SECURITIES ARBITRATION ALERT 2021-05 (2/11/21)

George H. Friedman, Editor-in-Chief

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SQUIBS: IN-DEPTH ANALYSIS

FINRA DRS POSTPONES IN-PERSON HEARINGS THROUGH APRIL. ARE VIRTUAL HEARINGS DRIVING DOWN CUSTOMER RECOVERIES? THESE RESEARCHERS SAY "YES." ***FINRA's Office of Dispute Resolution Services ("DRS") has again administratively postponed all in-person arbitration and mediation hearings, and a new report – not from FINRA – concludes that virtual hearings may have harmed investor recovery rates.*** The **February 5** FINRA announcement on in-person hearing postponements now includes hearings through **April 30**; the previous date

was **April 2**. The Authority also tweeted the news on **February 8**, stating: "We're postponing all in-person arbitration and mediation proceedings scheduled through April 30, 2021 unless the parties stipulate to proceed telephonically or by Zoom or the panel orders that the hearings will take place telephonically or by Zoom." As was the case before, the DRS Website notice adds: "Please note that postponing a hearing will not affect other case deadlines. All case deadlines will continue to apply and must be timely met unless the parties jointly agree otherwise." The updated announcement offers fee waivers for stipulated postponement of hearings set through **July 31, 2021.** Why the latest date pushback? Says DRS: "Currently, none of the 69 hearing locations demonstrate public health conditions that are consistent with CDC guidance for activities such as in-person hearings."

Are Virtual Hearings Driving Down Customer Recoveries?

In **March,** it will be a year since the COVID-19 pandemic drove FINRA arbitrations to virtual hearings via Zoom. A **January** research report by **Craig McCann** and **Chuan Qin** of Securities Litigation and Consulting Group, Inc., *The Impact of ZOOM on FINRA Arbitration Hearings* -- the first research we've seen on the topic -- contends that this transformation has not been beneficial to customer recovery prospects. The chart and link-rich report has five conclusions (presented *verbatim*): "**1) Investors Win Much Less Often in ZOOM Hearings than in In-person Hearings. 2) Investors Recover Less in ZOOM Hearings than in In-person Hearings When They Win. 3) There is Marked Geographic Variation in the Decline of Investor Win Rate. 4) Investors are Settling on Less Favorable Terms in the ZOOM-era than Previously. 5) While Investor Claimants Suffer Under ZOOM, Broker Claimants are Having Even More Success with Expungement Requests**. One finding is particularly striking: "In the pre-ZOOM-era, Investors won 43.7% of the time and recovered 65% of their requested amount when they won. This implies a 28.4 cents per dollar average recovery in cases decided after a hearing in the pre-Zoom-era. In the ZOOM-era, investors win only 27.9% of the time and recover only 33.3% of their requested amount when they won. This implies a 9.3 cents average recovery in cases decided after a hearing in the ZOOM-era." The authors also assert that there are significant regional variations.

And a Cautionary Tale

We close with a humorous tale about the potential pitfalls of virtual hearings. Readers have seen plenty of advice about how best to conduct a hearing (arbitration, mediation, or litigation) by Zoom, and what practices to avoid. This video of an actual court proceeding definitely adds another item to the "don't do this" list!

*(ed: *As we've said many times before, with the ongoing spike in COVID-19, we're not surprised by the latest administrative postponement from DRS. In fact, despite vaccines being rolled out, things are still moving in the wrong direction. **While the Report's data speaks for itself, query whether there's another factor reflected in the numbers? By that, we wonder whether a significant number of customers who believe they have strong cases have declined the virtual hearing option, preferring instead to await resumption of in-person hearings? ***Author McCann told the* Alert*: "Recoveries are down more than 65% in the ZOOM-era compared to average over the same periods from past 5 years.*

This is not due to isolated cases or any particular type of case. We now have enough data to conclude the dramatic decline is due to the remote interface rather than in-person hearings.")
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CALIFORNIA DISTRICT COURT DELIVERS POSTMATES AN ORDER TO ARBITRATE 5,000 INDIVIDUAL ARBITRATIONS. ***The District Court of California holds that California Senate Bill 707 ("SB 707") is not preempted by the FAA, does not violate the Contracts Clauses of the United States and California Constitutions, and that Postmates is compelled to arbitrate 5,000 individual arbitrations.*** *Postmates Inc. v. 10,356 Individuals*, CV 20-2783 (C.D. Calif. Jan. 19, 2021) (unpublished), involves the issue of whether California's SB 707 is preempted by the Federal Arbitration Act ("FAA") or is unconstitutional under the Contracts Clauses of the United States and California Constitutions. In short, the Court says the answer is "no."

