SECURITIES ARBITRATION ALERT 2022-48 (12/22/22)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **President Biden Signs *Speak Out Act.* Bars Enforcement of Predispute Nondisclosure or Nondisparagement Clauses in Sexual Assault or Harassment Disputes**
- **Several Customers Awarded Almost $6 Million Payable by Former Broker**

SHORT BRIEFS:

- **Court's Correction of Arbitrator's Award Disallowed Because it Affected the Merits of the Controversy**
- **Back to Civics 101 on the Life Span of Bills in Congress**
- **Save the Dates: FINRA's Annual Conference is May 16 – 18**
- **Save The Date: CPR's Annual Meeting is Next March in New Orleans**

QUICK TAKES:

- ***Lipsett v. Banco Popular North America,* No. 1:2022cv03901 (S.D.N.Y. Dec. 9, 2022)**
- ***Access Funding, LLC v. Linton,* No. 5-22 (Md. Ct. App. Dec. 1, 2022)**
- ***City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO,* 2022 NY Slip Op 07095 (NY Dec. 15, 2022)**
- ***Credit Suisse Securities (USA) LLC v. Henry,* FINRA ID No. 21-00562 (Boston, MA, Feb. 18, 2022)**
- ***Reeve v. Skogen,* FINRA ID No. 21-02227 (Seattle, WA, Nov. 22, 2022)**

ARTICLES OF INTEREST:

- **Sohan Dasgupta, *CFPB Is In Existential Crisis — And Covered Parties Have A Unique Opportunity*, TaftLaw Blog (Dec. 6, 2022)**
- ***Biden Signs Speak Out Act, Barring Predispute NDAs, Nondisparagement Clauses for Sexual Assault, Harassment Claims,* Jackson Lewis LLC Blog (Dec. 8, 2022)**
- ***SIFMA Urges SEC to Disapprove FINRA Expungement Proposal,* Lexology (Dec. 8, 2022)**
- ***ESG Clauses and Dispute Risks*, Kluwer Arbitration Blog (Dec. 11, 2022)**
- ***Supreme Court To Settle Longstanding Split Over Stays Pending Arbitration Appeals,* Morrison & Foerster LLP Blog (Dec. 13, 2022)**
- ***SEC Charges Eight Social Media Influencers in $100 Million Stock Manipulation Scheme Promoted on Discord and Twitter,* www.sec.gov (Dec. 14, 2022)**

DID YOU KNOW?

- **AAA Has Passed the Half-Million Cases Filed Mark This Year**

LETTER TO THE EDITOR:

- **FINRA Responds on Panel Demographics**

ALERT! NO *ALERT* NEXT WEEK. *It's the end of another calendar quarter, so we will be taking our customary break in publishing the* Securities Arbitration Alert *as the quarter and year comes to a close. Look for the next edition of the* SAA *in your e-mailbox January 5. In the meantime, follow us @SecArbAlert and sign up for updates on our weekly blog posts. Or take a look at our publisher and Editor-in-Chief George*

Friedman's 2014 blog post, On the 1st day of Christmas/Chanukah/Kwanzaa, My True Love Gave to me … A New Form of ADR, *which has aged well*.

Speaking of next year, we're pleased to announce that, despite inflationary pressures, our pricing for 2023 is unchanged for the weekly online Alert*:* ***Individual*** *-- $480 a year (48 issues).****Group*** *-- $480 for first subscriber and $100 for each additional (a librarian forwarding the* Alert *to another inhouse recipient counts as one subscriber). More details for renewing and becoming new subscribers will be sent next year*.

Our heartfelt thanks to the SAA Editorial Advisory Board, SAC's ARBcheck facility, and Harry Jacobowitz, Esq. for their many contributions this year.

