SECURITIES ARBITRATION ALERT 2023-07 (2/16/23)

George H. Friedman, Editor-in-Chief

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- ***Bakker v. E*Trade Securities*, FINRA ID No. 22-02013 (San Francisco, CA, Jan. 5, 2023)**
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- ***What is International Arbitration?,* Cooley Blog (Jan. 31, 2023)**
- ***FINRA Slams $475K Fine on UBS Securities—Second in 4 Months,* Finance Magnates (Feb. 2, 2023)**
- ***Wells Fargo Advisors Wins Nearly $20M in Raiding Claim Against Raymond James,* AdvisorHub (Feb. 4, 2023)**
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DID YOU KNOW?

- **FDR's Undelivered Last Speech Called for Peaceful Conflict Resolution**

Happy Presidents Day!

From the *Alert* to our readers, all the best for this unique American holiday.
As a result, we will be publishing a bit later than usual next week.
For your three-day weekend reading, consider this *SAA* blog post from 2021 that has held up well.
The Presidents and Arbitration: From Washington to Biden: An Update

SQUIBS: IN-DEPTH ANALYSIS

VERY FEW COMMENTS – GENERALLY SUPPORTIVE – ON FINRA'S RULE CHANGE PROPOSAL IMPLEMENTING "RIGGED PANELS" INVESTIGATION REPORT RECOMMENDATIONS. ***The comment period closed February 2 on FINRA's rule change proposal to implement recommendations resulting from the outside investigation of allegations that the arbitrator selection process was rigged. We offer an analysis of the very few, generally supportive, comments.*** As reported in SAA 2023-03 (Jan. 19), the proposed rule was published in the *Federal Register* on **January 12** (Vol. 88, No. 8, P. 2144), making comments due **February 2**. We reported in SAA 2023-01 (Jan. 5) that, on the eve of the year-end holiday break, FINRA had filed a rule change proposal that would implement recommendations resulting from the outside investigation of allegations that the arbitrator selection process was rigged. As summarized in SAA 2022-38 (Oct. 13), FINRA in **June 2022** released a 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 Sandler LLP's Securities Litigation and Corporate Investigations & Integrity Practice Groups. FINRA's management accepted all recommendations, and now posts on its Website a live progress report on implementation. *Status Report on Lowenstein Sandler LLP Recommendations* shows that most items have been implemented or are "in progress."

Proposed Changes

FINRA filed with the SEC on **December 23, 2022**, SR-FINRA-2022-033, *Proposed Rule Change to Amend the Codes of Arbitration Procedure.* The filing describes it as: "a proposed rule change to amend the Code of Arbitration Procedure for Customer Disputes ('Customer Code') and the Code of Arbitration Procedure for Industry Disputes ('Industry Code') (together, 'Codes') to make changes to provisions relating to the arbitrator list selection process in response to recommendations in the report of independent counsel Lowenstein Sandler LLP. The proposed rule change also makes clarifying and technical changes to requirements in the Codes for holding prehearing conferences and hearing sessions, initiating and responding to claims, motion practice,

claim and case dismissals, and providing a hearing record." For a "chapter and verse" analysis on the proposed changers, we recommend *FINRA Proposes Substantial Changes to its Arbitrator Selection Process and Introduces Other Procedural Amendments*, JDSupra (Feb. 7, 2023). This is the best summary we've seen so far.

Very Few Comments
As of press time, there were just a handful of comments posted on the SEC's Website. We analyze here the comments received from PIABA and three law school clinics (*ed: we'll skip your publisher's short email inquiring about the whereabouts of the comments*). We describe all of the comments as generally supportive but recommending improvements. Footnotes are omitted.

PIABA: "While PIABA generally supports the rule proposals, we urge FINRA to consider additional steps in the arbitration selection process to promote our shared goal of improving transparency and fairness in the Dispute Resolution forum.... PIABA generally supports FINRA's proposed procedural amendments in the rules proposals, many of which are simply to clarify and codify existing policies into the FINRA Code provisions. PIABA submits the following additional comments with respect to the specific procedural amendments detailed below…."