Postmates and the Fleet Agreement
Postmates operates an online marketplace that connects consumers with local merchants. If the consumer opts for delivery, independent couriers deliver the products. To become a courier on behalf of **Postmates**, an applicant must accept Postmates' Fleet Agreement (the "Agreement") containing a predispute arbitration agreement ("PDAA"). Couriers are allowed to opt out of the PDAA within thirty days of accepting the agreement. The arbitration provision contains a class action waiver and a delegation clause, which states that the authority to resolve any issues concerning "the interpretation, applicability enforceability, or formation" of the arbitration provision is exclusively for the arbitrator. However, a court can determine any claim that the class action waiver is "unenforceable, unconscionable, void, or voidable."

Procedural History
On September 24, 2019, 1,250 individuals, represented by **Keller Lenkner**, filed separate arbitrations with the AAA against Postmates. The AAA later determined that the Demands for Arbitration met the AAA's filing requirements and that Postmates had to pay the applicable fees by October 21, 2019 to commence arbitration. Postmates did not pay the fees and the AAA "administratively closed the cases."

On February 15, 2020, 10,356 individuals filed arbitration demands against Postmates. The demands alleged "worker misclassification and violations of California wage and hours laws" and other violations. Postmates received notice of the arbitration Demands in an email sent by Lenkner. The AAA notified Postmates of the 10,356 individual arbitration demands and stated that "Postmates must pay a total of over $4,000,000 in initial fees by March 16, 2020."

On March 25, 2020, Postmates began this action against the 10,356 individuals who filed the arbitration demands on February 15, 2020. On May 22, 2020, 5,290 individuals (the **"Cross-Petitioners"**) filed a motion to compel arbitration against Postmates. 4,933 of the

Cross-Petitioners are Defendants who filed demands for arbitration on February 15, 2020 and 357 are non-parties who filed arbitration demands on September 24, 2019 (the **"September 2019 Cross-Petitioners"**). On July 1, 2020 Postmates filed a Second Amended Complaint seeking: 1) a declaratory judgment that the FAA preempts SB 707; 2) declaratory relief that SB 707 violates the United States and California Constitutions; and 3) injunctive relief enjoining enforcement of SB 707.

A Primer on SB-707

As reported in SAA 2019-40 (Oct. 23), California Governor **Gavin Newsom** in **October 2019** signed SB-707 into law. This amendment to California's arbitration statute aimed in part to address the "procedural limbo and delay workers and consumers face when they submit to arbitration, pursuant to a mandatory arbitration agreement, but the employer fails or refuses to pay their share of the arbitration fees." A staff analysis of SB-707's administrative fees portion states that the law (*ed: presented essentially* verbatim):

- Provides that, where any drafting party fails to pay the fees necessary to commence or continue arbitration, within 30 days after such fees being due to be tendered to the arbitrator, the drafting party is held to have materially breached the arbitration clause and is in default of the agreement.
- Gives consumers or employees several remedies in the event a drafting party breaches the arbitration agreement by failing to pay the arbitration costs and fees.
- Would permit, should the drafting party fail to pay the costs necessary to commence arbitration, the employee or consumer to remove the matter to court or move to compel the arbitration.
- Provides that if the drafting party fails to pay the fees or costs necessary to continue an arbitration currently in progress, the employee or consumer can move the matter to court, seek a court order compelling the payment of the fees, continue the arbitration and permit the arbitrator to seek collection of their fees, or pay the costs and fees and seek those fees from the drafting party at the conclusion of the arbitration regardless of the ultimate outcome.

FAA Does Not Preempt SB-707

The District Court of California holds that SB-707 is not preempted by the FAA. Although FAA section 2 does not contain an "express pre-emptive provision," the Supreme Court in *Volt Information Services v. Stanford University*, 489 U.S. 468 (1989), stated that a state law may be preempted "to the extent that it actually conflicts with federal law." Here, Postmates argued that a court must apply either the "disfavored treatment" theory or the "obstacles" theory to determine whether a state law is preempted by the FAA. On the other hand, the Cross-Petitioners argued that FAA only preempts state laws that render an arbitration clause "invalid, revocable, or unenforceable." In agreeing with the Cross-Petitioners, the District Court of California holds that the disfavored treatment and obstacles tests do not need to be applied "if a state law does not require a court to render arbitration agreement [sic] invalid."

