SECURITIES ARBITRATION ALERT 2022-19 (5/19/22)

George H. Friedman, Editor-in-Chief

SQUIB:

SHORT BRIEFS:

QUICK TAKES:

- ***Cisneros Guerrero v. Occidental Petroleum Co*., No. 20-20633 (5th Cir. May 5, 2022)**
- ***Nano Gas Technologies, Inc. v. Roe,* Nos. 21-1809, 21-1822 (7th Cir. Apr. 25, 2022)**
- ***Transcor Astra Group S.A. v. Petrobras America Inc.,* No. 20-0932 (Tex. Apr. 29, 2022)**
- ***Rimini v. JP Morgan*, FINRA ID No. 21-01831 (New York, NY, Apr. 13, 2022)**
- ***Klein v. Morgan Stanley*, FINRA ID No. 21-00507 (Houston, TX, Apr. 14, 2022)**

ARTICLES OF INTEREST:

- **Emerson, R. and Hunt, Z., *Franchisees, Consumers, and Employees: Choice and Arbitration*, 13 WILLIAM & MARY BUSINESS LAW REVIEW 487-572 (2022)**
- ***SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit,* www.sec.gov (May 3, 2022)**
- ***Months After Release from Prison, Ex-Merrill Broker Tom Buck Ordered to Pay $7.5 Mln,* AdvisorHub (May 9, 2022)**
- ***California Supreme Court Affirms Employee's Right to Sue Under PAGA*, Human Resources Director (May 10, 2022)**
- ***Finra Arbitration Claims Decline — for Now*, InvestmentNews (May 10, 2022)**
- ***Wells Fargo Investors Support Lawsuit Alleging Firm Rigged Arbitration Case,* FA Magazine (May 12, 2022)**

DID YOU KNOW?

- **A Delightful -- if Older -- Review of Arbitration History**

SQUIBS: IN-DEPTH ANALYSIS

ALABAMA SECURITIES COMMISSION MOVES TO VACATE FINRA EXPUNGEMENT AWARD FOR PROCEDURAL IMPROPRIETIES. ***In a timely move, the Alabama Securities Commission ("ASC") raises serious questions about the procedure employed in a recent FINRA expungement proceeding, giving the forum some more to consider as it begins focusing on reform of the procedure for excising customer dispute information from brokers' registration records.*** As we reported in SAA 2022-03 (Jan. 27), FINRA President and CEO **Robert Cook** last **January** said the

SRO would be focusing this year on expungement. More recently, we discussed in SAA 2022-17 (May 5) a 26-page *Discussion Paper – Expungement of Customer Dispute Information* that FINRA issued on **April 28**. The *Discussion Paper* recommended a dual-track approach of adopting expungement reforms contained in SR-FINRA-2020-030, a rule change proposal to reform expungement procedures that FINRA temporarily withdrew in **May 2021** (see SAA 2021-22 (Jun. 3)), while at the same time considering new ideas. As if on cue comes word of the ASC's own interest in the expungement process, news of which we teased in SAA 2022-18 (May 12), while promising a more though review in this issue. Through the good offices of ASC Commissioner **Joseph Borg**, the *Alert* has obtained copies of the pleadings. Our discussion here will focus on the ASC's petition to vacate and what it suggests about deficiencies in the existing process.

The ASC Intervenes in an Expungement Confirmation Proceeding

In *Kent Kirby v. UBS Financial Services Inc.*, FINRA ID No. 21-01152 (Nashville, TN, Sep. 17, 2021), Arbitrator **Harvey R. Linder** recommended the expungement of five customer dispute occurrences from broker Kirby's Central Registration Depository (CRD) records. After Kirby filed a petition to confirm the Award in the Circuit Court for Palm Beach County, Florida, the ASC filed a petition to intervene in the confirmation proceeding and an accompanying petition to vacate the Award on **Feb. 22, 2022**. In the petition to intervene, the ASC argued that it is charged with protecting investors and regulating the securities industry in Alabama, that Kirby is registered to do business as a securities dealer in Alabama, that the integrity of the ASC is critical to protecting investors, and that the ASC therefore has an interest in maintaining that integrity. In addition, the ASC argued that Florida had the same interest. The parties did not oppose the intervention.