Law School Clinics: Letters were received from three law school investor advocacy clinics, **Cornell**, **Pace**, and **St. John's**. All were generally supportive, but recommended changes. The Cornell letter is a good representation. It offers a section-by-section breakdown, expressing support for all but one proposed change: "**The Clinic does Not Support the Proposed Rule Regarding Hearing Records.** While this Rule Proposal fills in a gap in the Code by specifying the parties' obligations when ordered to provide a transcription of hearing records, the Clinic urges FINRA to reconsider the appropriateness of imposing such obligations on the parties, especially on claimants with limited financial means, considering the high costs associated with providing hearing records. In order to prevent the imposition of such costs on public investors, the Clinic recommends FINRA to (1) provide guidelines on the circumstances under which the panel might order hearing records from a party; (2) consider only allowing the panel to order hearing records from member firms; and (3) provide waivers or other forms of financial and legal assistance to indigent parties who cannot afford to provide the hearing records and whose case might be jeopardized as a result."
*(ed: *Next is FINRA's response to the comments. **We were shocked by the paucity of comments to this comprehensive rule change package. ***The rule filing's progress can be tracked here.)*
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NEW YORK STATE COURT REFUSES TO COUNTENANCE END RUN AROUND FINRA DRS EXPUNGEMENT DENIAL. ***A broker's attempt to vacate an unfavorable New York arbitration decision through forum shopping in Colorado and an effectively uncontested vacatur proceeding, got slapped down when the broker tried to persuade a New York State court to force FINRA to allow a "do-over" of the***

expungement proceeding. Vincent Jerome Camarda brought a series of arbitrations to expunge various customer complaints recorded against him in FINRA's Central Registration Depository ("CRD"). Only one of these arbitrations, *Camarda v. Ameriprise Financial Services Inc.*, FINRA No. 18-00748 (New York, NY, Jun. 12, 2019), resulted in a denial of expungement relief. Camarda sued to vacate that Award in a Colorado State court, naming Ameriprise as the only other party. The court granted vacatur upon the stipulation of those two parties, but FINRA refused to recognize the vacatur and Camarda filed the present action to have a New York court "re-vacate" the Award. The Court, in *Camarda v. Financial Industry Regulatory Authority, Inc.*, No. 150032/2021 (N.Y. Sup. Ct., NY Cty., Dec. 7, 2022), grants FINRA's motion to dismiss.

Too Late to Vacate

The Court cites three grounds for dismissal. First: "the complaint is time barred. The relief sought by plaintiff is equitable in nature and is, therefore, subject to a six-year statute of limitations (CPLR § 213). The occurrences at issue were filed to plaintiff's FINRA records in 2003 and 2004; and as plaintiff prays this Court to exercise its equitable authority expunging these occurrences, such relief was required to be sought sometime prior to approximately 2010. Stated simply, plaintiff's time to seek equitable relief related to the 2003 and 2004 occurrences expired more than a decade ago."

Missing Indispensable Parties

Secondly: "Plaintiff now contends that this Colorado stipulation vacating the FINRA award requires that this Court direct FINRA, not a party in that Colorado action, vacate its arbitration award. This Court will do no such thing; it is beyond cavil that, under these circumstances, an out-of-state judgment cannot be binding as against an unnamed indispensable non-party…. Plaintiff's attempts, in this action, to enforce an out-of-state judgment against a non-party with an indisputable interest in the outcome of said out-of-state action, and without serving notice of that out-of-state proceeding upon said non-party or naming same as a party, is, at a minimum, repugnant to the most basic principles of the rule of law….[] "Thirdly, conspicuously absent from these proceedings is plaintiff's former employer, the only other party named in the Colorado action and therefore, an indispensable party here."

