SECURITIES ARBITRATION ALERT 2022-25 (6/30/22)

George H. Friedman, Editor-in-Chief

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*****BREAKING NEWS: FINRA RELEASES INDEPENDENT INVESTIGATION REPORT ON THE "RIGGED PANELS" ACCUSATION.** *This week's* Alert *features a lead squib on the long-awaited independent Report analyzing the charge that FINRA manipulated the arbitrator list preparation process. Spoiler alert: The report finds no evidence of wrongdoing but has several recommended improvements. Wishing our readers a safe and healthy Independence Day.*

All the best for this truly American holiday!

SQUIBS: IN-DEPTH ANALYSIS

FINRA RELEASES REPORT ON INDEPENDENT REVIEW OF "RIGGED PANELS" ACCUSATION: FINDS NO IRREGULARITIES BUT RECOMMENDS CHANGES. ***FINRA has released the long-awaited report of outside investigators retained to study the "rigged panels" accusation. The June 29 report finds there were no irregularities, but contains several recommended improvements.*** The *Alert*'s readers are very familiar with this saga, which we've covered extensively and blogged about on February 2, 9, and 25. To review, Fulton County Superior Court Judge **Belinda E. Edwards** in *Leggett v. Wells Fargo Clearing Services, LLC*, No. 2019CV328949 (Ga. Super Jan. 25, 2022), found that the potential FINRA arbitrator list preparation process had been compromised.

Award and Attempt to Vacate

We covered in SAA 2019-30 (Aug. 7) the underlying Award in *Leggett v. Wells Fargo Clearing Services, LLC*, FINRA ID No. 17-01077 (Atlanta, GA, Aug. 1, 2019), where the All-Public Panel: 1) denied the investors' $1.2 million claim; 2) assessed $51,000 in costs and all forum fees against the investors; and 3) recommended expungement. The investors moved to vacate in **October 2019**, asserting several acts of party, arbitrator and FINRA arbitration forum misconduct. This one generated the most attention (*ed: footnotes omitted*):

> *"First*, Wells Fargo rigged the arbitrator selection process in direct violation of the FINRA Code of Arbitration Procedure, denying the Investors' of their contractual right to a neutral, computer generated list of potential arbitrators…. Rather than ranking and striking pursuant to the Code, on July 10, 2017, counsel for Wells Fargo submitted a letter to FINRA insisting that one of the proposed arbitrators on the list of potential arbitrators be removed from the computer generated list on the ground that he harbored personal bias against Wells Fargo' s lead counsel…"

The Trial Court Essentially Agrees
Judge **Belinda E. Edwards** vacated the Award in what might be considered a primer on the basic FAA grounds for vacating an award (i.e., fraud, arbitrator bias, arbitrator misconduct in not hearing relevant or material evidence or failing to grant a reasonable postponement request; or the panel exceeding authority). The Court weighed in on interference with the Neutral List Selection System ("NLSS") with some scathing verbiage:

> "The Court's factual review of the record evidence leads to its finding that Wells Fargo and its counsel manipulated the FINRA arbitrator selection process in violation of the FINRA Code of Arbitration Procedure, denying the Investors' their contractual right to a neutral, computer-generated list of potential arbitrators. Wells Fargo and its counsel, Terry Weiss, admit that FINRA provides any client Terry Weiss represents with a subset of arbitrators in which certain arbitrators (at least three, but perhaps more) are removed from the list Wells Fargo agreed, by contract, to provide to the Investors in the event of a dispute. Permitting one lawyer to secretly red line the neutral list makes the list anything but neutral, and calls into question the entire fairness of the arbitral forum."

Post-Decision History
The Trial Court's decision prompted: 1) subsequent calls by PIABA for Congressional and SEC investigations; 2) a denial from Wells and a vow to appeal; 3) a **February 9** letter to FINRA from Sen. **Elizabeth Warren** (D-MA) and **Rep. Katie Porter** (D-CA) demanding answers by **February 23**; 4) a **February 18** Press Release from FINRA announcing that the Authority had retained the Lowenstein Sandler law firm to conduct an independent review; 5) news reports in *FA Magazine* and *ThinkAdvisor* in late **February** of a coming appeal by Wells; 6) a FINRA reply to Sen. Warren and Rep. Porter in a **February 21** letter from CEO and President **Robert W. Cook**; 7) as reported in SAA 2022-10 (Mar. 17), a **March 7** follow-up letter from Sen. Warren and Rep. Porter that was announced in a Press Release and posed several questions and demanded a response by **March 22**; and 8) an **April 4** appeal by Wells in the Georgia Court of Appeals.