The Court next determines that SB-707 does not renders arbitration agreements invalid or unenforceable. In the words of **Judge Philip S. Gutierrez**: "rather than render arbitration agreements invalid, SB-707 *encourages* arbitration by changing the remedies available to non-drafting parties when parties delay the process and refuse to pay required fees." Here, the Court holds that the FAA "does not preempt laws that make arbitration *more effective* by providing targeted remedies *in aid* of arbitration" -- which SB-707 does.

Although unnecessary, the Court also applies the "disfavored treatment" and "obstacles" theories and holds that SB-707 is not preempted under the disfavored treatment theory because SB-707 *encourages* arbitration by preventing employers and corporations from delaying the initiation of arbitration by refusing to pay fees. The Court also holds that SB-707 is not preempted under the obstacles theory because SB-707 *removes obstacles* to the arbitration process and facilitates, rather than stand in the way of, arbitration.

SB-707 Does Not Violate the Contracts Clauses

Next. the Court determines whether SB-707 violates the Contracts Clauses of the United States and California Constitutions. The Contracts Clauses "prohibit the passage of laws that impair the obligation of contracts." The first step to determine whether a law violates the federal Contracts Clause is "whether the state law has operated as a substantial impairment of a contractual relationship." The District Court holds that SB-707 does not substantially impair contractual relationships and it is unnecessary to continue to the second step -- the "means and ends" determination.

The Bottom Line: Postmates Must Commence and Pay Fees for Many Individual Arbitrations

Postmates conceded that the Court should grant the motion to compel arbitration as to those Cross-Petitioners with "valid arbitration agreements with Postmates." Postmates argued that 233 individuals did not have a valid arbitration agreement because the person either: 1) never accepted the agreement; or 2) accepted the agreement but affirmatively opted out of the arbitration provision. The Court denies the motion to compel arbitration specifically for these 233 individuals because of factual disputes regarding whether they had a valid arbitration agreement with Postmates, but grants the motion to compel arbitration with respect to all of the remaining Cross-Petitioners.

*(ed: *This squib was authored by Ruben Huertero, a 3L at St. John's School of Law. He is the Executive Research Editor of the New York International Law Review and Associate Managing Editor of the Commercial Division Online Law Report at St. John's. **The Court considered whether joinder was appropriate for the September 2019 Cross-Petitioners, and held that the relief they seek arises out of the same series of transactions or occurrences because Postmates had refused to arbitrate with them as well. ***The Court also denied Postmates' request for injunctive relief enjoining enforcement of SB-707 because it found the statute valid and not unconstitutional).*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SHADES OF MADOFF! ANOTHER BIG PONZI SCHEME EXPOSED. ARE MORE ARBITRATIONS COMING? The SEC on **February 4**: "charged three individuals and their affiliated entities with running a Ponzi-like scheme that raised over $1.7 billion from securities issued by a New York-based asset management firm and registered investment adviser, GPB Capital" (see *SEC Charges Investment Adviser and Others With Defrauding Over 17,000 Retail Investors*, SEC.gov (Feb. 4, 2021). The SEC's complaint alleges that: "David Gentile, the owner and CEO of GPB Capital, and Jeffry Schneider, the owner of GPB Capital's placement agent Ascendant Capital, lied to investors about the source of money used to make an 8% annualized distribution payment to investors. According to the complaint these defendants, along with Ascendant Alternative Strategies, which marketed GPB Capital's investments, told investors that the distribution payments were paid exclusively with monies generated by GPB Capital's portfolio companies. As alleged, GPB Capital actually used investor money to pay portions of the annualized 8% distribution payments." Whether this event will lead to FINRA arbitrations remains to be seen, but we've already noticed postings from customers' attorneys alerting defrauded investors that they may be able to pursue individual arbitrations against brokerage firms that sold clients GPB Capital funds. For example, see this notice from the office of Chicago attorney **Andrew Stoltmann,** and this one from the **Silver Law Group**."
(ed: Based on the law firm advisories we've seen already, we would predict that 17,000 defrauded investors will translate eventually to more arbitrations.)
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FINAL DOL FIDUCIARY RULE GOES INTO EFFECT FEBRUARY 16 … OR DOES IT? We analyzed in SAA 2020-30 (Aug. 12) the thousands of comments received on the Department of Labor's ("DOL") proposed fiduciary standard rule for those offering retirement investment advice – *Improving Investment Advice for Workers & Retirees* – that was published in the *Federal Register* on **July 7** (85 FR 40834; Vol. 85, No. 130, P. 40834). The exemption, which is harmonized with the SEC's *Regulation Best Interest*, allows Investment Advice Fiduciaries to engage in certain prohibited transactions that would otherwise be disallowed under *ERISA* and the *Internal Revenue Code* (see our analysis in SAA 2020-25 (Jul. 8)). Most recently, we reported in SAA 2021-01 (Jan. 14) that the DOL on **December 15** released the massive Final Rule**,** which was to become effective 60 days after its **December 18** *Federal Register* publication (85 FR 92798Vol. 85, No. 244. P. 82798), or on **February 16, 2021.** Whether that actually happens remains to be seen. As we said before, the Final Rule's long-term fate is unclear since it will become effective after Inauguration Day. As previously reported on **December 4**, House Financial Services Committee Chairwoman **Maxine Waters** (D-CA) wrote to then President-elect Biden urging that *Reg BI* and *Form CRS* be rolled back. How do we know? Under the heading "Investor Protection and Capital Markets," appears this one-word recommendation about *Reg BI*: "Rescind." And there's already media conjecture that new DOL Secretary **Marty Walsh,** if confirmed, will pause implementation before February 16 (see, for example, *DOL Fiduciary Rule 3.0—How Long Will It Last?*, Bloomberg Law (Jan. 25)). And Congress has exercised its authority