A Warning

The Court concludes its discussion of the second ground for dismissal by noting: "The advancement of such injudicious arguments may indeed be sanctionable …, as arguments proffered must not be complete[ly] devoid of merit; however, the Court declines to impose financial sanctions, *at this time*" (emphasis added). The Court's Order directs plaintiff's counsel to serve a copy on the justices hearing any other case pending in New York against FINRA, including one with: "identical facts, including a Colorado so-ordered stipulation." This seems like a thinly veiled threat to impose sanctions in the future if the plaintiff in this case or anyone else attempting any similarly creative procedures doesn't take the hint.

*(*Seems right to us. **Although the Court did not apply FINRA's six-year eligibility rule for industry disputes, Rule 13206, which the arbitrator could have used as a bar to*

*consideration of the expungement requests denied below, it suggests that New York's own six-year statute of limitations for equitable proceedings may have similar effect. We wonder whether a New York court might use it as grounds to refuse to confirm an Award expunging occurrences in a late-filed arbitration. ***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.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SCOTUS SETS ORAL ARGUMENT IN *COINBASE*. The Supreme Court has set for Tuesday **March 21** the oral argument in *Coinbase, Inc. v. Bielski*, No. 22-105. As reported in SAA 2023-47 (Dec. 15), the Court's **December 9, 2022** Order List granted *Certiorari* in the case. The issue in this matter is a technical one, as described in the **July 2022** Petition: "Under § 16(a) of the Federal Arbitration Act, when a district court denies a motion to compel arbitration, the party seeking arbitration may file an immediate interlocutory appeal. This Court has held that an appeal 'divests the district court of its control over those aspects of the case involved in the appeal.' *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam).[] The question presented is: "Does a non-frivolous appeal of the denial of a motion to compel arbitration oust a district court's jurisdiction to proceed with litigation pending appeal, as the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits have held, or does the district court retain discretion to proceed with litigation while the appeal is pending, as the Second, Fifth, and Ninth Circuits have held?" (links added by the *Alert*).
*(ed: *We covered in SAA 2022-17 (May 5) the trial court decision below,* Bielski v. Coinbase, Inc.*, No. C21-07478, 2022 WL 1062049 (N.D. Cal. Apr. 8, 2022). There, the District Court, applying California contract law, held that the predispute arbitration agreement covering the case before it was both substantively and procedurally unconscionable. The subsequent District Court and Ninth Circuit decisions declining to stay the case pending the appeal are unreported. **The docket already reflects several* Amicus *briefs. ***A prediction in our October 2022 blog post,* First Monday in October: Some Arbitration-Centric Cases Worth Following*, gets partial credit. "We're reasonably certain another* Cert. *grant is coming this Term. Time will certainly tell….")*
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SEC SEEKS APPLICANTS FOR PCAOB SEAT. The SEC announced via a **February 7** Press Release: "the start of the selection process to fill a seat on the Public Company Accounting Oversight Board (PCAOB) that will become vacant in October." The appointment is for a five-year term, starting **October 2023** and ending **October 2028**. The candidate: "must be or have been a Certified Public Accountant (CPA)." The PCAOB was established by the *Sarbanes-Oxley Act of 2002* to: "oversee the audits of public companies and registered broker-dealers through registration, standard-setting, inspection, and disciplinary programs." It is subject to SEC oversight.