The Report is Issued: No Wrongdoing …
FINRA on **June 29** released the 37-page *Report of the Independent Review of FINRA's Dispute Resolution Services – Arbitrator Selection Process*, which was announced in a corporate Press Release and a separate statement from the Audit Committee. The investigation was directed by **Christopher Gerold**, a partner in Lowenstein's Securities Litigation and Corporate Investigations & Integrity Practice Groups. Mr. Gerold is past Chief of the New Jersey Bureau of Securities and served as President of the NASAA. After discussing methodology – "Lowenstein conducted 29 interviews; examined more than 150,000 documents, emails, and telephone records; reviewed the FINRA Dispute Resolution Services (DRS) arbitrator database system; and listened to recordings of relevant arbitration proceedings" – and the operation of the Neutral List Selection System, the Report concludes there were no irregularities:

"After careful consideration of the evidence obtained during the investigation, Lowenstein does not believe that there was any agreement between Weiss and FINRA regarding the panels for Weiss's cases. All current and former FINRA personnel who could conceivably have been a part of such an agreement were interviewed and denied the agreement's existence, noting that it would be contrary to DRS's culture of neutrality. Lowenstein found them all to be credible. Likewise, no documentary evidence – including any emails or other material – suggested in any way that such an agreement existed…. The only evidence that such an agreement existed was the July 13, 2017 Letter, which Weiss emphatically disclaimed meant that there was a secret agreement during the course of this investigation and in other forums."

… But There Can Be Improvements

The Report concludes with recommendations for improvement, the core ones being (*ed: presented* verbatim *from the Release*):

- Implementing ongoing, mandatory training for staff;
- Requiring written explanations, upon a party's request, of approval or denial of a causal challenge to the selection of an arbitrator or an arbitrator removal by the DRS Director for cause;
- Conducting an updated external procedural review of the arbitrator selection algorithm to determine if it is still the most effective means for creating random, computer-generated arbitrator lists; and
- Updating the DRS Manual and rules to clarify staff roles and procedures, and to ensure consistency and transparency.

The FINRA Board of Governors conferred with the Committee on **June 22**. The Statement says that the Board is: committed to the continual improvement of all FINRA operations, including DRS, and has directed FINRA management to implement the recommendations contained in the report. FINRA management agrees with the recommendations and has committed to deliver a plan for implementation to the Board. The Audit Committee will monitor management's progress in implementing these recommendations going forward."

*(ed: *Kudos to FINRA for keeping its promise to make the Report public. **We suspect this is by no means the end of it. It's just the latest chapter in what is sure to be a lengthy process. Next will likely be reactions from PIABA, NASAA, Congress and the SEC. ***Wonder what other steps are planned to address overall investor confidence in the forum? ****The Wells appeal is pending.)*

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AAA CASE STATS, 1ST QUARTER 2022: CONSUMER & EMPLOYMENT DISPUTES. ***AAA Award Data is updated quarterly by the American Arbitration Association. This analysis, which covers the first quarter of 2022, is provided by Rick Ryder, President of Securities Arbitration Commentator, Inc., and by SAC's* ARBchek.com *- securities arbitration's original arbitrator evaluation service.*** The American Arbitration Association ("AAA") releases on a quarterly basis a report

providing detailed information about its many Consumer and Employment cases. The report issues in the form of an Excel sheet, with each row representing a specific disposition, whether that disposition be in the form of an Award, settlement, withdrawal, dismissal, or administrative termination. AAA has been posting this information on its Consumer and Employment cases since the early aughts, but in five-year tranches. Thus, the latest Report that AAA has posted on its Website covers the five years ending in March 2022. We'll review that Report here, focusing primarily on the latest quarter.

Spoke in AAA's Wheels?

Generally speaking, AAA processes a heavy load of "Financial Services" cases, far more than FINRA, and the number of disputes the forum handles has increased over recent years. We illustrated that in a chart published last quarter, when we reviewed AAA dispute statistics for the whole of 2021. In that chart, we showed that "Financial Services" disputes recorded in 2014 totaled only 298 and that steady increases grew that number to 2,111 in 2018. Three years later in 2021, AAA reported 5,398 "Financial Services" disputes among its Consumer and Employment caseload. This year may be different, if the first quarter is indicative, because we found only 211 such cases among a surprisingly large listing of 15,890 case dispositions (just for context, AAA reported 17,001 case dispositions for all of 2021; the 15,890 is just for this past quarter).