under the *Congressional Review Act*, 5 USC §§ 801 *et seq*., to nullify legislatively any regulation within 60 legislative/session days of its publication. Time will soon tell. *(ed: We will of course track this one.)*
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ANOTHER *CERT.* PETITION ON FAA APPLICABILITY TO AMAZON DRIVERS. Amazon on **January 29** Petitioned SCOTUS for *Certiorari* in *Waithaka v. Amazon.com, Inc*., No. 19-1848 (1st Cir. Jul. 17, 2020) *petition for reh'g denied* (Sep. 1), a case we covered in SAA 2020-27 (Jul. 22). There's a clear Circuit split on whether the Federal Arbitration Act's ("FAA") section 1 exemption embraces only workers actually moving goods or people in interstate commerce or is to be construed broadly to cover those who are part of the "flow" of interstate commerce. The *Waithaka* Court held: "After close examination of the text and purpose of the statute and the relevant precedent, we now hold that the [FAA section 1] exemption encompasses the contracts of transportation workers who transport goods or people within the flow of interstate commerce, not simply those who physically cross state lines in the course of their work." The Petition identifies this question: "Whether the Federal Arbitration Act's exemption for classes of workers engaged in foreign or interstate commerce, 9 U.S.C. 1, prevents the Act's application to local transportation workers who, as a class, are not engaged to transport goods or passengers across state or national boundaries."
*(ed: *The SCOTUS case is* Amazon.com, Inc. v. Waithaka, *No. 20-1077. **As reported in SAA 2020-42 (Nov. 12), the Supreme Court has also been asked to review* Amazon.com, Inc. v. Rittmann, *971 F.3d 904 (9th Cir. Aug. 19, 2020),* SCOTUS *No. 20-622. The issue presented: "whether the Federal Arbitration Act's exemption for classes of workers engaged in foreign or interstate commerce prevents the Act's application to local transportation workers who, as a class, are not engaged to transport goods or passengers across state or national boundaries." The Petition is set for conference on February 19. ***Emblematic of the split, the* Rittman *Court took the more stringent view of Section 1. The* Waithaka *Petition urges that* Cert. *be granted in at least one of the cases.)*
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DENIAL OF MOTION TO COMPEL NOT REACHED WHERE NO CONCRETE INJURY DEMONSTRATED. *Nettles v. Midland Funding, LLC*, No. 19-3327 (7th Cir. Dec. 20, 2020), starts out with a typical fact pattern but ends up in a different place. The debtor sued the creditor for violating the *Fair Debt Collection Practices Act* ("*FDCPA*"), 15 U.S.C. §§ 1692 *et seq.*, for overstating by about $100 the amount allegedly owed. Creditor Midland moved without success to compel arbitration, leading to this appeal. So far, there is nothing unusual, but what follows is. On appeal, the Seventh Circuit declines to deal with the arbitration issue, because debtor Nettles had no standing to assert claims – in any forum – under the *FDCPA.* Says the Court: *"*The complaint alleges that the [demand] letter is false, misleading, or otherwise unfair or unconscionable in violation of 15 U.S.C. §§ 1692e and 1692f. A jurisdictional defect prevents us from reaching the arbitration question. Nettles sued for violation of §§ 1692e and 1692f, but she has not alleged any injury from the alleged statutory violations. Applying our recent decisions in