(ed: Qualified applicants should submit a cover letter, "discussing the statutory qualifications summarized above and described more completely in the Act," and a current résumé or curriculum vitae to: Boardrecommendations@sec.gov by March 7.)
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INCORPORATION OF AAA'S RULES IS CLEAR AND UNMISTAKABLE EVIDENCE OF DELEGATION. The non-attorney employee's Fair Labor Standards Act claim against Alston and Bird LLC was compelled to arbitration by virtue of a predispute arbitration agreement ("PDAA") calling for the AAA's rules, the Court holds in *Corporan v. Alston and Bird LLC*, No. 1:22-cv-00831-VMC (N.D. Ga. Jan. 25, 2023). And, any arbitrability issues are delegated to the Arbitrator by incorporation of the AAA's rules. District Judge **Victoria Marie Calvert** observes at the onset that: "The Eleventh Circuit has held that, by incorporating AAA rules into an agreement, parties clearly and unmistakably evince an intent to delegate questions of arbitrability." The Court then rejects each challenge asserted by Corporan (internal and external citations omitted):

> "First, he alleges the Agreement did not clearly and unmistakably delegate issues of arbitrability to the arbitrator. But as noted above, this issue is foreclosed by binding Eleventh Circuit precedent. The Court thus finds that the parties clearly and unmistakably delegated issues of arbitrability.
>
> "Second, Plaintiff contends that his FLSA claims are not within the scope of the Agreement. This too, is foreclosed. Whether a claim is within the scope of an arbitration provision is a delegable question of arbitrability, and in the face of a binding delegation provision, this Court lacks the authority to refuse to compel arbitration even where it finds the argument that a dispute is within the scope of an arbitration clause 'wholly groundless.'
>
> "Third, Plaintiff argues that Defendant willfully and fraudulently induced him to sign the Agreement, that the agreement lacks consideration, or that it is unconscionable. But these contract formation questions are questions of arbitrability that must be referred to the arbitrator."

*(ed: *Seems right; the law is reasonably well-settled that incorporation of the AAA's rules is clear evidence of delegation. **An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision. ***Email us at Help@SecArbAlert.com for a copy of the Order.)*
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CLOUD-BASED ADR PROVIDER ARBITRATION RESOLUTION SERVICES LAUNCHES NEW ONLINE PLATFORM. Online ADR provider Arbitration Resolution Services ("ARS") has launched a new software platform, Arb-IT™ 3.0, designed to: "increase access to alternative dispute resolution services and reduce cost and time to resolution." ARS President **Mark Norych** said, "The purpose of the new Arb-IT™ platform is to offer business and consumers access to the best experience and technology in alternative dispute resolution. The 3.0 mission grew out of our team's

expert process knowledge and experience being leveraged to achieve goals like stress reduction for client admins and removing anxiety for consumers worried about litigation through streamlining process design from the user perspective." Adds a **February 14** Press Release: "The cloud-based platform reduces up to 80% of the costs of traditional litigation in as little as 20% percent of the time. This affordability and time reduction means attorneys, businesses, and consumers can easily resolve claims previously too small or costly to pursue."
(ed: Full disclosure: the Alert*'s publisher and Editor-in-Chief is non-executive Chairman of ARS.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***United Natural Foods, Inc. v. Teamsters Local 414*, No. 22-1469 (7th Cir. Jan. 31, 2023)**: Although this concerns a labor case, the Court's decision on the bilateral nature of the arbitration clause, decided under the Federal Arbitration Act, is instructive: "In short, there is no ambiguity in the CBA [Collective Bargaining Agreement] which might trigger the presumption in favor of arbitration. The grievance and arbitration procedure that the parties have agreed to is focused exclusively on employee-initiated grievances and does not envision or apply to employer-initiated grievances. We can say with confidence that the arbitration clause is not reasonably susceptible to an interpretation that includes an employer-initiated dispute regarding the meaning and application of the terms of the agreement. Thus, United Natural is not obligated to submit its dispute over the two strikes to arbitration."