A Customer's Objections

In essence, the ASC seeks to vacate the Award because, in its view, Arbitrator Linder violated the procedural rights of Kenneth Lehman, the only customer to appear at the arbitration hearing and oppose granting expungement relief to Kirby. According to the ASC, based on an affidavit by Lehmann which the ASC attached to the petition to vacate: Lehmann complained that in **2008**, when Kirby worked for Merrill Lynch Pierce Fenner & Smith, Inc. (Merrill Lynch), he overconcentrated Kirby's account in 23 alternative investments, including two Alesco collateralized debt obligations (CDOs). In **2011**, Kirby filed an arbitration against Merrill Lynch only, because his attorney advised him that Merrill Lynch was liable for Kirby's actions. Merrill Lynch settled with Lehmann for $125,000. According to Kirby's Statement of Claim (as well as his BrokerCheck Report), however, the claim involved only the two CDOs. Lehmann received notice of the telephonic expungement hearing, refamiliarized himself with his case against Kirby, and appeared *pro se* at the hearing to object.

The Expungement Hearing

The ASC, citing the hearing transcript (also attached to the petition), as well as Kirby's affidavit, alleged several problems with the hearing, including the following: 1) No one

else appeared at the hearing to contest Kirby's request; 2) Kirby's attorney mischaracterized Lehmann's arbitration as involving only the two Alesco CDOs and as not involving Kirby; 3) Before allowing Lehmann to make an opening statement, "Arbitrator Linder falsely stated that Linder was not permitted by "guidance and rules and procedures' to allow Lehmann to reargue the facts underlying his Merrill Lynch arbitration in Kirby's expungement hearing," although "FINRA's guidance, rules and procedures require arbitrators to consider evidence about the underlying customer complaint;" 4) After allowing Lehmann to give an opening statement and Kirby's attorney to cross-examine him, the Arbitrator dismissed the customer from the hearing; 5) The Arbitrator allowed Kirby to give unrebutted testimony concerning the merits of Lehmann's complaint; 6) Kirby perjured himself; 7) The Arbitrator did not allow Lehmann to introduce documents that supported Lehmann's and contradicted Kirby's testimony; and 8) "After Kirby concluded his testimony, Arbitrator Linder had only one question for Kirby – why was Lehmann 'so vehement about your expungement' and 'What do you think turned him so much against you?'"

The ASC's Grounds for Vacatur

It is not for us to judge the credibility of the witnesses, the merits of the expungement recommendation itself or whether vacatur ought to be granted on any ground; in fact, it is worth noting that Lehmann's losses occurred during the 2008 market crash, which might account for losses in Lehmann's account regardless of how suitable his securities were. The ASC, though, sought to vacate the resulting Award on the following grounds: 1) The Arbitrator refused to hear relevant evidence by removing Lehmann from the hearing prematurely and not allowing him to introduce documents to supplement his testimony; 2) The Award was procured by fraud, because "Arbitrator Linder reinforced misleading and inaccurate statements made by Kirby's attorney in opening remarks about the scope and purpose of the expungement proceeding" and Kirby gave perjured testimony; 3) The Arbitrator displayed evident partiality or corruption by allowing Kirby's attorney to cross-examine Lehmann but denying Lehmann the right to cross-examine Kirby and refusing to question Kirby about Lehmann's specific allegations himself; 4) The Arbitrator overstepped his authority by misrepresenting and not following FINRA's guidance to arbitrators; and 5) The Award was in manifest disregard of the law because the Arbitrator "imposed his own brand of 'industrial justice' in granting expungement."

Is Expungement Guidance Enough?