Now, we think we see the reason, or at least a possible explanation, in the form of a bottleneck of class action-related matters that have taken, on an individual basis, the arbitration route. Of the 15,890 dispositions in the latest AAA report, 13,740 represent cases involving Amazon disputes with customers. Only one of all these Amazon closures was decided by an Arbitrator. Amazon won that case, defeating its customer's claim for an award of $732.40. But Arbitrator Jeffrey C. Brown, Esq., an intellectual property specialist from Minnesota, also stipulated in his January 25, 2022 Award that Amazon had to pay 100% of the $1,500 arbitrator fee. Subtract three other "dismissed" cases, two settlements, and one administrative termination, and, two months later, Amazon and the disputants in 13,733 cases, led by law firm Keller Lenkner, withdrew all remaining claims.

Uber too, But Different Dynamics

Among the approximately 2,000 remaining dispositions, we found 186 matters involving Uber, defending claims that are labelled as "Consumer" claims. Here, Uber was, again, opposing the clients of one law firm, for the most part, but taking the bulk of the matters to an arbitral decision. 153 of the matters were decided by arbitrators (33 were withdrawn). 139 were represented by attorney Bryan Weir, Consovoy McCarthy (VA). Fourteen other parties went forward without representation and lost (although Uber paid the arbitrator fees). The 37 Arbitrators handling the 139 represented matters non-suited 110 of the claimants (again, Uber pays the fees). The other 28 awards were wins for the Claimants. In 11 cases, they not only won, but also received attorney fees of about $1,000 to $6,000. There, the damage awards were mostly either $4,000 or $8,000. There were 15 awards in the other cases that stopped out at $9,999.99, suggesting some stipulated limit imposed by the parties.

Now, we confess that not many arbitrators ultimately had to provide their services in connection with those nearly 14,000 case dispositions, so that was not the bottleneck. But, consider, AAA had to prepare for the potential need for arbitrators to decide that flood of new cases, when first filed in 2021. We recall back then that AAA was recruiting heavily to add to its ranks for Consumer Rules cases; the forum even developed a separate cadre of arbitrators, separate and apart from its Commercial Arbitrator force. Anyway, that's our best guess as to why the forum was able to process to conclusion just 211 "Financial Services" cases in the first quarter. Certainly, we have no evidence to believe that a sharp reversal has occurred in the climb of "Financial Services" cases over the past eight years.

2022 Financial Services Results

Now, let's take a look at those 211 Consumer & Employment cases that were reported. Of the 186 "Financial Services" Consumer dispositions, 57 resulted in Awards. That's interesting in itself, because, *in the whole of 2021,* the 5,000+ "Financial Services" case dispositions produced 195 "Awarded" cases. That high ratio (57:186) of Awards to total case dispositions strongly supports the proposition that any delay occasioned by the Amazon and Uber cases has not prevented parties desiring an arbitral decision from obtaining one. Such delays might have an impact on party decisions not to settle or withdraw a case, but parties claiming their "day in court" seem, from these numbers, to be getting it - and proceeding to decision within a reasonable amount of time. Drawing an average turnaround time for a relevant sample among the Awarded cases, we found that arbitrators returned a final disposition with 342 days.

Among the 57 "Awarded" cases -- which the AAA legend defines as: "A case in which the arbitrator ... rendered a decision," we found 33 in which monetary relief was awarded and 13 in which the Consumer was the recipient of that monetary relief. A summary of the dispute is not information AAA provides, so we selected six of the 13 wins with a potential securities cast to delve further. It was from this set that we took the 342-day average turnaround time. As to the size of the recoveries, we found four of the six winners were granted a monetary award that either matched or exceeded the claimed amount. A fifth claim for $100,000 returned only a $2,000 award. The sixth had no stated claim and the award was small, but "other" unspecified relief was also granted. Counsel represented the claiming Consumer in four of the six matters and all cases involved hearings (i.e., not "documents only" proceedings).