***Darby v. Sisyphian*, *LLC*, No. B314968 (Calif. Ct. App. 2 Jan. 26, 2023)**: "Under the California Arbitration Act (Code Civ. Proc., § 1280 et seq.) (the Act), a party seeking to vacate or correct an arbitration award must do so prior to the expiration of the Act's statutory deadlines (§§ 1288.2, 1290.6). Sometimes, the party seeking such relief misses those deadlines. If another party to the arbitration has filed a competing petition to confirm that award, is the trial court allowed to consider any of the objections to confirmation raised in untimely filings seeking to vacate or correct the award? And if the judgment confirming the award is appealed, may the party who untimely sought to vacate or correct the award renew on appeal their challenges to the award's confirmation? We conclude that the answer to both questions is 'no.' Because well-settled law dictates the finding that the appealing party in this case did not meet the Act's deadlines for vacating or correcting the arbitration award, we affirm the judgment confirming that arbitration award and grant the prevailing party her attorney fees on appeal" (footnotes omitted).
(*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Taylor Morrison of Texas, Inc. v. Ha*, No. 22-0331 (Texas Jan. 27, 2023) (*per curiam*)**: "We hold that when a family unit resides in a home and sues for factually intertwined construction-defect claims concerning that home, a nonsignatory spouse and minor children have accepted direct benefits under the signatory spouse's purchase agreement such that they may be compelled to arbitrate through direct-benefits estoppel. This is

especially true given the special nature of marital and parent–child relationships." See also the companion case, *Taylor Morrison of Texas, Inc. v. Skufca*, No. 21-0296 (Texas Jan. 27, 2023) (*per curiam*).

***Bakker v. E*Trade Securities*, FINRA ID No. 22-02013 (San Francisco, CA, Jan. 5, 2023)**: In this small claims arbitration, an Arbitrator explains in detail why he decided to deny a customer's claims against Respondent broker-dealer, finding that he did not meet his burden of proof in this case. The customer's claim sought relief for interest charged upon his Margin Account that he alleged he was not informed about. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Reed v. Arive Capital*, FINRA ID No. 22-00523 (St. Louis, MO, Jan. 6, 2023)**: An investor alleging that his account was churned, and that Respondents failed to build him a well-managed diversified portfolio, loses his case as a sanction for his failure to comply with the Panel's Order regarding the production of discovery. The investor is also held liable to Respondents for $5,000 in the form of attorney fees as a monetary sanction pursuant to FINRA Rule 12212. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Schneider, Andrea Kupfer, *The Impact of the Singapore Convention on the Development of Non-Adjudicative Forms of International Dispute Resolution*, 114 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 123 (Feb. 2, 2023): "The impact of the Singapore Convention might affect both state and companies' behaviors even more than encouraging mediation. We have had for a long time the phrase 'bargaining in the shadow of the law,' and then more recently, in particular when we look at international investment, it is bargaining in the shadow of international arbitration. We know that a dispute could end up in arbitration and therefore impact behaviors before that. I want us to think about what bargaining might look like in the shadow of mediation.[] Mediation is not going to establish law in the same way that arbitration and litigation have precedential value or persuasive value. But when countries and investors both know that mediation is the next process that they will take advantage of, we can consider what is the trickle-down effect, in terms of those conversations that are had between governments and investors as disputes arise."

***What is International Arbitration?*, Cooley Blog (Jan. 31, 2023)**: "International arbitration is a method of dispute resolution where the parties are entitled to appoint a tribunal of arbitrators who will resolve their dispute. It is generally recognized as the preferred dispute resolution mechanism in cross-border disputes. Before starting arbitration proceedings, the disputing parties must agree to submit their dispute to arbitration. Such an agreement is usually found either in the form of a dispute resolution clause in a commercial contract or as an agreement to arbitrate a dispute that has already arisen."

***FINRA Slams $475K Fine on UBS Securities—Second in 4 Months*, Finance Magnates (Feb. 2, 2023)**: "The Financial Industry Regulatory Authority (FINRA) has slammed another fine on New York-based securities broker, UBS Securities (UBS-S). This time the self-regulatory organization hit the firm, which is the brokerage arm of the Swiss banking group, UBS, with a censure order and fine of $475,000 for publishing 'inaccurate' monthly statistics on execution of its covered orders between September 2015 and January 2019.[] Details of the new fine, which UBS Securities has agreed to pay without admitting or denying the allegations, are contained in a Letter of Acceptance, Waiver and Consent (AWC) filed by the broker and accepted by FINRA on February 3."