FINRA's *Expanded Expungement Guidance* provides, in part: "In making these determinations, arbitrators should consider the importance of maintaining the integrity of the information in the CRD system….[] Given this significant role, arbitrators should ensure that they have all of the information necessary to make an informed and appropriate recommendation on expungement. Thus, arbitrators should request any documentary or other evidence they believe is relevant to the expungement request, particularly in cases that settle before an evidentiary hearing or in cases where only the requesting party participates in the expungement hearing.[]… It is important to allow customers and their counsel to participate in the expungement hearing in settled cases if they wish to. Specifically, arbitrators should:[]… 3. Allow counsel for the customer or a

pro se customer to introduce documents and evidence at the expungement hearing;[] 4. Allow counsel for the customer or a pro se customer to cross-examine the broker and other witnesses called by the party seeking expungement; and[] 5. Allow counsel for the customer or a pro se customer to present opening and closing arguments if the panel allows any party to present such arguments." Arbitrator Linder did not follow some of these instructions, at least by limiting Lehmann's involvement and arguably by not asking more questions of Kirby to ensure he had "all of the information necessary," but such "Guidance," in its current form, is not mandatory.

Other Lessons Learned

This case raises two other concerns that FINRA should consider addressing. First, Kirby's BrokerCheck Report makes no mention of the other 21 alternative investments of which Lehmann complained, raising questions about the completeness of FINRA's CRD records even without expungement and, therefore, whether arbitrators are necessarily getting a complete and accurate account of the customer complaints they are expunging. Secondly, the overwhelming majority of expungement proceedings (about 95% in the last three years by our estimate) are entirely uncontested; yet, it is likely that none of these concerns would have come to light in this case but for Lehmann's objections and the ASC's intervention.

*(ed: *This Squib was prepared by Harry A. Jacobowitz, President of HAJ Research and Writing LLC. Mr. Jacobowitz, a member of the Pennsylvania bar, and his firm perform legal research and writing for attorneys and handle substantive searches of SAC's Award database. He can be contacted at harryjacobowitz@optimum.net. **Email us at Help@SecArbAlert.com for copies of the pleadings. ***We will keep our readers informed of any further developments in this case of which we learn. ****Among the reforms included in the withdrawn rule were to require "straight-in requests" (i.e., those filed by brokers in arbitrations independent of customer complaints) to be decided by three-member panels composed of randomly chosen arbitrators with enhanced expungement training and to give customers or their representatives the right to cross-examine the broker and opposing witnesses. *****Regardless of the particular merits of its petition to vacate, kudos to the ASC for taking an interest in the integrity of the expungement process.)*

return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

REMINDER: COMMENTS WERE DUE MAY 16 ON REG NOTICE 22-09. This is a friendly reminder that comments were due **May 16** on Regulatory Notice 22-09, *FINRA Requests Comment on a Proposed Rule to Accelerate Arbitration Proceedings for Seriously Ill or Elderly Parties.* We will provide a full analysis in a future *Alert*. As reported in SAA 2021-46 (Dec. 9), FINRA's Board of Governors met in **December 2021** and among other actions approved a rule change proposal to codify the existing FINRA Dispute Resolution Services special program to expedite administration of arbitration cases involving senior or seriously ill parties. FINRA CEO Robert W. Cook's post-meeting memo stated: "The Board approved publication of a Regulatory Notice soliciting comment on proposed amendments to the Codes of Arbitration Procedure to accelerate

case processing for seriously ill parties and parties who are 75 or older." In keeping with the "new normal" for rule change proposals, the Board had authorized staff to publish the **March 16** Regulatory Notice seeking comments, rather than a 19b filing with the SEC. Nine questions are posed to commenters.
*(ed: *See our full analysis in SAA 2022-12 & -13 (March 31). **Thus far, 14 comments have been posted by FINRA. Although the comment period has closed, if past is any indication, FINRA will not reject late submissions. Comments must be submitted through one of the following methods: 1) online using FINRA's comment form; 2) emailing comments to pubcom@finra.org; or 3) mailing comments in hard copy to: Jennifer Piorko Mitchell, Office of the FINRA Corporate Secretary, 1735 K Street, NW, Washington, DC 20006-1506.)*
return to top

