SECURITIES ARBITRATION ALERT 2022-35 (9/15/22)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **Institutional Comments, Mostly Supportive But With All Suggesting Further Modifications, on FINRA's Proposed Expungement Changes. Individual Industry Commenters Uniformly Oppose the Rule**

SHORT BRIEFS:

- **FINRA Board Meets in Person Next Week. No Agenda Yet**
- **FINRA Panel Hits Oppenheimer with $35+ Million Award**

QUICK TAKES:

- ***Zirpoli v. Midland Funding LLC*, No. 21-2438 (3rd Cir. Sep. 1, 2022)**
- ***Anderson v. Hansen*, No. 21-2719 (8th Cir. Aug. 30, 2022)**
- ***Middleton v. T-Mobile US, Inc.*, No. 20-CV-3276 (E.D.N.Y. Aug. 24, 2022)**
- ***Aiyappa v. Merrill Lynch*, FINRA ID No. 20-03257 (Washington, DC, Jul. 27, 2022)**
- ***Goldman Sachs v. Leissner,* FINRA ID No. 19-00231 (Los Angeles, CA, Jul. 27, 2022)**

ARTICLES OF INTEREST:

- **Zojaji, Dustin, *Document Production Outside the Seat: Looking Beyond SCOTUS's Interpretation of 28 U.S.C. § 1782,* Kluwer Arbitration Blog (Sep. 6, 2022)**
- ***China Steps Up Arbitration of International Business Disputes: Report*, Global Times (Sep. 5, 2022)**
- ***NFA Orders Denmark Firm Direct Hedge Danmark Fondsmaeglerselskab AS to Pay a $70,000 Fine,* www.nfafutures.org (Sep. 6, 2022)**
- ***FINRA Arbitrators Demand Oppenheimer & Co. Pay $35M+ Award,* Wealth Management (Sep. 7, 2022)**
- ***Republicans Urge FINRA to Reject Proposals that Limit Choice for Everyday Investors*, https://republicans-financialservices.house.gov (Sep. 7, 2022)**
- ***Advisors Flock to Florida. New York? Fuggedaboutit*!, Financial Advisor IQ (Sep. 9, 2022)**

DID YOU KNOW?

- **ICC Dispute Resolution Services is Hiring**

CHANGING OF THE GUARD AT THE AAA. *Just as we were finalizing this issue came word of a pending leadership change at the American Arbitration Association. A September 13 Press Release announces that Michigan Chief Justice Bridget M. McCormack will become the AAA's new President and CEO, effective February 2023. She will be replacing the retiring India Johnson, who has led the Association the past ten years. Says the Release: "Justice McCormack is joining the AAA-ICDR from the Michigan Supreme Court, where she has served as Chief Justice, overseeing the state's judicial system encompassing 244 courts and 560 judges. She has taught as an adjunct professor of law at the University of Michigan Law School for many years, and is*

currently a Strategic Advisor at the University of Pennsylvania Law School's Future of the Profession Initiative…. Justice McCormack also holds various positions on the American Bar Association (ABA), including Board of Elections Chair, and memberships on the board of the Center for Innovation Governing Council, as well as the Litigation Journal board of editors. She the Vice-Chair of the ABA's Council on Legal Education and Admission to the Bar." We wish Ms. Johnson and Chief Justice McCormack all the best.

SQUIBS: IN-DEPTH ANALYSIS

INSTITUTIONAL COMMENTS, MOSTLY SUPPORTIVE BUT WITH ALL SUGGESTING FURTHER MODIFICATIONS, ON FINRA'S PROPOSED EXPUNGEMENT CHANGES. INDIVIDUAL INDUSTRY COMMENTERS UNIFORMLY OPPOSE THE RULE. ***The comment period closed earlier this month on FINRA's proposed changes to the expungement process. The institutional comment letters – including those from PIABA, NASAA, and SIFMA – were mostly supportive, but suggested further improvements. Individual industry commenters, however, mostly panned the proposed rule changes and the expungement process in general.*** We reported in SAA 2022-30 (Aug. 4) that FINRA staff had followed up on recent Board approval to file a new expungement rule. Specifically, FINRA on **August 1** filed with the SEC SR-FINRA-2022-024, *Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process relating to the Expungement of Customer Dispute Information.* The introduction to the 298-page rule filing would amend the *Codes*: "to impose requirements on expungement requests (a) filed by an associated person during an investment-related, customer-initiated arbitration ('customer arbitration'), or filed by a party to the customer arbitration on behalf of an associated person ('on-behalf-of request'), or (b) filed by an associated person separate from a customer arbitration ('straight-in request')." We later reported in SAA 2022-32 (Aug. 18) that *Federal Register* publication occurred on **August 15** (Vol. 87, No. 156, P. 50170), and that comments were due by **September 6**.