Larkin v. Finance System of Green Bay, Inc., Nos. 18-3582 & 19-1537, 2020 WL 7332483 (7th Cir. Dec. 14, 2020), and *Casillas v. Madison Avenue Associates, Inc*., 926 F.3d 329 (7th Cir. 2019), we vacate and remand with instructions to dismiss the case for lack of standing.
*(ed: *Never seen that before. **Then-Judge Amy Coney Barrett was a member of the panel when the case was submitted but didn't participate in the decision.)*
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CFPB AND ONLINE LENDER SETTLE MILITARY LENDING ACT SUIT OVER PDAA USE. Readers may recall that we reported in "Quick Takes" in SAA 2020-47 (Dec. 17) on *Bureau of Consumer Financial Protection v. LendUp Loans, LLC*, No. 4:20-cv-8583 (N.D. Calif. Dec. 4, 2020), where the Consumer Financial Protection Bureau ("CFPB") sued an online lender for several violations of the *Military Lending Act* ("*MLA*"), 10 U.S.C. § 987. The *MLA* is a George W. Bush-era statute that, among other things, bans mandatory predispute arbitration agreements; *Dodd-Frank* gives the CFPB enforcement authority. Among the allegations in the suit: "The MLA makes it unlawful for any creditor to extend consumer credit to a covered borrower with respect to which the creditor requires the borrower to submit to arbitration in the case of a dispute. 10 U.S.C. § 987(e)(3); 32 C.F.R. § 232.8(c). Since October 3, 2016, LendUp has made over 4,100 single-payment or installment loans to over 1,200 covered borrowers by way of loan agreements requiring the borrowers to submit to arbitration in the case of a dispute. LendUp violated the MLA each time it extended such a loan." We can now report that the suit was tentatively settled on **January 19,** with LendUp Loans agreeing to pay $1.25 million in civil penalties and other relief. Although arbitration is not mentioned in the 15-page proposed Order settling the case, the lender agrees to comply with the *MLA* which we presume includes the ban on arbitration.
(ed: Nice to see the change in administrations had no impact on the Bureau's enforcement efforts here.)
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FINRA PANEL: MERRILL U5 ENTRY WAS DEFAMATORY. A sole Public Arbitrator holds in an explained Award in *Wigart v. Merrill Lynch Pierce Fenner & Smith Inc*., FINRA ID No. 20-00635 (Reno, NV Jan. 28, 2021), that Merrill Lunch defamed a former broker in its U5 description of her termination. What happened? "Respondent knew or should have known that by stating in the U5 that Claimant had opened a bank account without the client's authorization she would be unemployable in the banking industry. Indeed, her manager testified he would not hire someone with this statement on her U5. And Claimant testified she had applied for a position at a number of banks with no success despite years of experience in the industry." As for why he ruled this way, Arbitrator **Dean J. Dietrich** says: "Under Nevada law, Respondent enjoys a conditional privilege to the charge of defamation, but the privilege can be overcome by a showing of 'reckless disregard for the truth' (*Bank of America Nevada v. Boudreau*, 115 Nevada 263 (1999)). The failure of Respondent to interview the client and accept the allegations at face value, despite her well-known memory impairment, and for the reasons cited above demonstrates reckless disregard for the truth and overcomes the