FINRA RELEASES 2022 ANNUAL BUDGET SUMMARY. DRS CASH FLOWS EXPECTED TO BE UP. FINRA on **May 9** issued its *2022 Annual Budget Summary*, showing that Dispute Resolution Services ("DRS") accounts for just four percent of the Authority's expected 2022 cash flow – the same as reported for **2021**. DRS is first mentioned in the nine-page *Budget Summary,* starting on page five. There, we learn that DRS is budgeted to generate $51.4 million in cash flow, up significantly from the $47.1 million reported in the *2021 Budget Summary*. As for FINRA proper, the *Summary* states that operating revenues are projected to be $1,095.5 million, an increase compared to 2021's $924.2 million budget, but a 5% decrease compared to actual revenues last year. The reasons? "Our projection for 2022 reflects expected declines in corporate filings and in trading volume. These declines are expected to offset the impact of previously announced fee increases approved by the SEC. As we have communicated in more detail in the past, FINRA's multiyear strategic planning includes targeted fee increases that were detailed in advance and phased in over three years, beginning in 2022, in order to provide time for member firms to plan accordingly. We project an increase in operating expenses during 2022 as we resume more normal activities, including increased travel, as well as higher compensation costs as we backfill vacancies and, where necessary, hire new staff to reflect the increased scope and challenges of our regulatory activities and responsibilities."
*(ed: *Wonder why the DRS' expected cash flow is forecast to be up significantly this year – more than 9% – given that case filings were down 26% last year? **Kudos to FINRA for again letting in the sunshine on its financials. ***As we already knew, DRS is a very small (but important!) part of FINRA's operation. The anticipated 4% of "cash flow by key function" is the smallest of those listed. ****COVID-19 is mentioned just once.)*
return to top

MARKET VOLATILITY AND ARBITRATION CASE FILINGS: BEEN THERE, DONE THAT. The market volatility in recent weeks has led inevitably to media conjecture on what this may mean for arbitration case filings. See, for example, *Finra Arbitration Claims Decline – For Now*, InvestmentNews (May 10, 2022), covered in this *Alert*'s "Articles of Interest." FINRA's arbitration case filings tend to run countercyclical to the capital markets. Or, as your publisher and Editor-in-Chief says with regularity,

"people fight when they are losing money; not so much when they are making money." Thus, our view as always is that arbitration filings typically trail the capital markets by several months, especially after prolonged bear or bull markets. That said, we would expect investor arbitration case filings to rise for several months from now – especially suitability, overconcentration, and margin** claims. Your immediate past publisher, **Richard "Rick" Ryder**, and current publisher, **George Friedman**, jointly authored a blog post on this very tropic in **March 2020** at the start of the pandemic. The points made on cause-and-effect in *What's Past is Prologue – All Over Again. What's Ahead for Arbitration Filings in the Wake of Recent Volatility* have held up reasonably well.
*(ed: *Our predictions back then on a rise in cases, not so well. Good reading, nonetheless. **To our surprise, FINRA reports that aggregate investor margin debt has been declining the past several months.)*
return to top

SCOTUS DENIES *CERTIORARI* IN ANOTHER ARBITRATION-RELATED CASE. The Supreme Court on **May 16** denied a *Certiorari* Petition in *Robertson v. Intratek Computer, Inc*., No. 20-1229, a case we covered in SAA 2020-39 (Oct. 21). We will cover in detail in a future *Alert* this latest rejection by SCOTUS of the chance to take on another arbitration-centric case. Spoiler alert: we are not surprised. At issue? A federal statute -- 41 U.S.C. § 4712 – aims to protect whistleblowers and among other things bars waivers of protections provided by the law, including the right to sue. Specifically: "The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment." The statute, however, does not ban predispute arbitration agreements ("PDAA") or even mention arbitration. A core question in *Robertson v. Intratek Computer, Inc*., 976 F.3d 575 (5th Cir. 2020), was whether the statute barred enforcement of a PDAA covering a whistleblower? Relying on several SCOTUS decisions and statutory language, the Fifth Circuit found unanimously in this case of first impression that this federal whistleblower protection statute yields to the Federal Arbitration Act because it does not expressly ban PDAAs.
*(ed: *The case is on page 2 of the Order List. **The Fifth Circuit's decision and the* Cert. *denial were no-brainers in our view. As we said in our editorial comment in # 2020-39, how many times must the rule of law be reiterated? ***The same Order List also shows on page 2 that the Court agreed to review* SEC v. Cochran, *No. 21-1239, where the Petition identifies this issue: "Whether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing Securities and Exchange Commission administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the administrative law judge who will conduct the proceeding.")*
return to top