SQUIBS: IN-DEPTH ANALYSIS

PRESIDENT BIDEN SIGNS *SPEAK OUT ACT*. BARS ENFOREMENT OF PREDISPUTE NONDISCLOSURE OR NONDISPARAGEMENT CLAUSES IN SEXUAL ASSAULT OR HARASSMENT DISPUTES. ***The President has signed into law a new statute barring enforcement of predispute nondisclosure or nondisparagement clauses in disputes involving sexual assault or harassment.*** Mr. **Biden** on **December 7** signed the bipartisan *Speak Out Act*, S. 4524. The *Act* passed the House on **November 16** by a vote of 315-109, and the Senate by unanimous consent on **September 29.** The text provides: "… with respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be judicially enforceable in instances in which the conduct is alleged to have violated Federal, Tribal, or State law." There is a carveout protecting trade secrets and proprietary information, and the statute expressly does not preempt state law: "that is at least as protective of the right of an individual to speak freely, as provided by this Act." The stated purpose: "Prohibiting nondisclosure and nondisparagement clauses will empower survivors to come forward, hold perpetrators accountable for

abuse, improve transparency around illegal conduct, enable the pursuit of justice, and make workplaces safer and more productive for everyone." It was effective immediately: "with respect to a claim that is filed under Federal, State, or Tribal law on or after the date of enactment of this Act."

Companion to *EFASASHA*
The *Act* complements the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021* ("*EFASASHA*"), which the President signed into law on **March 3**. As we have reported many times, *EFASASHA* expressly amended the Federal Arbitration Act ("FAA") to make predispute arbitration agreements and class action waivers voidable at the option of the victim. The new law has been codified as FAA Chapter 4. It consists of § 401 (definitions) and § 402 (no validity or enforceability). *(ed: That the new law also covers arbitrations to us is very clear; "disputes" is defined broadly in the* Act*.)*
return to top

SEVERAL CUSTOMERS AWARDED ALMOST $6 MILLION PAYABLE BY FORMER BROKER. ***As widely reported in the media, a former CFD Investments money manager has been ordered to reimburse several former clients to the tune of nearly $6 million.*** Financial services media widely reported recently that former money manager Dana Bruce Vietor had lost his FINRA arbitration, and had been directed to pay $5.7 million to 12 former clients, "who said he urged them to liquidate their annuities and invest their money in a cancer treatment business he controlled." See, for example, *Finra Panel Orders Ex-Broker In Iowa To Pay $5.7M*, FA Magazine (Nov. 30, 2022). We analyze below *Lotz v. CFD Investments and Vietor*, FINRA ID No. 21-01564 (Des Moines, IA, Nov. 28, 2022).

Claims Asserted
Claimants asserted the following causes of action: "misrepresentation, fraud-nondisclosure, negligent misrepresentation, breach of fiduciary duty, negligence, breach of contract, failure to supervise/respondeat superior, violations of the Iowa Securities Act, and federal and state control person liability. The causes of action relate to Claimants' allegations that, as a part of a cancer treatment scheme, D. Vietor (*ed: Ashley Vietor (Bolson) was also a Respondent)* represented that Claimants would make profits from services provided to cancer patients by buying a building to house cancer treatment and other equipment, but D. Vietor and CFD never provided them with financial information after they surrendered annuities (some with hefty surrender charges) based on D. Vietor's advice to place their funds in LLC notes. Claimants further alleged that the Vietors and CFD have not advised them of the current financial condition of their investments and that CFD took no supervisory action to protect investors and itself."

CFDs Cross-Claim Against D. Vietor
In its cross-claim: "CFD asserted the following causes of action: express indemnification and implied or equitable indemnity. The causes of action relate to

CFD's allegations that D. Vietor expressly agreed to indemnify it for, among other things, any losses, liabilities, claims, and damages resulting from his conduct or based upon any action or asserted failure or negligence by Vietor to comply with federal or state securities laws and regulations. CFD alleged that that Vietor misrepresented the nature of his involvement with SRS to CFD and if CFD is found liable to Claimants, it should be entitled to indemnity from Vietor."

Damages Sought
In the Statement of Claim, as amended, Claimants: "requested compensatory damages in the amount of $2,658,320.00; a minimum of $10,633,280.00 in punitive damages; attorneys' fees, expert fees, and FINRA costs…. In the Statement of Answer to Counterclaims, Claimants requested that the Counterclaims be dismissed with costs to be taxed to the Vietors including, but not limited to, attorneys' fees and expenses incurred to defend the filing, and an additional $10,000,000.00 in damages as a result of the Counterclaims…. At the hearing, Claimants requested a total of $20,000,000.00, which included compensatory and punitive damages."