privilege." The *pro se* Claimant is awarded $50,000 in compensatory damages and expungement is recommended.
*(ed: *The Arbitrator notes that: "the client was not interviewed by Respondent nor did she sign an affidavit supporting Respondent's allegations." **We noticed this statement at the end of the Award: "Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum -- pursuant to rules approved by the SEC -- but has no part in deciding the award." The is the same disclaimer at the top of awards, but we hadn't before noticed that it is repeated at the end as well.)*
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FORDHAM LAW TEAM WINS ABA ARBITRATION COMPETITION. We reported in "Articles of Interest: Recent News from the ADR Front" in SAA 2021-04 (Feb. 4) that a team from Fordham Law School had won the ABA's recent Arbitration Competition. (see *Fordham Wins 2021 ABA Arbitration Competition Crown,* ABANet (Jan. 27, 2021)). We thought we would add some context. The ABA Website states: "The Arbitration Competition promotes greater knowledge in arbitration by simulating a realistic arbitration hearing. Participants prepare and present an arbitration case, including opening statements, witness examinations, exhibit introductions, evidentiary presentations, and summations." This year's topic was Contracts and Warranties. The Texas Tech University School of Law team came in second.
(ed: Congratulations to the Fordham Law team, Ksenia Matthews, Margaret Revera, Catherine Young, Joshua Zelen and Perry Zirpoli. Full disclosure: your publisher teaches at the law school; in fact, Ms. Matthews attends his class in arbitration.)
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SAVE THE DATE: NYSBA'S *ARBITRATION & MEDIATION 2021* PROGRAM IS MARCH 24. The New York State Bar Association's Commercial and Federal Litigation and Dispute Resolution Sections will be conducting *Arbitration and Mediation 2021: Best Practices Working Through and Beyond COVID* on **March 24.** The day-long virtual event will focus on the major ADR providers' views on dispute resolution in the post-COVID era. The impressive faculty features speakers from major ADR organizations, such as AAA, CPR, FINRA, and JAMS. CLE credit of 7.0 hours is available.
(ed: Registration is done online via the Webpage. Pricing is not noted.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Commodities & Minerals Enterprise, Ltd. v. CVG Ferrominera Orinoco, C.A.*, No. 1:19-cv-11654 (S.D.N.Y. Dec. 10, 2020)**: The Court confirms a $12 million Society of Maritime Arbitrators award, finding none of the grounds for *vacatur* under the *UN Convention* are present.

***Cabatit v. Sunnova Energy Corporation*, No. C089576 (Calif. Ct. App. 3 Jan. 21, 2021):** "We conclude (1) Sunnova did not assert in the trial court that the arbitrator must determine whether the clause is enforceable, and hence we will not address the issue, (2)

the arbitration clause is procedurally and substantively unconscionable and therefore unenforceable, and (3) we need not consider whether the *McGill* [*v. Citibank, N.A.*, 2 Cal.5th 945 (2017)] rule applies here because general considerations of unconscionability, independent of the *McGill* rule, support the trial court's determination. We will affirm the trial court's denial of the motion to compel arbitration." (*ed*: *An* SAA *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***G'Sell v. AOS, Inc*., FINRA ID No. 19-01232 (Houston TX Feb. 2, 2021)**: At first blush, this seems to be a run-of-the mill case. But this appears to be the first FINRA arbitration held in person since the start of the pandemic. The "Other Issues Considered and Decided" section states: "On September 30, 2020, Claimants filed a Motion for Zoom Hearing. On October 5, 2020, Respondents filed a Response to Claimant's Motion to Conduct Final Hearing Via Zoom. On October 9, 2020, Claimants filed a Reply in Support of Motion for Zoom Hearing. On October 27, 2020, the Panel heard oral arguments on the Motion for Zoom Hearing. In an Order dated the same day, the Panel ruled that the hearing would be held in-person but with some participants appearing via Zoom." The customer claimant won $111,000 in compensatory damages, out of the $407,671 he requested at the hearing, and $36,042 in attorney fees. (*ed: we expect the new normal post-COVID will be a hybrid of some participants appearing virtually and others in person.*)
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Maria Fanou and Kiran Nasir Gore, *2020 in Review: The Year of Virtual Hearings*, Kluwer (Feb. 2, 2021): "In the aftermath of the COVID-19 public health crisis, a seismic event in history, many of us feel as if 2020 is the year that did not happen. While it certainly was not business as usual, in a display of flexibility and resilience, the arbitration community ensured that the (virtual) show did go on. With 2020 now concluded, we reflect on the year's hot topic: virtual hearings (or remote hearings) …."

***FINRA to Focus on Retail Investors in its Reviews this Year*, Investment Executive (Feb. 1, 2021)**: "Emerging trends such as apps that treat stock trading like a video game, and compliance with new retail investor conduct rules will be among the top priorities for the U.S. Financial Industry Regulatory Authority Inc. (FINRA) in the year ahead. In a new report, the self-regulatory organization (SRO) sets out its compliance examination priorities for 2021."

