SECURITIES ARBITRATION ALERT 2022-03 (1/27/22)

George H. Friedman, Editor-in-Chief

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- ***Bland v. JP Morgan Securities, LLC,* FINRA ID No. 21-01191 (Los Angeles, CA, Dec. 23, 2021)**
- ***Mastrovich v. UBS Securities, LLC,* FINRA ID No. 19-01247 (New York, NY, Dec. 23, 2021)**

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- ***SEC Seeks Candidates for Investor Advisory Committee*, www.sec.gov (Jan. 19, 2021)**
- ***Arbitration and PAGA Representative Actions: Supreme Court to Weigh In*, JDSupra (Jan. 21, 2022)**
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DID YOU KNOW?

- **SCOTUSBlog: One of Our Favorite Websites**

SQUIBS: IN-DEPTH ANALYSIS

PIABA FOLLOWING THROUGH ON RIA GOAL. ***PIABA has begun following up on a "top-three" goal for this year: arbitration and investment advisors.*** Readers may recall that we reported in SAA 2021-42 (Nov. 11) on the main objectives this year for the Public Investors Advocate Bar Association ("PIABA"). When asked about PIABA's top three priorities for the coming year, newly-elected President Michael Edmiston said that the organization's second priority is to: "continue to work to understand the arbitration

issues in the RIA space. In addition to the unpaid awards issue, we will focus on arbitrator disclosures, forum rules, and fees, and disclosure of awards. We plan to work with both the SEC and NASAA to resolve the problems." When asked to elaborate on the RIA goal, he said: "Arbitration is a proven dispute resolution tool. When used properly between consenting, sophisticated parties, it helps resolve disputes, preserve relationships and returns the parties to business. When a sophisticated party with greater resources perverts arbitration into a shield from disputes or uses it to hide misconduct, it hurts our society.[] RIAs are fiduciaries to their clients. They are obligated to put their clients' interests first. It makes no sense that an RIA would take away a client's constitutional right to a jury trial or use the cost of arbitration to stop a client from bringing a dispute and still believe it has put its clients' interests first. If an RIA consents to dispute resolution in the forum of the client's choice, the RIA is doing what is best for the client. If a client, with informed consent, chooses arbitration after the dispute arises, they should be able to proceed in that forum and should not need to receive the consent of the firm."

Focus on Forum and Fees

In an interview published in a **January 21** *Financial Adviser Magazine* article, *Group Seeks End To RIAs Forcing Costly Arbitration On Clients,* Mr. Edmiston focused on the forum and fee issues. The magazine states that PIABA: "has begun lobbying the SEC to either do away with the forced arbitration clauses RIAs foist upon clients or require the industry to pick [up] 80% to 90% of the tab for investors' arbitration costs." As we've stated several times in the past, many RIA-customer agreements call for arbitration at non-SRO fora, such as AAA or JAMS. The publication notes that: "Right now, an investor filing an arbitration claim against an RIA would need to advance more than $30,000 to cover their anticipated private arbitration forum fees upfront, according to PIABA.[] That's compared with an average of $2,300 in upfront fees a brokerage investor would need to pay to use the Financial Industry Regulatory Association's (Finra's) arbitration forum, which also allows investors to settle their fees after their arbitration claim is decided, the organization said. Moreover, Finra-registered firms are required to pay most of the cost for arbitration themselves." What to do? Mr. Edmiston suggests: "Regulators should either do away with forced RIA arbitration or firms should pay 80% to 90% of arbitration fees, like Finra firms do." He added that mandatory non-SRO arbitration: "works out well for the RIA industry. I can't tell you how many times I've had to say, 'I see you have a JAMS clause in your RIA contract so you'll need to advance $30,000.' …. What happens [if] you have retiree[s] who have lost their retirement savings because of a bad actor and they literally cannot afford to get their money back in arbitration?"