The Award
The Panel finds D. Vietor liable for $4,275,177 in compensatory damages to 12 of the 13 former clients. The Panel also awards $1,425,058 in attorney's fees and $21,351 in costs. All other claims were denied or dismissed, including those asserted against CFD.
(ed: A large Award, indeed.)
return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

COURT'S CORRECTION OF ARBITRATOR'S AWARD DISALLOWED BECAUSE IT AFFECTED THE MERITS OF THE CONTROVERSY. State laws permitting arbitrators to modify or correct their awards invariably have a caveat, to wit: the arbitrator's correction or modification cannot: "affect[] the merits of the decision upon the controversy submitted" (*ed: see, e.g., Calif. Code Civ. Proc., §§ 1284 and 1286.6(b)*). This issue was front and center in *E-Commerce Lighting, Inc. v. E-Commerce Trade LLC*, No. E074525 (Calif. Ct. App. 2 Dec. 9, 2022), as described by the Court in the Opinion: "An arbitrator determined that a borrower and lender were liable to each other for similar amounts, each roughly two and a half million dollars. He then offset the awards against each other, resolving the disputed issue of whether a setoff was proper. A bank, however, had also lent money to the borrower. That bank, not a party to the arbitration, believed that the setoff effectively circumvented the agreement among it, the borrower, and the other lender that the bank's loan had priority and would be paid back first. Instead of being offset against the other lender's award, the bank believed, the borrower's award should go toward satisfying the bank's loan. It thus convinced the trial court to correct the arbitrator's award by eliminating the setoff. Per statute, the trial court could correct the award only "without affecting the merits of the decision upon the controversy submitted." (Code Civ. Proc., § 1286.6, subd. (b).) This helps ensure that a party cannot use a petition to correct an arbitration award as an appeal of an arbitrator's considered decision. We hold that, on the facts presented, the correction affected the

merits of the arbitrator's decision. Accordingly, the correction was improper, and we reverse."
*(ed: *ADR institution rules on modification/correction are similar. See, e.g., AAA* Commercial Arbitration Rules*, Rule R-52(a); FINRA* Customer Code of Arbitration Procedure, *Rule 12905(a)(2). **FINRA Rule 12904(j) states, as to offsets: "Absent specification to the contrary in the award, when arbitrators order opposing parties to make payments to one another, the monetary awards shall offset, and the party assessed the larger amount shall pay the net difference." ***An Alert h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*
return to top

BACK TO CIVICS 101 ON THE LIFE SPAN OF BILLS IN CONGRESS. We have covered in the *Alert* the status of several arbitration-related bills in Congress. This prompted a reader to ask about the shelf life of a bill. A congressional term runs two years from noon January 3 of odd numbered years. For example, the current 117th Congress runs until **January 3, 2023**. Any bills not enacted by that date expire and must be reintroduced to be considered by the 118th (and any future) Congress. With the GOP in control of the new House of Representatives, there will be a slew of new committee chairs. For example, Congressman **Patrick McHenry** (R-NC) will replace Rep. **Maxine Waters** (D-CA) as Chair of the Financial Services Committee.
*(ed: *We think it is unlikely that any reintroduced anti-arbitration bills will pass in the House during the coming Congress. **For more details see https://ballotpedia.org/117th_United_States_Congress.)*
return to top

SAVE THE DATES: FINRA'S ANNUAL CONFERENCE IS MAY 16 – 18. FINRA has announced that its 2023 Annual Conference will be held in person **May 16 – 18** in Washington, D.C. Says the event Webpage: "FINRA's premier event—the Annual Conference provides the opportunity for practitioners, peers and regulators to exchange ideas on today's most timely compliance and regulatory topics. The conference offers industry professionals a variety of sessions related to current trends in technology, cybersecurity, risk management and much more." Registration, which is done online, ranges from $495 for small firm members to $1,995 for non-members, and group discounts are available. The agenda is TBD, so we don't know if there's a dispute resolution component.
*(ed: *We assume that, as was the case last year, some parts of the conference will be available online. **Questions? Call 800- 321-6273 or use email.)*
return to top