A Concise History

Recall that, as reported in SAA 2021-22 (Jun. 3), FINRA in **May 2021** temporarily withdrew a proposal for improving the expungement process -- SR-FINRA-2020-030 -- which had its origins in the Dispute Resolution Task Force and its *Final Report and Recommendations*. A Press Release 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. As later reported in SAA 2022-17 (May 5), the Authority on **April 28, 2022** issued a 26-page *Discussion Paper – Expungement of Customer Dispute Information*. The *Discussion Paper* recommended a dual-track approach of adopting expungement reforms contained in the withdrawn rule, while at the same time considering new ideas. We later reported in SAA 2022-18 (May 12) that, just days after FINRA issued the *Discussion Paper*, SIFMA on **May 6** submitted to the SEC a comment letter accusing FINRA of overreaching.

New Rule Filing

With an emphasis on "straight-in" cases, the proposed rule change would: "(1) require that a straight-in request be decided by a three-person panel that is randomly selected from a roster of experienced public arbitrators with enhanced expungement training; (2) prohibit parties to a straight-in request from agreeing to fewer than three arbitrators to consider their expungement requests, striking any of the selected arbitrators, stipulating to an arbitrator's removal, or stipulating to the use of pre-selected arbitrators; (3) provide notification to state securities regulators of all expungement requests and a mechanism for state securities regulators to attend and participate in expungement hearings in straight-in requests; (4) impose strict time limits on the filing of straight-in requests; (5) codify and update the best practices in the Notice to Arbitrators and Parties on Expanded Expungement Guidance ('Guidance') applicable to all expungement hearings, including amendments to establish additional requirements for expungement hearings, to facilitate customer attendance and participation in expungement hearings and to codify the panel's ability to request any evidence relevant to the expungement request; (6) require the unanimous agreement of the panel to issue an award containing expungement relief; and (7) establish procedural requirements for filing expungement requests, including for on-behalf-of requests" (footnotes omitted). The proposed rule change would also amend the *Customer Code*: "to specify procedures for requesting expungement of customer dispute information during simplified arbitrations."

Several Comments, Almost All Supportive, But Suggesting Improvements

As of press time, nearly 40 letters were posted on the SEC's Website. We present below some representative comments. Footnotes have been omitted and any emphasis appears in the original. Stylistic changes have been made. Given space limitations, we encourage readers to consult the letters for full details and specifics. We characterize all of the institutional comments as of the "yes, but…" category, while almost every comment from individual registered reps and RIAs was negative.

Support Objectives, But Suggest Change(s)

Institutional

While the institutional commenters generally support the proposed changes, all recommend improvements.

PIABA: "PIABA believes that FINRA should have proposed additional changes to the expungement rules to ensure expungement becomes the 'extraordinary remedy' it is supposed to be. First, PIABA believes that the time limitations for straight-in expungement requests should be a uniform one year, as FINRA first proposed in Regulatory Notice 17-42, not the currently proposed two-year (arbitrations that end without an expungement determination) or three-year (customer complaints that do not progress to arbitration) limitation. Second, FINRA should reinstate the requirement it proposed in Regulatory Notice 17-42 that arbitration panels must find the underlying customer dispute information has 'no investor protection or regulatory value' in order to

recommend expungement. Finally, FINRA should prohibit associated persons from making 'straight-in' expungement requests for multiple, unrelated matters by denying the FINRA forum for such requests. In sum, PIABA applauds FINRA's proposal as a meaningful step in the right direction, but believes there are additional and important ways that the expungement process could be further improved." The **PIABA Foundation** also submitted a supportive letter that recommended changes.

NASAA: "NASAA supports the Proposal generally but remains concerned, as we have repeatedly expressed in the expungement context, that the fundamental flaws with Rule 2080 will continue to exist even if this Proposal is adopted. NASAA's position on expungement is clear: expungement is intended to serve as an extraordinary remedy granted solely in extremely limited circumstances. The Proposal does not address this issue, nor does it narrow the grounds for expungement." As for a suggested change: "NASAA supports requiring arbitrators to explain their rationale for granting expungement relief. However, NASAA urges FINRA to strengthen this aspect of the Proposal by requiring the arbitrators to provide a fulsome explanation of how a request meets expungement's extraordinary standard, including an explanation of how the arbitrators determined that the requesting party's uncontested assertions accurately reflected the truth of the matter."