*(ed: *It's nice to see the FINRA arbitration forum recognized as an economical alternative. **Speaking of which, why not recommend that, if RIAs use an arbitration clause, it must offer a FINRA arbitration option?)*

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NLRB TAKING ANOTHER LOOK AT CONFIDENTIALITY PROVISIONS IN MANDATORY ARBITRATION CLAUSES. ***The National Labor Relations Board announced that it is revisiting a Trump-era ruling permitting confidentiality***

agreements in mandatory predispute arbitration agreements. A **January 18** Press Release, *NLRB Invites Briefs on Mandatory Arbitration Clauses*, states: "In a notice issued today in *Ralphs Grocery Company* 371 NLRB No. 50 (2021), the National Labor Relations Board invites parties and amici to submit briefs addressing whether the Board should adopt a new legal standard to determine whether confidentiality requirements in a mandatory arbitration agreement violate Section 8(a)(1) of the National Labor Relations Act and other legal issues related to mandatory arbitration agreements."

Subjects to Be Addressed

The Board asks commenters to address these questions (*ed: repeated* verbatim): 1. Should the Board abrogate the decision in *Anderson Enterprises*, where it overruled its earlier decision in the instant case? Does the arbitration policy at issue in the instant case interfere with employees' right to file Board charges or otherwise access the Board's processes? 2. Did the Board correctly hold in *California Commerce Club* that the Federal Arbitration Act privileges employers' maintenance of confidentiality requirements in arbitration agreements that would otherwise violate Section 8(a)(1) by interfering with employees' exercise of their rights guaranteed by Section 7? 3. If, contrary to *California Commerce Club*, the FAA does not prevent the Board from reviewing arbitration confidentiality requirements under the National Labor Relations Act, what standard should the Board apply to determine whether such requirements are lawful? Chairman **McFerran** and Members **Wilcox** and **Prouty** joined in issuing the notice; Members **Kaplan** and **Ring** dissented.

FINRA's Views on Confidentiality Agreements and Arbitration

Readers may recall that FINRA in **2014** issued guidance on confidentiality agreements in arbitration. Specifically, Regulatory Notice 14-40, *Confidentiality Provisions in Settlement Agreements and the Arbitration Discovery Process*, provides: "FINRA reminds firms that it is a violation of FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade) to include confidentiality provisions in settlement agreements or any other documents, including confidentiality stipulations made during a FINRA arbitration proceeding, that prohibit or restrict a customer or any other person from communicating with the Securities and Exchange Commission (SEC), FINRA, or any federal or state regulatory authority regarding a possible securities law violation."
*(ed: *The parties and* amici *should file briefs electronically by E-Filing on www.nlrb.gov. For help, contact the Office of Executive Secretary at 202-273-1940. **"Briefs not exceeding 20 pages in length may be filed with the Board in Washington, DC on or before March 21, 2022. The parties (but not amici) may file responsive briefs on or before April 4, 2022, which shall not exceed 30 pages in length. No other responsive briefs will be accepted. Motions for extensions of time in which to file briefs will not be granted absent compelling circumstances." ***Recall that SCOTUS held in* Epic Systems Corp. v. Lewis, *138 S.Ct. 1612 (2018), that class or collective action waivers in employment were enforceable under the FAA.)*
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DC CIRCUIT DERAILS EFFORT TO EVADE AMTRAK ARBITRATION PROVISION. ***Passengers who had suffered no injury lacked Article III standing to challenge an arbitration clause in Amtrak's Terms and Conditions***. Amtrak's passenger Terms and Conditions have since **2019** contained a predispute arbitration agreement applying to: "all claims, disputes, or controversies, past, present, or future, that otherwise would be resolved in a court of law or before a forum other than arbitration." The Appellants in *Weissman v. National Railroad Passenger Corp.*, No. 20-7081 (D.C. Cir. Dec. 28, 2021), were: "two individuals who have traveled on Amtrak in connection with their work and expect to continue doing so. They sought declaratory and injunctive relief to prevent Amtrak from imposing an arbitration requirement on rail passengers and purchasers of rail tickets." On what basis? "Amtrak's adoption of the arbitration provision was an unlawful *ultra vires* action that violated the Petition Clause, Article III, and separation-of-powers principles of the United States Constitution."