SAVE THE DATE: CPR'S ANNUAL MEETING IS NEXT MARCH IN NEW ORLEANS. CPR has scheduled its annual meeting for **March 3 – 4** in New Orleans. The event has returned to an in-person format. The agenda in formation is here. Among the panels are: Using Mock Arbitrations to Improve Predictability; The Next Frontiers in Energy; How to Prevent the Expected Disputes of 2023; and Mitigating Risk in Life

Sciences Transactions. Registration is open and is done online. An early bird discount ends **January 10**. CPR members receive a special rate on registration.
(ed: Those interested in becoming a sponsor may contacteparker@cpradr.org.)
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Lipsett v. Banco Popular North America*, No. 1:2022cv03901 (S.D.N.Y. Dec. 9, 2022)**: "Thus, because no contract between BPNA and Lipsett to arbitrate claims under the customer deposit agreement was formed in 2008, when such a clause was first added, and none of the agreements thereafter is offered as a 'new deposit agreement' that would re-trigger Lipsett's ability to opt out, Lipsett is not bound to arbitrate his claims with BPNA.[] To the extent the Court must also find that the arbitration provisions are also substantively unconscionable, it does. For largely the same reasons discussed in *Valle,* the Court finds that the 'loser pays' provision in the 2008 and 2013-2014 PBD&As are 'unreasonably favorable to the party against whom unconscionability is urged.'"

***Access Funding, LLC v. Linton*, No. 5-22 (Md. Ct. App. Dec. 1, 2022)**: "We conclude that the question of whether an agreement to arbitrate exists, i.e., whether the arbitration clause in the agreements is valid, has been raised and is a question for the circuit court, not the arbitrator, to determine. It is well settled that where a party denies the existence of an arbitration agreement, the court—not an arbitrator—determines if the agreement exists. In this case, we conclude that the circuit court erred in compelling arbitration of the question of whether the arbitration clause in the agreements is valid. Accordingly, we affirm the judgment of the Court of Special Appeals."

***City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 2022 NY Slip Op 07095 (NY Dec. 15, 2022)**: A labor case, but an instructive decision from New York's highest court. "Well-settled law dictates that the grievances like the present one are arbitrable so long as no public policy, statutory, or constitutional provisions prohibit them and they are reasonably related to the provisions of the CBA. That requirement is satisfied when, as here, the CBA outlines a detailed procedural mechanism by which firefighters on section 207-a status may seek arbitration of disputes concerning their benefits.[] Accordingly, the order of the Appellate Division should be affirmed, with costs."

***Credit Suisse Securities (USA) LLC v. Henry*, FINRA ID No. 21-00562 (Boston, MA, Feb. 18, 2022)**: A Panel in a promissory note case awards the broker-dealer $684,655.49 in compensatory damages and $6,034.29 in interest. The Court in a case of the same name, No. 2284-CV-00478 (Mass. Super., Suffolk Cty. Sep. 30, 2022), denies a Motion to Vacate, and confirms the Award: "The Court disagrees with Henry's contention that the arbitrator's denial of his Motion to Compel discovery was a 'refusal to hear evidence material to the controversy.' … Instead, the Court finds Henry's request for vacatur to essentially be an appeal of an unfavorable discovery decision, which this Court lacks authority to review."

***Reeve v. Skogen*, FINRA ID No. 21-02227 (Seattle, WA, Nov. 22, 2022)**: A Panel explains in detail why it has decided to grant Respondent broker's Motion for Directed Verdict with prejudice, finding that Claimant's amended Statement of Claim failed to establish alleged vicarious liability against the broker. The Arbitrators explain that the broker was not a party to the Affiliation Agreement. The Panel further explains why it denies Claimant's case against Respondent broker-dealer, finding that he materially breached the Affiliation Agreement in which he is seeking damages. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Sohan Dasgupta, *CFPB is in Existential Crisis — and Covered Parties Have a Unique Opportunity*, TaftLaw Blog (Dec. 6, 2022): "Due to a Fifth Circuit decision striking down the Consumer Financial Protection Bureau's (CFPB) Payday Lending Rule promulgated in 2017 — in a case known as *Community Financial Services Association of America, Limited v. CFPB* — the Bureau's very existence is in peril.[] Some of the key takeaways from this decision are: CFPB's funding structure violates the Constitution's Appropriations Clause; There was a 'linear nexus' between the unconstitutional funding mechanism and the challenged CFPB action — in this case, a rule promulgated by the Bureau; That nexus applies to all CFPB actions resultant from the CFPB's funding, including the rules it promulgates, the investigations it conducts, and the decisions it make; Most and perhaps all of the CFPB's actions, rules, investigations, and decisions are in jeopardy; Private entities subject to the CFPB might want to deploy this decision expeditiously and strategically.[] In this Taft white paper, partner Sohan Dasgupta details how the CFPB operates and provides further insight into the Fifth Circuit decision, including who benefits most from it."