***Wells Fargo Advisors Wins Nearly $20M in Raiding Claim Against Raymond James*, AdvisorHub (Feb. 4, 2023)**: "Wells Fargo Advisors won more than $19.6 million in an arbitration claim accusing Raymond James Financial Services and an ex-Wells broker of raiding an Arkansas branch that has since closed, according to an award issued Thursday.[] Raymond James and [broker], who left Wells for Raymond James' independent channel in October of 2018, were ordered by a panel of Financial Industry Regulatory Authority arbitrators to pay Wells $15.3 million in compensatory damages. [Broker] was also individually liable for $3.5 million in Wells' legal fees, per his contract with Wells, and another $847,000 in costs, according to the award."

***FINRA Steps Up Reg BI Enforcement with Excessive Trading Case*, Financial Planning (Feb. 6, 2023)**: "An excessive trading case against two brokers at Laidlaw & Company is the latest sign that regulators are getting serious about a nearly 3-year-old rule requiring advisors to put clients' interests before their own.[] The Financial Industry Regulatory Authority, the broker-dealer industry's self-regulator, reached agreements last month with [brokers] for the payment of more than $150,000 in restitution and fines after the two Laidlaw brokers were found to have violated a federal law known as Regulation Best Interest. Reg BI, as the rule is known for short, requires brokers to act in a client's best interest, to disclose conflicts of interest and to take into account a client's total portfolio and exposure to risk when making investment recommendations."

***FINRA Proposes Substantial Changes to its Arbitrator Selection Process and Introduces Other Procedural Amendments*, JDSupra (Feb. 7, 2023)**: "Just prior to the New Year, the Financial Industry Regulatory Authority, Inc. (FINRA) filed with the Securities and Exchange Commission (SEC) a 96-page proposed rule modification to make certain clarifying and technical changes to the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes (collectively "the Codes") relating to the arbitrator list selection process as well as other procedural amendments. These proposed rule changes come in response to an independent review by Lowenstein Sandler, LLP that investigated potential abuses of the arbitrator selection process and issued a report in June 2022 making recommendations to provide greater transparency and consistency.[] In response to the independent review, FINRA is proposing to amend the Codes to implement the report's recommendations." (*ed: *This is the best summary we've seen so far. **See our coverage elsewhere in this* Alert.)

***North American Securities Administrators Association Posts Investor Alert Warning on Self Directed IRAs and Crypto, Risk of Fraud*, Crowdfund Insider (Feb. 7, 2023)**: "The North American Securities Administrators Association (NASAA), along with the SEC Office of Investor Education and Advocacy, and the Financial Industry Regulatory Authority (FINRA), have published an Investor Alert cautioning individuals on Self Directed Individual Retirement Account (IRAs) that enable investors to select assets that may be riskier."
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DID YOU KNOW?

FDR'S UNDELIVERED LAST SPEECH CALLED FOR PEACEFUL CONFLICT RESOLUTION. In keeping with our recent Presidents Day theme, we share with you the close of **President Franklin D. Roosevelt**'s final speech, prepared on the morning of April 12, 1945, a few hours before his death. The speech was to be delivered by radio the next day. World War II was in its final months: "The work, my friends, is peace. More than an end of this war -- an end to the beginnings of all wars. Yes, an end, forever, to this impractical, unrealistic settlement of the differences between governments by the mass killing of peoples." It's been said that war is the ultimate failure of dispute resolution.
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Send any messages or inquiries to: George@SecArbAlert.com

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Mail to: 194 Carlton Terrace, Teaneck, NJ 07666
T: 917-841-0521
Web: www.SecArbAlert.com
Blog: www.sacarbalert.com/blog/; Twitter: @SecArbAlert