Core Issue is Article III Standing …
The District Court never got to the substantive issues – including whether Amtrak was a governmental player – instead granting Amtrak's motion to dismiss the complaint because the Appellants lacked standing under Article III of the U.S. Constitution, and this appeal followed. The DC Circuit holds unanimously that the challengers: "have not plausibly alleged an actual injury-in-fact and therefore lack Article III standing." The Court specifically rejects the passengers' argument that: "they suffer ongoing injury because purchasing a ticket with an arbitration clause 'strips [them] of the ability to determine for themselves the level of risk to accept when deciding whether to enter into a commercial transaction' and they 'desire not to take on any risk of arbitration as a condition to purchasing rail travel'" (*ed: brackets in original*).

But In Case You Were Wondering About Amtrak's Status …
The Court notes that: "Congress created the National Railroad Passenger Corporation, commonly known as Amtrak, to provide passenger rail service to travelers throughout the United States. Although created by statute, Amtrak is 'a private, for-profit corporation,' *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454 (1985), 'not a department, agency, or instrumentality of the United States Government,' 49 U.S.C. § 24301(a)(3)" (*ed: some citations omitted*).
*(ed: *Concurring Senior Circuit Judge Silberman: "writes separately because I think Appellants' claim can be disposed of rather simply. I start with the proposition that virtually every court to encounter a challenge to an arbitration clause has held: a challenger lacks standing unless and until an incident gives rise to a plaintiff's claim and a defendant invokes the arbitration clause." **We're assuming a challenge to the arbitration agreement can be raised after an actual dispute arises.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS FULL-YEAR 2021 STATS: A DOWN YEAR BY MOST MEASUREMENTS. FINRA Dispute Resolution Services ("DRS") posted full-year **2021** case statistics, with overall arbitration case filing trends continuing from prior

months, and with mediations ending the year with a meteoric rise. We will perform our usual in-depth analysis in next week's *Alert*, but wanted to share the headlines right now. In brief: 1) overall arbitration filings for 2021 – 2,893 cases – were down 26%); 2) cumulative customer claims were down 9% from 2020; 3) industry disputes were way down at minus 45%; 4) the ratio of customer to industry filings – about 2:1– returned to usual levels; 5) arbitrators issued awards in 15% of cases concluded, with customers receiving damages in about a third of these cases; 6) for the sixteenth month in a row, pending arbitration cases declined; 7) overall arbitration turnaround times were 15.4 months, with hearing cases now taking 18.1 months (both were up over 2020); 8) there are now 8,269 DRS arbitrators, 3,980 public and 4,289 non-public; and 9) mediation cases surged 49%.
(ed: Other than the surge in mediations and the continued decline in pending cases, there wasn't much stat-wise to write home about last year.)
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FINRA TO FOCUS ON EXPUNGEMENT THIS YEAR, COOK SAYS. Although FINRA's formal goals for 2022 have not yet been released, the Authority's President and CEO **Robert Cook** recently shared that the SRO will be focusing this year on expungement. As reported **January 21** by *AdvisorHub*: "In the next few months, Finra will release a white paper to provide 'some data and statistical analysis and discussion' regarding expungements as well as some 'alternative approaches' to brokers' requests to remove client complaints from their Central Registration Depository records, according to the self-regulator's CEO." Mr. Cook, speaking at a **January 19** SIFMA Webinar, stated: "We think these amendments would help provide greater confidence that expungements are only happening in accordance with the kind of limited circumstances identified in our rules, when the CRD information is clearly inaccurate."
(ed: As reported in SAA 2021-22 (Jun. 3), FINRA on May 28, 2021 temporarily withdrew a proposal for improving the expungement process. A Press Release, FINRA Statement on Temporary Withdrawal of Specialized Arbitrator Roster Rule Filing, *announced: "Following consultations with the SEC staff, we temporarily withdrew from SEC consideration our rule filing establishing specialized arbitration panels for expungement requests so that we can further consider whether modifications to the filing are appropriate." The two-page regulatory filing provided no further insights.)*
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SEC TO MEET JANUARY 26. NO ARBITRATION OR MEDIATION AGENDA ITEMS. The SEC on **January 19** announced that the Commission would be meeting on Wednesday, **January 26**, starting at 10:00 a.m. Eastern Time. The Agenda, which has no dispute resolution items, includes consideration of whether to propose amendments to (*ed: excepted essentially* verbatim): 1) Form PF to require current reporting and amend reporting requirements; and 2) the definition of an exchange under the Securities Exchange Act of 1934 and re-propose amendments to Regulation ATS for ATSs that trade U.S. government securities, NMS stock, and other securities and to Regulation SCI for ATSs that trade U.S. government securities.