SIFMA: "SIFMA supports the goal of CRD and BrokerCheck to provide investors with complete and accurate information about firms and their financial advisors. We agree with FINRA's assessment that information on CRD and BrokerCheck has investor protection value *only if* it is complete and accurate. SIFMA also supports the goal of FINRA's expungement rules to balance, among other things, 'the interests of investors in having access to *accurate and meaningful* information' and 'the interests of the brokerage community in having a fair process to address inaccurate customer dispute information.' We respectfully submit the following comments and recommendations…." There is an eight-item Executive Summary starting on page two. For example: "The Proposal would require unanimous panel decisions, likely resulting in the unfair denial of expungement in meritorious cases. ***Accordingly, we strongly recommend that the unanimity requirement be stricken from the Proposal, and that the standard for expungement should remain majority decision****."*

Law School Securities Arbitration Clinics: Comments were received from **thre**e clinics: **Cornell**, **Miami**, and **St. John's**. All were supportive but suggested improvements. We quote from the Miami letter: "[T]he Clinic supports FINRA's proposed new rules regarding the expungement process, with additional recommendations and commentary below." For example: "However, the current proposed rule for simplified customer-related arbitrations permits named associated persons to file a straight-in request for expungement, rather than requiring them to request expungement during the simplified arbitration case. This suggested procedure, which only applies in simplified cases, makes an unnecessary distinction between simplified and non-simplified proceedings. The new rules for requesting expungement in

simplified cases should mirror those for non-simplified cases: A named associated person *must* request expungement during the arbitration of the customer's claim."

Individual
While individual industry commenters opposed the new rule, non-industry ones were generally supportive but suggested changes. Here are two examples:

Stephen B. Caruso, Esq. (retired attorney and past NAMC chair): "It is my opinion that an additional predicate be added to FINRA Rule 2080(b)(1) which would be as follows: the Claimant did not sustain its burden of proof to support the claim, allegation or information that has been presented.[] This proposed modification would reduce the all-too-often predicate of the claim, allegation or information as having been false that seems to dominate a majority of the arbitration awards that grant expungement relief."

David Robbins, Esq: "To adapt the iconic 1992 observation of James Carville about the economy to expungement cases, 'It's the arbitrators stupid.'[] With that in mind, I would like to propose the following to improve the process in all customer arbitrations:[] In a customer arbitration in which a Respondent associated person in her/his Answer seeks expungement relief or in a customer arbitration in which the Respondent brokerage firm, in its Answer, seeks expungement relief for a non-party associated person, the list of proposed Chairpersons sent to the parties should only contain those from the Special Arbitrator Roster (as will occur for straight-in cases).[] Without such a requirement, expungement Awards arising out of customer arbitrations will continue to be inconsistent."

Opposed
The overwhelming percentage of individual industry commenters opposed the changes, often opining that the expungement process is unfair to registered reps and RIAs. We offer some representative comments:

Tosh Grebenik, Esq. (securities attorney): "This rule change should be denied because it is addressing the symptom and not the cause. FINRA needs to evaluate and create a minimum threshold for complaints before it limits the ability by advisors to get the complaints expunged."

Douglas W. O'Connell (Certified Financial Planner): "The current system can cost the advisor $5,000 or more just to have a hearing on expungement – it's way too expensive. The proposed system basically is even worse making it very difficult to remove spurious BrokerCheck disputes. Meanwhile, states do zip to regulate thousands of insurance agents selling index annuities as the investment panacea for retirees and estate planning. Other than MA, NY and FL - most states do little to regulate insurance or securities - makes no sense to involve them too."