Employment Cases

The employment side of the "Financial Services" case dispositions deserves a brief paragraph. They made up the 26 other dispositions among the 211 total. Twenty-three of the matters were initiated by employees and three were brought by the business entity. Just paging through the SAC Database of these AAA cases, we quickly note that these 26 employment matters more commonly involve identifiable broker-dealers or investment advisers than the Consumer side. Only one of the 23 was an "Awarded" case and it involved a life insurance respondent. The damages claimed in these employee-initiated matters cover a wider dollar range ($75,000-$4 million) and the arbitrator fees assessed

can be hefty; in the Consumer arbitrations, they are commonly limited to a one-day fee of $1,500.

Conclusion

Because there were only 185 Consumer cases to review, we scanned for respondent broker-dealers or RIA businesses we could recognize. We saw more than several -- none, of course, related to large wirehouses -- but, without some idea of the complaint, we can't speculate further about some of the other company names. We did note with interest a handful of matters involving cryptocurrency, where the respondent business was Coinbase. The amounts involved in those disputes ranged from $3,100 to $250,000. It would be really interesting to know the nature of the Consumer's underlying grievance. *(R. Ryder: *Take a look for yourself at AAA's Consumer Arbitration Statistics. While the majority of the cases involves non-securities disputes, considerable arbitrator overlap exists between the FINRA and AAA roster, making this an excellent secondary source of arbitral activity when performing FINRA arbitrator evaluations. Importantly, checking for AAA Awards provides an alternative to simply striking a candidate who has no FINRA Awards -- a new arbitrator at FINRA may be highly experienced at AAA. If you happen to have a AAA dispute, your appointed arbitrator's C&E case history can lead to a wealth of information that will inform your tactical decisions. **SAC has the earlier reports on file going back to 2005 and provides Arbitrator Summary Reports in individualized Excel and PDF formats. You can check the name for free on SAC's AAA/JAMS Directory, under the green "Search ARBchek" selection on the ARBchek Homepage, and, if you hit a positive, contact SAC for a report for a very modest fee.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH MAY: CUSTOMER ARBITRATION CLAIMS BOUNCE BACK, BUT INDUSTRY CASES ARE NOW DOWN. MEDIATION FILINGS CONTINUE TO BE VERY STRONG. FINRA Dispute Resolution Services ("DRS") has posted case statistics through **May**. We offer these headlines: 1) overall arbitration filings through **May** – 1,053 cases – are down 16% (had been down 18% last month); 2) cumulative customer claims declined by 22% (had been minus 30%); 3) industry arbitration filings are now *down* 6% (had been up 5% through **April**); 4) mediation cases continue to rise; and 5) pending cases continue to decrease. Overall arbitration turnaround times were 17.6 months, with hearing cases now taking 19.1 months (both figures are slight increases from last month). There were 388 mediation cases in agreement, a gargantuan 137% increase (besting April's torrid plus 130% pace). The settlement rate remains very high at 90%. There are now 8,413 DRS arbitrators, 4,041 public and 4,372 non-public. Pending cases stand at 3,445, a decline of 73 from April.

*(ed: *If the trend holds, the 1,053 arbitrations filed through April still straight-lines to only about 2,500 yearly arbitration filings, a weak year by any measure. Time will tell. **Hearing processing times ticked up a bit again through May, after decreasing earlier this year. We will continue to keep an eye on this one, since we continue to*