(ed: The meeting will be webcast at www.sec.gov. For further info contact Vanessa A. Countryman from the Office of the Secretary at 202-551-5400.")
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SCOTUS DENIES *CERTIORARI* IN YET ANOTHER ARBITRATION-RELATED CASE. The Supreme Court on **January 18** declined to review *CLMS Management Services Limited Partnership v. Amwins Brokerage of Georgia, LLC*, No. 8 F.4th 1007 (9th Cir. Aug. 12, 2021), a case of first impression we reported on in SAA 2021-33 (Sep. 2). First, a review: The virtually unlimited reach of Federal Arbitration Act ("FAA") preemption can be checked by a contrary federal statute, such as the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The Act protects state laws regulating the business of insurance from federal preemption, in effect "reverse-preempting" the FAA: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance …." But what if the arbitration-friendly federal statute is not the FAA but the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("UN Convention")? There is no reverse preemption and the Washington law barring arbitration is preempted, says the *CLMS* Court. Why? Because the *UN Convention* is a *treaty* and not an "Act of Congress" as defined by the statute: "Article II, Section 3 of the Convention on Recognition and Enforcement of Foreign Arbitral Awards is self-executing, and it requires enforcement of the parties' arbitration agreement. Because the Convention is not an 'Act of Congress' subject to reverse-preemption by the McCarran Ferguson Act, the district court correctly granted defendants' motion to compel arbitration." The Court's **January 18** Order List denies the *Cert.* Petition in *CLMS Management Services Limited Partnership v. Amwins Brokerage of Georgia, LLC*, No. 21-708.
*(ed: *We're not surprised that SCOTUS had no appetite to take on this relatively esoteric issue, especially with an already-crowded docket of cases involving arbitration. **We covered in SAA 2020-31 (Aug. 19) a case to the same effect, J.B. Hunt Transport, Inc. v. Steadfast Insurance Co., No. 5:20-cv-05049 (W.D. Ark. 2020). That Court cited with favor McDonnel Group, L.L.C. v. Great Lakes Ins. SE, UK Branch, 923 F.3d 427 (5th Cir. 2019), another case to the same effect we covered in SAA 2019-21 (May 29).)*
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FINAL REMINDER: ANNUAL CITY BAR ASSOCIATION SECURITIES & ENFORCEMENT INSTITUTE IS FEBRUARY 9. As reported in SAAs 2022-01 (Jan. 13) & 2021-48 (Dec. 23), the Association of the Bar of the City of New York will be holding its *10th Annual Securities & Enforcement Institute* via live Webcast on **February 9**. Sign up here. The faculty features several prominent securities litigators, senior in-house counsel at major financial institutions and corporations, nationally recognized trial lawyers, jury consultants, and economists who will conduct several panels, the Agenda reveals. The program offers CLE credit from California, Connecticut, New Jersey, New York, and Pennsylvania.
(ed: Registration ranges from $249 for government/nonprofit/academic/judiciary who are Association members to $649 for nonmembers and can be done online.)
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SAVE THE DATES: SIFMA C&L ANNUAL SEMINAR IS MARCH 20–23 IN ORLANDO. The SIFMA Compliance & Legal Society's *2022 Annual Seminar* will take place **March 20-23** in Orlando. The event Webpage states: "SIFMA's Compliance & Legal Seminar is the preeminent meeting place for compliance and legal professionals from across the financial services industry. This March, we're excited to welcome you back live and in-person to reconnect with colleagues, earn CLE credits and immerse yourself in three days of substantive programming - all in a carefully planned experience at Grande Lakes in Orlando." The seminar topics are still being developed, but we note a "program track" on *Retail, Private Client & Arbitration.* Among the speakers are FINRA's President & CEO **Robert W. Cook**, and Vice President Talent Acquisition and Chief Diversity Officer **Audria Pendergrass Lee**. CLE credit has been requested from more than 15 states.
*(ed: *Registration, which can be done online, ranges from $995 for Members (if done by January 31) to $2,199 for non-Members (after January 31). **Registration for in-person attendance: "requires proof that registrants are fully vaccinated against COVID-19. Ongoing participation in this event is subject to SIFMA's COVID-19 Safety Acknowlegment." ***Questions? Email the Society at clsociety@sifma.org.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Baker Hughes Energy Services LLC (f/k/a GE Oil & Gas, LLC) v. International Engineering & Construction S.A.*, No. 21-CV-1961 (JMF) (S.D.N.Y. Nov. 16, 2021):** "GE petitions to confirm the arbitration award; IEC opposes GE's petition and cross-petitions to vacate the arbitral award on the ground that the arbitrators manifestly disregarded the law and the plain language of the parties' contracts. If the Court were writing on a blank slate, some of IEC's arguments might have traction. But given the well-established deference owed to arbitrators, the Court concludes that IEC's arguments for vacatur fall short. Accordingly, and for the reasons stated below, the Court grants GE's petition to confirm the arbitration award and denies IEC's cross-petition to vacate"…. [Also], IEC has not identified, and the Court has not found, a difference between the CPLR's 'completely irrational' inquiry and the FAA's 'manifest disregard' inquiry that would lead to a different result under New York law."