Scott Sonnier (RIA): "I certainly believe that there needs to be a fair in way to dispute any of the allegations that a representative has on their U4/U5. There are many broker

dealers out there that will put things that are not complete or accurate. I think this current proposal that FINRA is proposing will create an additional layer of obstacles and unfortunate setbacks for people looking to dispute a claim a broker dealer and/or client stated."
*(ed: *What's next? Most likely staff will return to the National Arbitration & Mediation Committee or the Board with changes resulting from the comments received. Then, FINRA will respond to the comments. **As we've said before, this is a complex topic, so better right than rushed.)*
return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD MEETS IN PERSON NEXT WEEK. NO AGENDA YET. FINRA's Board of Governors will meet in person **September 21 – 22**; thus far, there is no published agenda. As usual, we will follow up after the meeting results are posted. The schedule for the rest of 2022 shows one more meeting, to be held **December 7 – 8**.
(ed: We'll tweet any news as soon as we have it.
return to top

FINRA PANEL HITS OPPENHEIMER WITH $36+ MILLION AWARD. A Majority-Public FINRA Panel has hit Oppenheimer with a $36+ million Award arising out of losses suffered by several investors in a Ponzi scheme perpetrated by a former adviser. The claims asserted in *Robinson v. Oppenheimer & Co., Inc.*, FINRA ID No. 21-02234 (Atlanta, GA, Sep. 6, 2022), were for: violations of FINRA Rules; negligence; breach of fiduciary duty; violation of the Georgia RICO statute; and breach of contract. The causes of action relate to Claimants' investments in Horizon Private Equity III." The Claimants were each awarded almost $5.7 million in compensatory damages and almost $11.4 million in punitive and more than $14.2 million in treble damages pursuant to Georgia's RICO statute -- O.C.G.A. § 16-14-6(c) -- which provides: "Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred." The award also included more than $5.3 million in attorney fees and $98,655 in costs.
(ed: According to media reports, Oppenheimer may challenge the Award.)
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Zirpoli v. Midland Funding LLC*, No. 21-2438 (3rd Cir. Sep. 1, 2022)**: "Accordingly, we must only determine if the parties to the Loan clearly and unmistakably expressed an agreement to arbitrate the issue of arbitrability. A plain reading of the text of the arbitration agreement shows that they did. The arbitration agreement provides that 'any Claim . . . shall be resolved by binding arbitration.' Among other things, a claim 'includes, without limitation, anything related to . . . *the arbitrability of any Claim* pursuant to th[e] Agreement, including but not limited to the scope of this Agreement and any *defenses to enforcement* of the Note or this Agreement.' A claim also includes

'anything related to . . . any alleged violation [of a state statute], including without limitation . . . usury . . . laws.' Read together, the arbitration agreement provides that an arbitrator shall resolve the arbitrability of defenses to enforcement, including alleged violations of state usury laws." (footnotes omitted; brackets, ellipses, and emphasis in original).

***Anderson v. Hansen*, No. 21-2719 (8th Cir. Aug. 30, 2022)**: "Katherine and Jason Anderson, independent contractors of American Family Life Insurance Company of Columbus (Aflac), alleged that Jeffrey Hansen, an Aflac employee, sexually assaulted Katherine in her hotel room during a work conference in St. Louis, Missouri. The Andersons filed suit against Hansen, asserting tort claims for battery, assault, false imprisonment, and loss of consortium, among others. Hansen moved to compel arbitration of the claims, claiming that he is a third-party beneficiary under the Andersons' Arbitration Agreements with Aflac. The district court1 denied the motion as to the aforementioned claims, holding that they did not arise under or relate in any way to the arbitration agreements. Hansen appeals, arguing that the claims fall within the scope of the arbitration agreements. We affirm." Judge **Grasz** dissents.

***Middleton v. T-Mobile US, Inc*., No. 20-CV-3276 (E.D.N.Y. Aug. 24, 2022)**: "Reginald Middleton and his company, Veritaseum, LLC, bring this suit against T-Mobile US, Inc., alleging failures by T-Mobile to protect Middleton's accounts. (Compl. (Dkt. 1).) Middleton is an investor who claims he was the victim of a 'SIM card swapping' scheme by hackers who duped T-Mobile into improperly authorizing access to his phone, facilitating the theft of $8.7 million in cryptocurrency. Middleton alleges violations of the Federal Communications Act; negligence; violations of the New York Consumer Protection Act; negligent hiring, retention, and supervision; negligent infliction of emotional distress; and gross negligence. T-Mobile moves to compel arbitration of these claims. For the reasons explained below, the company's motion is GRANTED."