THIRD CIRCUIT: POSSIBLE LEGAL ERROR BY FINRA PANEL IS NOT "MANIFEST DISREGARD." Even if a FINRA Panel's Award was legally erroneous, this alone did not meet the stringent standard for a finding of "manifest disregard of the law," a unanimous Third Circuit holds in *Caputo v. Wells Fargo Advisors, LLC*, No. 20-3059 (3rd Cir. May 9, 2022). Wells Fargo succeeded in a FINRA arbitration brought to

recover the $1,663,529.71 balance on a discharged adviser's promissory note. Rep. Caputo then sought without success to vacate the Award (*ed: see the case of the same name, No. 3:19-cv-17204-FLW-LHG (D. N.J. May 29, 2020)*), and this appeal followed. The issues? "Caputo argues that the award should be vacated because it violates public policy and is in manifest disregard of law. He also argues that it should be vacated because the arbitration panel exceeded its authority and excluded certain evidence." After rejecting the exceeding authority and public policy challenges, the Court says this about "manifest disregard": "Even if the FINRA arbitration panel got it wrong, it is hard to see how this would be more than legal error, as required to vacate an arbitration award under the manifest disregard doctrine. Further, despite Caputo's assertions to the contrary, there is no evidence in the record that Wells Fargo urged the FINRA arbitration panel to disregard the law. The arbitrators' decisions to cut off the cross-examination of certain witnesses and rule in favor of Wells Fargo do not support the inference that the FINRA arbitration panel disregarded the law such that they exceeded their authority." Jurisdiction was based on diversity.
*(ed: *Seems right. **As to the possibility of misconduct, the Court says: "We are not convinced that the arbitrators' decision to exclude evidence of Caputo's discharge deprived him of a fair hearing. Given that Caputo was an at-will employee who signed Promissory Notes promising that he would pay Wells Fargo back in full, we are skeptical that excluding the evidence at issue resulted in an unfair hearing." ***The FINRA case is FINRA ID No. 15-0204 (Newark, NJ, Jul. 26, 2019).)*
return to top

AAA TO OFFER VIRTUAL ADVANCED MEDIATION SKILLS PROGRAM LATER THIS MONTH. The American Arbitration Association will be conducting a virtual program, *Advanced Mediation and Advocacy Skills for Global Commerce*, **May 24** and **26.** The program announcement states: "Take a deep dive into advanced mediator techniques for international mediations. Come away with an appreciation for the dynamics of commercial decision making in a global context. Understand the influence of multi-cultural participants on negotiation and the power of co-mediation to achieve results." Among other topics this course will cover are (*ed: repeated* verbatim*)*: how culture influences the ethical outlook of participants and persuasion often used in international mediated settlement negotiations; application of the Singapore Convention and enforcement of cross-border mediated settlements; mediation in Investor State disputes; process-design considerations when mediating cross-border disputes; and the role of ADR institutions in cross-border disputes. The training program is targeted to: "… anyone interested in the field of mediation and involved in cross-border commercial pursuits. Legal training and education or prior experience with mediation, while helpful, is not necessary to fully participate in and benefit from all this course has to offer." Serving as faculty will be: **Harold Coleman, Jr.** (Mediation.org, a Division of the AAA -- Los Angeles); **Deborah Masucci** (Independent Arbitrator, Mediator and Educator, AAA-ICDR® Panel -- New York City and Vero Beach, FL); and **Wolf von Kumberg (**Independent Arbitrator and Mediator, Int-Arb --London, England and, AAA-ICDR Panel; -- Washington, DC). CLE credit is not available.