***Olson v. Doe*, No. S258498 (Calif. Jan. 13, 2022)**: "The question here is whether the nondisparagement clause in the parties' mediation agreement potentially applies to and thereby limits Doe's ability to bring a subsequent unlimited civil lawsuit against Olson seeking damages. Doe later filed such a lawsuit; Olson cross-complained for breach of contract and specific performance, arguing that Doe's suit violated the nondisparagement clause; and Doe moved to strike Olson's cross-complaint under the anti-SLAPP statute. We hold that the mediation agreement as a whole and the specific context in which it was reached — a section 527.6 proceeding — preclude Olson's broad reading of the nondisparagement clause. Accordingly, Olson has failed to show the requisite 'minimal merit' on a critical element of his breach of contract claim — Doe's obligation under the

agreement to refrain from making disparaging statements in litigation — and thus cannot defeat Doe's anti-SLAPP motion" (citation omitted).

***Bixler v. Superior Court (Church of Scientology)*, No. B310559 (Calif. Ct. App. 2 Jan.19, 2021)**: "The trial court granted the motion to compel, and petitioners sought writ relief. We issued an order to show cause, and now grant the petition. Individuals have a First Amendment right to leave a religion. We hold that once petitioners had terminated their affiliation with the Church, they were not bound to its dispute resolution procedures to resolve the claims at issue here, which are based on alleged tortious conduct occurring after their separation from the Church and do not implicate resolution of ecclesiastical issues. We issue a writ directing the trial court to vacate its order compelling arbitration and instead to deny the motion."

***Bland v. JP Morgan Securities, LLC*, FINRA ID No. 21-01191 (Los Angeles, CA, Dec. 23, 2021)**: A broker loses his request for expungement of a customer complaint from appearing on his CRD record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Mastrovich v. UBS Securities, LLC*, FINRA ID No. 19-01247 (New York, NY, Dec. 23, 2021)**: "A broker alleging wrongful termination and seeking deferred compensation relating to three bonuses is awarded nearly $6.4 million in compensatory damages against Respondent broker-dealer. The broker-dealer also loses its Counterclaim for unjust enrichment. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

K. Duggal and N. Diamond, *Regime Interaction in Investment Arbitration: Crowded Streets; Are Human Rights Law and International Investment Law Good Neighbors?*, Kluwer Arbitration Blog (Jan. 12, 2022): "Globalization has diversified the actors, institutions, norms, and instruments on the international legal stage. With diversification comes increased specialization and, in turn, organization around so-called regimes. The notion that international legal regimes can exist autonomously has long been refuted; indeed, each regime draws from general international law to some degree. If regimes are not autonomous, then how do they interact?"