***Merrill's U5 Notice Shows 'Reckless Disregard for the Truth': Finra Arb*, Financial Advisor IQ (Feb. 2, 2021):** "A Finra arbitrator has ruled in favor of a former broker in a claim against Merrill Lynch over her termination.... The Finra arbitrator ruled that Merrill Lynch's failure to interview the client in question meant that its termination notice for Wigart 'demonstrates reckless disregard for the truth.' The arbitrator found that the client had not been interviewed nor signed an affidavit to support the wirehouse's allegations, that the client had cognitive difficulties, that, as a result, Merrill Lynch had terminated

her as a brokerage client, and that the company had an 'ambiguous and not uniformly enforced' policy on opening new accounts, with several former employees claiming that they were encouraged to open new ones even if the client already had accounts with the wirehouse." (*ed: see coverage elsewhere in this* Alert.)

***Financial Services Institute Defends Reg BI Under New Administration*, InvestmentNews (Feb. 2, 2021)**: "The Financial Services Institute has long been on the offensive to get Regulation Best Interest put in place as the broker investment advice standard. This year, it's going on defense to protect it. Fiduciary advocates are pressing the Securities and Exchange Commission to overhaul the measure, arguing that it offers no real increase in investor protection from the previous suitability standard that governed brokers. They are hopeful that a Democratic-majority SEC in the Biden administration will agree with them. But industry proponents of Reg BI are gearing up to convince the SEC to keep Reg BI intact."

***$1.7 Billion Ponzi Scheme Defrauded 17,000 Investors, SEC Says*, CNN Business (Feb. 5, 2021)**: "The US Securities and Exchange Commission charged investment adviser GPB Capital Holdings and three executives on Thursday with defrauding over 17,000 retail investors in a Ponzi-like scheme that raised over $1.7 billion. The lawsuit alleges that David Gentile, owner and CEO, Jeffry Schneider, owner of GPB Capital's placement agent Ascendant Capital, and Jeffrey Lash, GPB Capital's former managing partner, used investors' own funds to pay out monthly distributions to investors instead of putting them toward customers' investments. GPB Capital was also charged with violating whistleblower protection laws." (*ed: see coverage elsewhere in this* Alert.)

***Russia Asks Dutch High Court to Toss $50B Award for Oil Shareholders*, Courthouse News Service (Feb. 5, 2021)**: "The Russian Federation faced off against former shareholders of oil giant Yukos on Friday in the latest chapter of a 15-year legal saga over the government's taking of shares. Before the Dutch Supreme Court, lawyers for Yukos argued that the government illegally confiscated the shareholders' holdings in the company. Russia countered that the shares were obtained in sham auctions and by paying bribes. Last year, the Hague Court of Appeals ordered Russia to pay $50 billion to the former shareholders."

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DID YOU KNOW?

SOCIETY OF MARITIME ARBITRATORS OFFERS A FREE INTEREST CALCULATOR FOR AWARDS. The Society of Maritime Arbitrators, which operates an arbitration forum, has on its Website: "a quick and accurate method for calculating interest at the Commercial Prime Rate." Why? "Arbitrators in New York, in most cases, award interest to the prevailing party based on the Commercial Prime Rate that banks commonly charge their business customers. These rates change based on announcements of the Federal Reserve Board. Depending on the length of time that has passed before issuance of a final award in arbitration, the prime rate may have changed between the date of the claim and the issuance of the award." The easy-to-use calculator requires

inputs of principal amount and interest start and end dates, and produces a detailed table for viewing on-screen or printing.
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Send any messages or inquiries to: George@SecArbAlert.com

Editor's Note & Disclaimer: While we undertake considerable efforts to present information in this publication in a fair and accurate manner, we caution that readers should access referenced material themselves as the best source. Our analyses make liberal use of links, and we offer courtesy copies of materials not on the Internet. Similarly, readers should not rely solely upon our summaries in making legal decisions or consider our commentary to be rendering legal, accounting, or other professional advice or service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. — *adapted from the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.*

Mail to: 194 Carlton Terrace, Teaneck, NJ 07040
T: 917-841-0521
Web: www.SecArbAlert.com
Blog: www.sacarbalert.com/blog/; Twitter: @SecArbAlert