*(ed: *The program will take place both days from 12 noon to 4:00 p.m. EDT.**Registration, which closes May 23, is $595; the Session ID is 22AMTP002. ***Questions? Contact Michael Rodriguez at CustomerService@AAAMediation.org or 877-252-0426.)*
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Cisneros Guerrero v. Occidental Petroleum Co.*, No. 20-20633 (5th Cir. May 5, 2022)**: "[I]n the middle of 2006 … the government canceled the exploration contract and expropriated Occidental's property, leading to massive losses. Profits and profit-sharing abruptly ceased. Occidental sought arbitration and, a decade later, received a nearly billion dollar settlement from Ecuador.[] A group of Occidental's former Ecuadorian employees then sued Occidental, claiming the arbitration settlement represented profits they were entitled to share. The district court correctly dismissed the employees' claims. Under the plain terms of Ecuadorian law, a company's profit-sharing obligation depends on the profits lawfully declared in its annual tax returns. Occidental's tax returns for the interrupted year of 2006 showed not profits but losses. As a result, Occidental owes its former employees no shared profits for that year."

***Nano Gas Technologies, Inc. v. Roe*, Nos. 21-1809, 21-1822 (7th Cir. Apr. 25, 2022)**: "Courts may remand to the arbitrator to clarify an award. Yet it is unnecessary and impractical to do so here. The arbitrator entered its award over five years ago and, at oral argument, Roe's counsel could not confirm the arbitrator's whereabouts. When an award's language compels only one conclusion, the parties need not track down the arbitrator to confirm the obvious. Resolving this matter today allows Nano Gas to return to the district court and resume enforcing judgment without needless delay. Nano Gas has waited long enough" (citations and footnote omitted).

***Transcor Astra Group S.A. v. Petrobras America Inc.*, No. 20-0932 (Tex. Apr. 29, 2022)**: "We conclude that the settlement agreement confirms that the parties agreed to supersede all prior agreements and to resolve any disputes over the settlement agreement in court. At a minimum, reading the arbitration agreement and the subsequent settlement agreement together, we cannot conclude that a presently enforceable arbitration agreement clearly and unmistakably exists. We thus conclude that courts, rather than the arbitrator, must decide whether an agreement to arbitrate claims regarding the 2006 stock-purchase agreement presently exists, and for the reasons we have explained, we conclude it does not.[] In the absence of an arbitration agreement, the trial court properly decided whether the 2012 settlement agreement bars the claims Petrobras asserted in the arbitration proceeding."

***Rimini v. JP Morgan*, FINRA ID No. 21-01831 (New York, NY, Apr. 13, 2022)**: In this employment discrimination case, an All-Public Panel grants with prejudice Respondent broker-dealer's Prehearing Motion to Dismiss pursuant to FINRA Rule 13206 (Six-year Eligibility Rule for Industry Disputes) and 13504 (Res Judicata). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Klein v. Morgan Stanley*, FINRA ID No. 21-00507 (Houston, TX, Apr. 14, 2022)**: A customer, an estate, and a limited partnership alleging unsuitable and risky investments in securities called Elks and Pacers, lose their case against two Respondent broker-dealers and broker pursuant to FINRA Rules 12504(a)(6)(B) and 12206(a) (Six-year Eligibility Rule). Respondent broker is granted his request for expungement of this matter from his CRD record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Emerson, R. and Hunt, Z., *Franchisees, Consumers, and Employees: Choice and Arbitration*, 13 WILLIAM & MARY BUSINESS LAW REVIEW 487-572 (2022): "Commentators and lawmakers have called attention to the rising frequency of contractual arbitration as a non-negotiable condition of many relationships. Indeed, it is a rare individual who is not subject to at least one pre-dispute, binding arbitration agreement…. Based on a comprehensive review of available data and literature, this Article finds that, while the most charitable interpretations by arbitration proponents are untenable, some measured but broadly supportive arguments for contractual arbitration can be persuasive. Although unchecked bargaining power disparities are rightfully concerning and should be addressed, contractual arbitration can nonetheless play a useful role in relational contracts."

***SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit*, www.sec.gov (May 3, 2022)**: "The Securities and Exchange Commission today announced the allocation of 20 additional positions to the unit responsible for protecting investors in crypto markets and from cyber-related threats. The newly renamed Crypto Assets and Cyber Unit (formerly known as the Cyber Unit) in the Division of Enforcement will grow to 50 dedicated positions."