***NLRB Invites Briefs on Mandatory Arbitration Clauses*, Office of Public Affairs (Jan. 18, 2022)**: "In a notice issued today in *Ralphs Grocery Company* 371 NLRB No. 50 (2021) the National Labor Relations Board invites parties and amici to submit briefs addressing whether the Board should adopt a new legal standard to determine whether confidentiality requirements in a mandatory arbitration agreement violate Section 8(a)(1) of the National Labor Relations Act and other legal issues related to mandatory arbitration agreements." (*ed: See our overage elsewhere in this* Alert.)

***Broker Generated $1.5M In Commissions Through Churning, Finra Says*, FA Magazine (Jan. 19, 2022)**: "A broker with a track record of churning accusations is the

focus of a Finra disciplinary proceeding that seeks to reclaim $1.6 million in commissions and fees that were allegedly generated from seven customers, the regulator said."

***Arb Panel Rules in Favor of UBS On $1.1M Promissory Note Case*, Financial Advisor IQ (Jan. 19, 2022)**: "A Financial Industry Regulatory Authority arbitration panel has ruled in favor of UBS over unpaid promissory notes from an advisor who jumped ship for Stifel.[] The wirehouse filed a claim against [Adviser] in February 2017, accusing him of breach of contract and unjust enrichment related to [his] alleged failure to repay the principal balance on 10 promissory notes upon his departure from the firm, according to a Finra award document published last week."

***SEC Seeks Candidates for Investor Advisory Committee*, www.sec.gov (Jan. 19, 2022)**: "The Securities and Exchange Commission is seeking candidates for appointment to the Investor Advisory Committee to help protect investors and improve securities regulations.[] The committee was established under the Dodd-Frank Wall Street Reform and Consumer Protection Act to advise the Commission, protect investor interests and promote the integrity of the securities marketplace. Committee members represent the interests of investors, are knowledgeable about investment issues and have reputations for integrity."

***Arbitration and PAGA Representative Actions: Supreme Court to Weigh In*, JDSupra (Jan. 21, 2022)**: "In California, however, state courts have declined to compel individual arbitration of representative actions under California's Private Attorney General Act ("PAGA"). Defense practitioners have long argued that this carve-out is difficult to reconcile with longstanding FAA jurisprudence, but the Supreme Court has not previously heard this issue on the merits.[] That may soon change. In important news for employers in California, the Supreme Court recently granted Viking River Cruises, Inc.'s petition for a writ of certiorari, which asks the Court to resolve the issue of whether the FAA preempts this state court carve-out of PAGA representative actions from the otherwise broad federal policy favoring individual arbitration."

***SEC Issues Awards Totaling More Than $40 Million to Four Whistleblowers*, www.sec.gov (Jan. 21, 2022)**: "The Securities and Exchange Commission today announced three awards totaling more than $40 million to four whistleblowers who provided information and assistance in three separate covered actions.[] In the first order, the SEC issued an award of approximately $37 million to two joint whistleblowers who provided key evidence that contributed to the success of the covered action. The whistleblowers also provided ongoing assistance and helped the staff identify additional information that advanced the investigation.[] In the second order, the SEC issued approximately $1.8 million to a whistleblower who provided important, new information that prompted Commission staff to open an investigation into the misconduct. The whistleblower continued to assist the staff by providing interviews and additional documents.[] In the third order, the SEC awarded approximately $1.5 million to a

whistleblower who provided new information that shaped staff's investigative strategy and significantly contributed to the success of the covered action…."
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DID YOU KNOW?

SCOTUSBLOG: ONE OF OUR FAVORITE WEBSITES. The recent frenetic level of arbitration-related activity at the Supreme Court prompts us to again share with viewers one of our favorite Websites, SCOTUSBlog. This searchable, well-organized, site has up-to-the-minute info on all things SCOTUS, including first-rate analyses of the cases and issues, as well as a live-feed. This one is worth bookmarking. *return to top*

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