*wonder if the resumption of in-person hearings in August 2021 is somehow linked to this stat. Common sense tells us it is easier to schedule and attend virtual hearings, than those conducted in-person. ***Past year stats can be found here.)*
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ANOTHER SCOTUS SHOE DROPS: COURT GRANTS *CERT*., REVERSES, AND REMANDS *UBER V. GREGG* AND OTHERS IN LIGHT OF *VIKING RIVER*. As our readers know, the Supreme Court on **June 15** held 8-1 in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, that California's Private Attorney General Act ("PAGA") was in part preempted by the Federal Arbitration Act ("FAA"), insofar as PAGA allowed employees to evade bilateral predispute arbitration agreements ("PDAA"). The lone dissenter was **Justice Thomas**, who held to his long-standing view that the FAA does not apply in state courts. That decision has broken a logjam of pending *Certiorari* Petitions in cases involving PAGA and FAA preemption. The Court's **June 27** Order List states on page 1 as to *Uber Technologies, Inc. v. Gregg*, No. 21-453; *Uber Technologies, Inc. v. Rosales*, No. 21-526; *Lyft, Inc. v. Seifu*, No. 21-742; *Schipt, Inc. v. Green*, No. 21-1079; and *Hanfy Technologies v. Pote*, No. 21-1121: "The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the Court of Appeal of California, Second Appellate District for further consideration in light of *Viking River Cruises, Inc. v. Moriana*, 596 U. S. ___ (2022)." We reported in SAA 2022-02 (Jan. 20) that the parties in *Gregg* had agreed to hold up, pending the decision in *Viking River*, on the *Certiorari* Petition seeking review of *Gregg v. Uber Technologies, Inc*., No. B302925 (Cal. Ct. App. 2 2021), *pet. for review den.*, No. S269000 (Cal. 2021). Specifically, Gregg filed a **January 10** request to delay stating: "This case raises the question on which this Court granted certiorari on December 15, 2021, in *Viking River Cruises v. Moriana*, No. 20-1573, and the petition should be held pending the Court's disposition of that case. Specifically, both cases present the question whether the Federal Arbitration Act (FAA) preempts the California Supreme Court's holding *in Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), that the right to bring a representative action under California's Private Attorneys General Act, or PAGA, cannot be waived in a private agreement, including an arbitration agreement." And the **January 12** response from Uber was: "Petitioners agree with Respondent that the Court should hold this petition pending resolution of *Viking River Cruises*. See Pet. 22 n.1 (stating that if this Court grants certiorari in *Viking River Cruises*, 'it should hold this petition until that action is resolved')."
(ed: The other cases in the Order List are similar. All decisions are vacated and remanded with instructions to reconsider in light of Viking River.*)*
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THAT DIDN'T TAKE LONG: THIRD CIRCUIT DENIES APPLICATION FOR DISCOVERY ASSISTANCE BECAUSE FOREIGN ARBITRATION TRIBUNAL IS NOT GOVERNMENTAL. As our readers know, the Supreme Court on **June 13** decided *ZF Automotive US, Inc. v. Luxshare, Ltd*., No. 21-401, ruling unanimously that 28 U.S.C. § 1782(a), which permits litigants to use American courts to obtain discovery in aid of "a foreign or international tribunal," applies only to governmental fora and does

not extend to private commercial arbitral tribunals. Not waiting very long to apply the holding is the Third Circuit in *In re: Application of EWE Gasspeicher GmbH*, No. 20-1830 (3rd Cir. Jun. 22, 2022) (*per curiam*), a case involving an arbitration pending at the Deutsche Institution für Schiedsgerichtsbarkeit ("DIS") in Germany. Says the Court: "While this appeal was pending, the Supreme Court decided *ZF Automotive*. In *ZF Automotive*, the Supreme Court held that '[p]rivate adjudicatory bodies do not fall within § 1782.' 2022 WL 2111355, at *8. Given that holding, our analysis here is 'straightforward.' Id. We must determine whether the arbitration panel is 'governmental or intergovernmental.' Id. *ZF Automotive* also answers that question. In *ZF Automotive*, as in this case, '[p]rivate parties agreed in a private contract that DIS, a private dispute resolution organization, would arbitrate any disputes between them.' Id. 'No government is involved in creating the DIS panel or prescribing its procedures.' Id. So as in *ZF Automotive*, the private arbitration panel in this case 'does not qualify as a governmental body.' Id. Given that, EWE had no right to seek discovery under section 1782" (brackets in original).
(ed: We expect there will be several other cases where the ZF Auto *shoe will drop.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***In re: A&D Interests*, No. 22-40039 (5th Cir. May 3, 2022)**: "A&D Interests, Incorporated (doing business as the 'Heartbreakers Gentlemen's Club'), Mike Armstrong, and Peggy Armstrong, petition us for a writ of mandamus. They argue that the district court should not have certified a Fair Labor Standards Act collective action comprised off 'exotic' dancers who had worked at Heartbreakers in the last three years. We must decide whether the district court's decision to send notice to potential opt-in plaintiffs who signed arbitration agreements ran afoul of our holding in *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019). And, if the district court did err, we must also decide whether Petitioners have cleared the remaining hurdles for mandamus relief. For the following reasons, we grant Petitioner's motion…. In sum, the district court apparently recognized that the arbitration agreement would prevent the opt-in plaintiffs from ultimately participating in the collective action, but approved class notice anyways. This was not merely an erroneous exercise of discretion. In light of *JPMorgan*, it was wrong as a matter of law. Because the district court clearly and indisputably erred, mandamus relief is appropriate" (footnote omitted; link to case added by the *Alert*).