***Biden Signs Speak Out Act, Barring Predispute NDAs, Nondisparagement Clauses for Sexual Assault, Harassment Claims*, Jackson Lewis LLC Blog (Dec. 8, 2022)**: "'I just signed the Speak Out Act, a bill that'll enable survivors to speak out about workplace assault and harassment and increase access to justice,' President Joe Biden wrote on Twitter on December 7, 2022.[] The bipartisan Speak Out Act passed the Senate by unanimous consent on September 29 and the House on November 16 with a roll call vote of 315-109…. Under the Act, a nondisclosure clause is 'a provision in a contract or agreement that requires the parties to the contract or agreement not to disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement.'" *(ed: See our coverage elsewhere in this* Alert.*)*

***SIFMA Urges SEC to Disapprove FINRA Expungement Proposal*, Lexology (Dec. 8, 2022):** "SIFMA urged the SEC to disapprove a FINRA proposal to amend the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes to impose additional requirements for expunging customer dispute information.[] In its comment letter, SIFMA argued that (i) the proposal would limit the grounds for granting expungement without providing proper due process and (ii) the

related release failed to provide justification or a cost-benefit analysis that supports limiting the grounds for expungement."

***ESG Clauses and Dispute Risks*, Kluwer Arbitration Blog (Dec. 11, 2022)**: "In 2022, environmental, social and governance ('ESG') is undoubtedly having a moment, from the cover page of the *Economist*, to new regulatory schemes in the US and in Europe, not to mention being a headline topic for arbitration conferences from Taipei to Paris, Rio de Janeiro, Singapore, Berlin and Hong Kong. Many reported ESG disputes to date have taken place in the public sphere in the form of strategic litigation, shareholder activism, or investment arbitrations that touch on environmental or human rights issues. But what can ESG mean for private commercial disputes brought to international arbitration?"

***SEC Charges Eight Social Media Influencers in $100 Million Stock Manipulation Scheme Promoted on Discord and Twitter*, www.sec.gov (Dec. 14, 2022)**: "The Securities and Exchange Commission today announced charges against eight individuals in a $100 million securities fraud scheme in which they used the social media platforms Twitter and Discord to manipulate exchange-traded stocks.[] According to the SEC, since at least January 2020, seven of the defendants promoted themselves as successful traders and cultivated hundreds of thousands of followers on Twitter and in stock trading chatrooms on Discord. These seven defendants allegedly purchased certain stocks and then encouraged their substantial social media following to buy those selected stocks by posting price targets or indicating they were buying, holding, or adding to their stock positions. However, as the complaint alleges, when share prices and/or trading volumes rose in the promoted securities, the individuals regularly sold their shares without ever having disclosed their plans to dump the securities while they were promoting them."

***Supreme Court To Settle Longstanding Split Over Stays Pending Arbitration Appeals*, Morrison & Foerster LLP Blog (Dec. 13, 2022)**: "The Supreme Court just agreed to review an important question at the intersection of arbitration law and appellate practice. Its ultimate decision in the case could provide a major boost to defendants seeking to enforce arbitration agreements in circuits (including the Second and Ninth) where they currently operate under a disadvantageous rule.[] Section 16(a) of the Federal Arbitration Act permits immediate interlocutory appeal of a district court's denial of a motion to compel arbitration. When a defendant exercises that right, what happens to the underlying district court litigation—does it proceed apace or is it automatically stayed until the appellate court decides whether the dispute should be in court at all? The circuits have long disagreed on that question, and on December 9 the Supreme Court granted *certiorari* to answer it."

return to top

DID YOU KNOW?

