See,* Consolidated Matter at 4-5.

offers.[62] Further, the Commission previously reasoned that "FINRA's corporate charter states that one of its functions is 'to promote self-discipline among members, and to investigate and adjust grievances between the public and members and between members.'"[63] These grievances include request to remove information on the CRD and BrokerCheck where that information is alleged to be inaccurate, misleading, false, erroneous, factually impossible, defamatory in nature, or that provides no investor protection or regulatory value.[64] As was established in the expungement action for the related customer dispute disclosure, the FINRA arbitration panel found that the facts of that customers complaint – that are the same set of facts that lead to the regulatory disclosure and the reporting of the Occurrence – were "factually impossible and clearly erroneous," pursuant to FINRA Rule 2080(b)(1)(A).[65] As such, it is clear that a challenge of this regulatory disclosure, which is based upon the same set of facts as another disclosure that was already ruled to have satisfied the FINRA Rule 2080 standard and expunged, should also be given an opportunity to be heard regarding its potential to satisfy the same standard. Based on the Commission's reasoning regarding FINRA's corporate charter, this makes access to FINRA's forum for expungement requests of this type a "fundamentally important service" offered, thereby satisfying the second prong of the test.

Therefore, as both prongs of the Commission's test are satisfied, the Commission has jurisdiction over Mr. Robertson's appeal.

II. FINRA's Forum Denial was Inconsistent with its Rules and the Exchange Act.

[62] *Id.* at 5-6 ("[W]e find that FINRA's service of providing arbitration of expungement claims is 'fundamentally important' and central to its function as an SRO.")
[63] *Id.* at 5.
[64] *See*, FINRA Rule 2080; *see also*, FINRA Rule 8312(g).
[65] Ex. 2 at 3.

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According to the Forum Denial Notice, FINRA made a determination under FINRA Rules 12203 or 13203 that Mr. Robertson's claim is ineligible for FINRA arbitration.[66] Prior to the Commission's approval of rule changes in 2007, NASD Rule 10301(b) permitted the Director to deny arbitration forum "only upon approval of the NAMC or its Executive Committee."[67] The Commission, in approving rule changes that resulted in FINRA Rule 13203, stated that the Director's authority could not be delegated and emphasized that its approval "should facilitate excluding cases from the NASD arbitration forum that are beyond its mandate, allowing it to focus on the cases that are appropriately in the forum … [which] should promote the efficacy and efficiency of the arbitration forum in processing its claims."[68] This rule was "intended to give the Director the flexibility needed in emergency situations" and that "in emergency situations, it is reasonable for the Director to have the authority and flexibility to act quickly to protect the health and safety of users and administrators of the forum."[69] Significantly, the Commission noted that the Director's use of this rule "should be limited by application in only a very narrow range of unusual circumstances."[70]

FINRA's denial of Mr. Robertson's access to the arbitration forum is inconsistent with its rules and its authority under the Exchange Act in that FINRA provided no rationale for why Mr. Robertson's claim was "ineligible" for arbitration consistent with its rules or the Exchange Act and provided no clarification as to what constitutes the definition of that term. FINRA clearly overstepped its authority under FINRA Rules 12203(a) and 13203(a), which are intended to be used in extreme, emergency situations, and "limited by application in only a very narrow range of

[66] CR at 23.
[67] National Arbitration and Mediation Committee (NAMC).
[68] SEC Release No. 34-55158, at 108.
[69] *Id.*
[70] *Id.*

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unusual circumstances."[71] FINRA also provided zero rationale as to what part of its rules made the subject matter of Mr. Robertson's claim "ineligible" or "inappropriate" for arbitration. The subject matter of Mr. Robertson's claim was expungement – a subject matter that is directly contemplated and authorized by its rules and guidance, and pursuant to the Exchange Act.

Expanding the Director's authority under FINRA Rule 13203 to permit this type of discretion completely undermines the purpose of providing a neutral arbitration forum for industry professionals. The ultimate determination of whether expungement is appropriate must be determined by a neutral factfinder – not by FINRA's Director. By way of analogy, when res judicata is an issue in a case, the court clerk who accepts the filing cannot preemptively decline to accept the filing. Whether an issue or claim is precluded is a determination made by the judge after an inquiry into the facts and circumstances is made. Here, FINRA has essentially determined that its Director has the authority to discriminate against brokers whenever the Director believes at the time a case is filed that their claims would not be consistent with investor protection or public interest. Such a rule is not consistent with FINRA Rules or the Exchange Act.

Additionally, permitting the Director such discretion effectively permits the Director to establish an unwritten blanket rule, without further inquiry, which bypasses the rulemaking procedures adopted by FINRA. FINRA Rule 0110 requires public notice and SEC approval for any new rules or rule changes,[72] none of which occurred before the Director created this new rule of denying access to any petitioner seeking expungement of a regulatory disclosure.

FINRA also denied Mr. Robertson the opportunity to contest this determination or denied him an opportunity to be heard. The Exchange Act requires FINRA to "provide a fair procedure for … the prohibition or limitation by the association of any person with respect to access to

[71] *Id.*
[72] FINRA Rule 0110.

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services offered by the association or a member thereof."[73] The Fourteenth Amendment to the U.S. Constitution also establishes a right to due process, which requires, at a minimum: (a) notice; (b) an opportunity to be heard; and (c) an impartial tribunal.[74] Federal courts have also long upheld that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[75] Here, FINRA has denied Mr. Robertson an opportunity to be heard and due process in seeking to clear his reputation, in violation of its own rules, the Exchange Act, the U.S. Constitution, and general principles of due process.

CONCLUSION

The Commission is authorized to review an action of an SRO where the SRO prohibits or limits a person's access to services offered by the SRO and where that service is fundamentally important, which is the case here. Mr. Robertson is an associated person pursuant to FINRA's Rules. FINRA overstepped its discretionary power and wrongfully denied Mr. Robertson access to a fundamentally important service it offers in its arbitration forum. Furthermore, FINRA's forum denial is inconsistent with the actual meanings and definitions of the Rules that they cite in the reasoning for the denial itself, and inconsistent with the rights afforded to Mr. Robertson under the Exchange Act. Mr. Robertson respectfully requests that his case be remanded to FINRA with an order that FINRA allow him access to its forum on his claim for expungement.

Dated: October 7, 2024

Respectfully submitted,

[redacted]

[73] Exchange Act § 15A(b)(8), 15 U.S.C. § 78o-3(b)(8).
[74] U.S. Const. amend. XIV; *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950).
[75] *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972).

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CERTIFICATE OF SERVICE

I, Austin Davis, certify that on October 7, 2024, I caused a copy of the foregoing Opening Brief of the above listed Applicant, in the matter of the Application for Review of Norman Thorn Robertson, Administrative Proceeding File No. 3-21982, 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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