***GP3 II, LLC v. Litong Capital, LLC*, No. 21-1443 (8th Cir. Jun. 3, 2022)**: "[W]e hold the district court did not err in concluding Green lacked apparent authority to sign the Contract for GP3. Thus, we affirm the district court's denial of Litong's motion to compel arbitration of GP3's claims. Further, Litong's basis for its argument to compel arbitration of Bank of the West's claims is that Bank of the West is bound to the Contract through incorporation or estoppel. Because we affirm the district court's holding that the Contract was never formed, Litong has no basis upon which it can compel arbitration of Bank of the West's claims."

***Beckley Health Partners, Ltd. v. Hoover*, No. 20-0680 (W. Va. Jun. 15, 2022**): "In August 2017, Respondent Ms. Cynthia Hoover admitted her mother, Elveria Faw, to The Villages at Greystone, an assisted living residence in Raleigh County. Ms. Hoover was not her mother's attorney-in-fact. She was her mother's medical surrogate. In that capacity, Ms. Hoover completed two forms on her mother's behalf: a residency agreement, which was required to gain admission to Greystone, and an arbitration agreement, which was not. In 2019, Ms. Hoover (who by then was her mother's attorney-in-fact) sued Petitioners Beckley Health Partners, Ltd. d/b/a The Villages at Greystone, Chancellor Senior Management, Ltd., and Megan Ward Wilson, Residence Manager, alleging that Ms. Faw had suffered injuries while a resident of Greystone due to Petitioners' negligence. Petitioners moved the circuit court to compel Ms. Hoover to arbitrate the claim. The circuit court concluded that no valid arbitration agreement existed and denied the motion. Petitioners appeal that ruling. The circuit court correctly applied our decision in *State ex rel. AMFM, LLC v. King* [230 W. Va. 471, 740 S.E.2d 66 (2013)] to conclude that Ms. Hoover lacked authority to bind her mother to the arbitration agreement. It also correctly concluded that Petitioners' four, alternative theories of contract formation—ratification, assent, estoppel, and unilateral contract—do not establish) a valid agreement to arbitrate on the facts of this case. For those reasons, we affirm the circuit court's order and remand this case for further proceedings" (footnotes omitted).

***Souran v. Robinhood Financial*, FINRA ID No. 21-00545 (Milwaukee, WI, May 16, 2022)**: The Arbitrator dismisses without prejudice a customer's claims against Respondent broker-dealer as a sanction for his failure to comply with his Order regarding the production of his witness list, the scheduling of a hearing in this matter, and the status of his bankruptcy filing and whether the arbitration case could proceed. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Seested v. J.P Morgan Securities, LLC*, FINRA ID No. 19-03358 (Boca Raton, FL, Jun. 25, 2022)**: The arbitrators sanction a Respondent for committing perjury during the arbitration: "As to the portion of Claimant's Motion for Sanctions which accused Respondents' counsel of wrongdoing, the Panel did not find that the evidence established such misconduct. As to the portion directed to at least one of the Respondents, the Panel finds that Respondent Rothman engaged in perjury by falsely testifying as to the creation of certain exhibits during the hearing and hereby awards sanctions of $100,000.00 against Respondent Rothman and in favor of Claimant. Accordingly, Respondent Rothman is liable for and shall pay to Claimant the sum of $100,000.00 in sanctions."
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Schmitz, A., *Metaverse Arbitration for Resolving Blockchain Disputes 1.0*, Ohio State Legal Studies Research Paper No. 713 (June 23, 2022): "Non-Fungible Tokens (NFTs) built in the blockchain are quietly revolutionizing ideas around digital assets despite their questionable status under current law. At the same time, disputes regarding NFTs are inevitable, and parties will need means for dealing with NFT issues. At the same time,

NFTs are generally governed by smart contracts, again built in the blockchain and sometimes allowing parties to remain anonymous. This chapter tackles this challenge and proposes that parties turn to online dispute resolution ('ODR') to efficiently and fairly resolve NFT and other blockchain disputes. Furthermore, the chapter acknowledges the benefits and challenges of current blockchain ODR start-ups and proposes ideas for how designers could address those challenges and incorporate ODR to provide just resolutions that will not stymie efficiencies of smart contracts. It will also consider various types of online arbitration, including metaverse arbitration – good, bad and ugly."