***Aiyappa v. Merrill Lynch*, FINRA ID No. 20-03257 (Washington, DC, Jul. 27, 2022)**: In this rare case, a broker (acting in his capacity as a customer) and three customers alleging defamation, wrongful termination, elder abuse, and unauthorized trading, to name a few causes of action, lose their case against Respondent broker-dealer. Two Non-Party brokers are each granted expungement of this matter from their respective CRD records. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Goldman Sachs v. Leissner*, FINRA ID No. 19-00231 (Los Angeles, CA, Jul. 27, 2022)**: Respondent broker is held liable to Claimant broker-dealers for nearly $20.7 million in compensatory damages on their breach of contract claim. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Zojaji, Dustin, *Document Production Outside the Seat: Looking Beyond SCOTUS's Interpretation of 28 U.S.C. § 1782*, Kluwer Arbitration Blog (Sep. 6, 2022): "In June

of this year, the Supreme Court of the United States issued a unanimous opinion (*ZF Automotive US, Inc. v. Luxshare, Ltd.*, settling a circuit-split regarding the interpretation of 28 U.S.C. § 1782. The provision grants U.S. federal courts the authority to compel testimony or the production of documents to aid 'foreign or international tribunals'. The question before the Court was whether private adjudicative bodies, such as arbitral tribunals, qualified as 'foreign or international tribunals' or not. Having held that the provision only applies to adjudicative bodies somehow embodied with the authority of one or more governments, the Court decided that the provision is not applicable to foreign seated private arbitrations. The ruling has been discussed widely…. Rather than revisiting the subject matter of the ruling at hand, this post seeks to briefly explore other options available to arbitral tribunals and the parties that appear before them to support the collection of evidence outside the country where the arbitration is seated."

***China Steps Up Arbitration of International Business Disputes: Report*, Global Times (Sep. 5, 2022)**: "China released an annual report on international business arbitration on Monday, which showed that China's status in international arbitration has improved over the past year.[] In 2021, 270 arbitration commissions nationwide dealt with a total of 415,889 cases, valued at 859.3 billion yuan ($123.9 billion), up 19.6 percent year-on-year, according to the report."

***NFA Orders Denmark Firm Direct Hedge Danmark Fondsmaeglerselskab AS to Pay a $70,000 Fine*, www.nfafutures.org (Sep. 6, 2022)**: "NFA has ordered Direct Hedge Danmark Fondsmaeglerselskab AS (Direct Hedge) to pay a $70,000 fine. Direct Hedge is a registered introducing broker and approved swap firm Member of NFA located in Hellerup, Denmark.[] The Decision, issued by an NFA Hearing Panel, is based on a Complaint issued by NFA's Business Conduct Committee and a settlement offer submitted by Direct Hedge, in which the firm neither admitted nor denied the allegations in the Complaint.

***FINRA Arbitrators Demand Oppenheimer & Co. Pay $35M+ Award*, Wealth Management (Sep. 7, 2022)**: "FINRA arbitrators demanded this week that Oppenheimer & Co. pay more than $35 million in awards to a number of investors allegedly victimized by a Ponzi scheme that was reportedly orchestrated by a former Oppenheimer advisor during the time he worked there. According to the arbitration award, the investors argued Oppenheimer was negligent in violating FINRA rules, breaching fiduciary duties and violating Georgia's Racketeer Influenced and Corrupt Organizations (RICO) statute, among other claims." (*ed: See our coverage elsewhere in this* Alert.)

***Republicans Urge FINRA to Reject Proposals that Limit Choice for Everyday Investors*, https://republicans-financialservices.house.gov (Sep. 7, 2022)**: "Today, all Republican members of the House Financial Services Committee's Investor Protection, Entrepreneurship, and Capital Markets Subcommittee—led by Republican Leaders Patrick McHenry (NC-10) and Bill Huizenga (MI-02)—sent a letter to Robert Cook, President and CEO of the Financial Industry Regulatory Authority (FINRA). Subcommittee Republicans are urging FINRA against considering proposals that would

limit everyday investors' access to financial products widely available to other investors under the guise of "investor protection."

***Advisors Flock to Florida. New York? Fuggedaboutit!*, Financial Advisor IQ (Sep. 9, 2022)**: "From 2019 to 2021, Florida added the most advisors, while New York lost the most. There are reasons for that.[] Advisors are flocking to Florida, according to an Investment Adviser Association report, and those already working in the Sunshine State say they know why."
return to top

DID YOU KNOW?

ICC DISPUTE RESOLUTION SERVICES IS HIRING. A recent posting announces: "*ICC Dispute Resolution Services is Hiring*. Are you interested in starting and/or advancing your career in the Arbitration and ADR field? Join the leading arbitral institution to learn and contribute to our legacy." Positions and other info can be found here.
return to top

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