AAA HAS PASSED THE HALF-MILLION CASES FILED MARK THIS YEAR. According to a banner on the American Arbitration Association's landing page, this venerable institution has had 562,074 cases filed so far this year (through **December 19**). It has administered 7,421,005 cases since its founding in **1926**.

return to top

LETTER TO THE EDITOR

We always welcome comments on current items of interest, and we really like it when a Letter to the Editor elicits a response. We published in SAA 2022-46 (Dec. 8) a letter from arbitration practitioner – and SAA Editorial Advisory Board Member – William D. Nelson, Esq., opining on FINRA's arbitrator and mediator panel demographics. At the Alert's *request, this prompted a response from FINRA in the form of a letter from Dispute Resolution Services' Associate Director, Recruitment and Training, Nicole Haynes. Headers were added by us*:

Haynes: FINRA Dispute Resolution Services was recently asked to respond to William D. Nelson's comments about FINRA's arbitrator roster in Denver, Colorado. FINRA strives to provide a fair, efficient and effective forum for the resolution of securities disputes. FINRA is committed to providing a well-qualified and diverse slate of neutrals to resolve these disputes and has broadened and expanded the depth and diversity of the arbitrator roster. FINRA has engaged in aggressive recruitment campaigns to increase the number of neutrals that are available to hear cases. From attending in-person conferences nationwide, to hosting regional events, to targeted digital advertising and most recently advertising on National Public Radio, FINRA has invested significant resources and cast an extremely wide net to recruit new arbitrators to join the forum. As a result, the number of arbitrators in the FINRA pool, including in Denver, has increased significantly over the years.

Demographic Survey

Each year, using an external vendor, FINRA conducts a voluntary, confidential and anonymous demographic survey of its arbitrator population. The survey results are published on FINRA's website – we provide overall arbitrator roster data as well as information regarding the newly added arbitrators each year. The results of the 2022 arbitrator demographic survey demonstrate that FINRA continues to make progress on the diversity front, particularly with respect to gender.

Recruitment Results

To truly illustrate the results of FINRA's recruitment efforts, highlighted below is a comparison of the newly added diverse arbitrators who joined the roster in 2015 and 2022.

	FINRA Arbitrator Demographic Survey Results For Arbitrators Added Within the Past Year	
	2015	**2022**
Female	26%	47%
Black or African American	4%	20%
Asian	2%	5%
Hispanic or Latino	17%	5%
Multi-Racial	7%	6%
LGBTQ	3%	9%

FINRA has seen a huge increase in the number of applications that we receive each year, as well as an increase in the diversity of FINRA's arbitrator roster. Notwithstanding this success, our efforts to further diversify the arbitrator roster is ongoing. FINRA will continue to aggressively recruit new arbitrators and continue to devise innovative strategies to expand the reach of our recruitment efforts in order to meet the needs of our constituents.

Changes Coming to the Arbitrator Listing Process

In addition to current recruitment efforts to bolster the forum's neutral roster, in 2023, FINRA will propose changes to the arbitrator selection process to provide new and more diverse public arbitrators with greater opportunities to serve. Currently, public chairpersons have two opportunities to appear on a list. Chairpersons not appointed to the chairperson list also appear in the public arbitrator pool along with the public arbitrators in each hearing location for possible inclusion on the list, thereby giving eligible public chairpersons an advantage. To correct this imbalance, the proposal would provide non-chair qualified public arbitrators with two opportunities to appear on the public list. Chair-qualified arbitrators would have one opportunity to appear on the public list, as they already had one opportunity to be selected on the chairperson list. The goal of the proposal is to provide new and more diverse public arbitrators with greater opportunities to serve, to gain experience and ultimately become eligible to join the chairperson roster.

Conclusion

FINRA remains fully committed to its goal of achieving diversity on the arbitrator roster and will continue its efforts to provide a robust and diverse slate of arbitrator candidates. To aid us with our efforts to achieve panel diversity, FINRA encourages parties to consider the value of diversity and the role that their selections play in fostering inclusion in the dispute resolution community.

Nicole Haynes
FINRA Dispute Resolution Services
Associate Director, Recruitment and Training

SAA: *We're delighted to have touched off this dialogue, and perhaps to have prompted release of the demographics stats update. The recruitment results are indeed impressive, but we would have liked to see discussion addressing Mr. Nelson's observations about age imbalance in the roster.*

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.*

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