Federal Courts' Rulings Differ on How to Treat an ERISA Arbitration, **Pensions & Investments (Jun. 30, 2022)**: "It should come as no surprise that defined contribution plan officials are skittish about inserting arbitration clauses in defined contribution plans when they read headlines like 'courts grapple with competing considerations' and 'courts continue to be split over enforceability of benefit plan arbitration provisions.'[] The headlines come from ERISA attorneys' reports commenting on various rulings covering arbitration-clause defenses in fiduciary breach cases.[] Absent U.S. Supreme Court guidance, ERISA attorneys say sponsors that want to add arbitration clauses must pay close attention to the wording of such clauses as well as the jurisdictions where such clauses seem most acceptable."

***Wells Fargo Wage Suit Sets Up Clash Between Arbitration, Notices*, Bloomberg (Jun. 22, 2022**): "Wells Fargo Bank NA hopes to persuade a federal appeals court in Philadelphia to block workers who signed arbitration agreements from receiving notice about joining a wage-and-hour collective lawsuit.[] The US Court of Appeals for the Third Circuit will hear oral arguments Wednesday over whether to follow two other federal circuit courts that have ruled that workers who agreed to arbitrate workplace disputes shouldn't automatically get notices about opting into conditionally certified Fair Labor Standards Act collective actions. Those workers can't join those suits, so notices would only mislead them into believing otherwise, Wells Fargo said." (*ed: See our coverage of* In re: A&D Interests, *No. 22-40039 (5th Cir. May 3, 2022), elsewhere in this* Alert.)

***Employers: Do Not Wait to Demand Arbitration*, JD Supra (Jun. 23, 2022)**: "The Supreme Court this term issued rulings in several cases involving arbitration. In *Morgan v. Sundance*, Plaintiff Robyn Morgan, who worked at a Taco Bell franchise owned by Sundance, filed a class action lawsuit against her employer alleging violations of federal wage and hour laws. The application Morgan completed when seeking employment at Sundance included a clause requiring her to resolve any future disputes with Sundance through arbitration. After Morgan filed suit in federal court, Sundance waited for eight months before requesting that the court compel arbitration. The only question the Supreme Court considered was whether Sundance's delay waived its right to demand arbitration."

***The US Supreme Court Says PAGA Representative Action Waivers Are Enforceable After All*, Proskauer Employment Law Update (Jun. 25, 2022)**: "On June 15, 2022, in

Viking River Cruises, Inc. v. Moriana, Case No. 20-1573,_ U.S. _ (2022), by an 8-1 majority, the U.S. States Supreme Court held that the Federal Arbitration Act ("FAA") preempts the California Supreme Court's central holding in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), that actions brought under the California Labor Code Private Attorneys General Act of 2004 ('PAGA') could not be divided into individual and representative claims through an agreement to arbitrate. This landmark opinion means that, at least for now, arbitration agreements with waivers of the right to bring representative PAGA claims for violations suffered by other alleged 'aggrieved employees' will be enforced—just like class action waivers."

Is the Supreme Court Having Second Thoughts About Arbitration? **Bloomberg (Jun. 27, 2022)**: "The US Supreme Court's recent rulings in cases involving arbitration reinforce the core of its historic arbitration jurisprudence: the principle that an arbitration contract must be enforced like any other contract, Covington & Burling LLP attorneys Sonya Winner and Ashley Simonsen write. They examine the two rulings and conclude the high court's staunch defense of arbitration agreements is unlikely to change significantly in their wake."
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DID YOU KNOW?

OUR NATION'S FOUNDERS AND ARBITRATION. As we approach Independence Day, I was inspired to update a blog post on the often-surprising relationships between our nation's founders and arbitration. OK, the smash Broadway hit *Hamilton* also played a role. Either way, although America's founders came from diverse political and socioeconomic backgrounds, many seemed to like arbitration. In the post I collected some snippets on a few well-known signers of the Declaration of Independence, and some famous non-signer patriots. For example, who knew that attorney, signer, and future President **Thomas Jefferson** in 1771 represented a litigant in *Bolling v. Bolling*, a dispute over a Will, and that this financial dispute was so complex that the parties submitted it to arbitration? Read on.
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