***Months After Release from Prison, Ex-Merrill Broker Tom Buck Ordered to Pay $7.5 Mln*, AdvisorHub (May 9, 2022**): "The hits keep coming for one-time Merrill Lynch star Thomas J. Buck.[] Buck, who was released from prison in January after serving a 40-month sentence for overcharging clients by more than $2 million, was on May 6 ordered by arbitrators to pay a former customer in Memphis, Tennessee more than $7.5 million. The customer, Janice J. Compton, had made a variety of fraud and overtrading allegations in her July 2020-filed claim.[] Buck, once the wirehouse's former top-producing broker in Indiana, was held responsible for $770,269 in compensatory damages, $1,860,144 in interest on nearly $6 million in well-managed account damages, $2,310,806 in treble damages pursuant to Indiana corruption and racketeering laws, and $2,585,232 in attorneys' fees, according to the Financial Industry Regulatory Authority award." (*ed: see* Compton v. Merrill Lynch and Buck, *FINRA ID No. 20-02468 (Memphis, TN, May 6, 2022). We plan to cover this one in full in a future* Alert. *Note that the claims against Merrill were voluntarily dismissed with prejudice.)*

***California [Appellate] Court Affirms Employee's Right to Sue Under PAGA*, Human Resources Director (May 10, 2022)**: "In *Iskanian v. CLS Transportation Los Angeles,*

LLC (2014), the California Supreme Court said that an employee's right to sue under the Private Attorneys General Act (PAGA) was unwaivable and that the rule against such waivers did not frustrate the Federal Arbitration Act (FAA)'s objectives.[] In *Wing v. Chico Healthcare & Wellness Centre*, Chico Healthcare & Wellness Centre, LP hired a receptionist at a skilled nursing facility. She agreed, as an employment condition, to be bound by the company's alternative dispute resolution (ADR) policy…. The employer's appeal asked the appellate court to reconsider Iskanian in light of two U.S. Supreme Court cases — *Epic Systems Corp. v. Lewis* (2018) and *Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) — that impliedly overruled *Iskanian*. The employer acknowledged that these decisions did not directly tackle PAGA.[] The California Court of Appeal for the Second District affirmed the trial court's denial of the employer's motion to compel arbitration."

***Finra Arbitration Claims Decline* — *for Now*, InvestmentNews (May 10, 2022)**: "Fewer brokerage customers are filing arbitration claims, but that trend may reverse later this year thanks to the steep market downturn. The number of customer claims declined to 369 cases in the first quarter of this year compared to 523 in the same period last year, a 29% drop, according to Financial Industry Regulatory Authority Inc. statistics through March…. 'If the trend holds, the 632 arbitrations filed for the quarter straight-lines to about 2,500 yearly arbitration filings, a weak year by any measure,' **George Friedman**, editor in chief of the *Securities Arbitration Alert*, wrote in a recent blog post."

***Wells Fargo Investors Support Lawsuit Alleging Firm Rigged Arbitration Case*, FA Magazine (May 12, 2022)**: "The saga of Wells Fargo's 'secret deal' with a Finra arbitrator has taken another turn, with investors filing a brief supporting a judge's January decision to overturn a 'fraudulent' arbitration award in the firm's favor."
return to top

DID YOU KNOW?

A DELIGHTFUL -- IF OLDER -- REVIEW OF ARBITRATION HISTORY. By its nature as a weekly online publication, the *Alert* tends to focus on current events and breaking news. But, every so often, it's nice to step back and see how we got here. We recently came across a delightful if older historical account authored by **William C. Jones**, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, that was published in volume 1956, issue 2, of the WASHINGTON UNIVERSITY LAW REVIEW. The article is loaded with interesting historical factoids. For example, who knew the Dutch West India Company during the period 1624-64 used arbitration to settle civil disputes in what became New York City? This is a must-read for arbitration history aficionados.
return to top

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 07666
T: 917-841-0521
Web: www.SecArbAlert.com
Blog: www.sacarbalert.com/blog/; Twitter: @SecArbAlert