SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2023-14 (4/13/23)

George H. Friedman, Editor-in-Chief

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- ***Sitrick Group, LLC v. Vivera Pharmaceuticals, Inc*., No. B317546 (Calif. Ct. App. 2 Mar. 30, 2023)**
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- ***SEC Awards More Than $12 Million to Two Whistleblowers*, www.sec.gov (Mar. 31, 2023)**
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- ***Contract Term Public Registry is "Unjustified Attack" on Arbitration,* CUNA News (Apr. 4, 2023)**
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DID YOU KNOW?

- **JAMS Also has a Code of Ethics for Arbitrators**

WE ARE BACK FOR THE SECOND QUARTER OF 2023. LOTS GOING ON, WITH A NEW FEATURE ARTICLE IN THE WORKS. *We are back after a quarterly break, and the news, court decisions and Awards have been piling up in our absence. One thing that caught our eye was a flurry of activity regarding FINRA's proposed rule changes on expungement. See specifically the April 3 proposed further amendments and response to comments by Associate General Counsel Mignon McLemore. We'll cover this topic in detail in a future* Alert.

We kick off the second quarter with coverage of dueling Circuit Court decisions on whether the CFPB's funding is constitutional. We also report on a California Court of Appeal decision holding that it is not bound by SCOTUS' Private Attorneys General Act ("PAGA") analysis in Viking River. *And we have our usual collection of Squibs, Short Briefs, Quick Takes, and Articles of Interest. In other words, a jam-packed new issue of the Alert!*

As for the future, we reported in SAA 2023-12 (Mar.23) on a newly-released research paper that questions securities arbitration's fairness and, among other things, recommends that list selection be eliminated. Tipping the Scales: Balancing Consumer Arbitration Cases, *was released February 23 by the Stanford Institute for Economic Policy Research. We encourage readers with views on the report to submit letters to the* Alert*'s editor. To our happy surprise, Rick Ryder has stepped in with an insightful "analysis of the analysis." Look for* Scaling the Tips of a Claimed Information Advantage: A Response to "Tipping the Scales: Balancing Consumer Arbitration Cases" *next week.*

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SQUIBS: IN-DEPTH ANALYSIS

WE BEG TO DIFFER: IN SPLIT WITH FIFTH CIRCUIT, UNANIMOUS SECOND CIRCUIT HOLDS THAT CFPB FUNDING METHOD *IS* CONSTITUTIONAL. ***In a split with its sister Circuit, the Second Circuit holds unanimously that the CPPB's funding mechanism does not violate the Constitution's Appropriations Clause*.** We reported in SAA 2023-10 (Mar. 9) that the Supreme Court had granted *Certiorari* in *Community Financial Services Ass'n of America v. CFPB*, No. 21-50826 (5th Cir. Oct. 19, 2022), where a unanimous Fifth Circuit held that, although the Consumer Financial Protection Bureau ("CFPB") did not exceed its authority in promulgating the Payday Lending Rule, its funding method is unconstitutional. As reported in SAA 2022-40 (Oct. 27), the Fifth Circuit's Opinion stated: "Congress's decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the Bureau, violates the Constitution's structural separation of powers. We thus reverse the judgment of the district court, render judgment in favor of the Plaintiffs, and vacate the Bureau's 2017 Payday Lending Rule."

***Certiorari* Granted**

Our editorial comment in # 40 said: "We suspect a Petition for *en banc* review is next." As reported in SAA 2022-45 (Dec. 1), eschewing that route, the CFPB instead went right to the Supreme Court. Specifically, the Bureau on **November 14, 2022** filed a *Certiorari* Petition identifying this question: "Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial Protection Bureau (CFPB), 12 U.S.C. 5497, violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding." The SCOTUS case is *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited*, No. 22-448, and appears on page 1 of the February 27 Order List. It will be heard next Term.

Second Circuit Disagrees
Going the other way is the unanimous decision in *CFPB v. Law Offices of Crystal Moroney*, No. 20-3471(2d Cir. Mar. 23, 2023). Says the Opinion: "As a threshold matter, we cannot find any support for the Fifth Circuit's conclusion in Supreme Court precedent. To the contrary, the Court has consistently interpreted the Appropriations Clause to mean simply that 'the payment of money from the Treasury must be authorized by a statute.' We are not aware of any Supreme Court decision holding (or even suggesting) that the Appropriations Clause requires more than this 'straightforward and explicit command.' Here, Congress expressly appropriated the CFPB's funding by enacting the CFPA [Consumer Financial Protection Act], see 124 Stat. at 1955–2113, and we are 'not at liberty to depart from binding Supreme Court precedent, "unless and until the [Supreme] Court reinterprets" [such] precedent' itself.[] We likewise find no support for the Fifth Circuit's reasoning in the Constitution's text"(citations omitted).
(ed: We suspect SCOTUS will have the last word!)
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CALIFORNIA COURT OF APPEAL: WE ARE NOT BOUND BY PAGA ANALYSIS IN *VIKING RIVER*. *Because standing under PAGA is a matter of State law, a California appellate court finds it is not bound by SCOTUS' analysis of the issue in* Viking River. *Seifu v. Lyft, Inc.*, No. B301774 (Calif. Ct. App. 2 Mar. 30, 2023), is one of those rare cases where we are comfortable merely quoting the Opinion *verbatim*. We've added the headers:

Basic Facts
Respondent Million Seifu is a former driver for appellant Lyft, Inc. In 2018, he filed suit against Lyft under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.). He alleged that Lyft misclassified him and other drivers as independent contractors rather than employees, thereby violating multiple provisions of the Labor Code.

Procedural History
Lyft moved to compel arbitration based on the arbitration provision in the "Terms of Service" (TOS) that it required its drivers to accept in order to offer rides through Lyft's smartphone application. The trial court denied the motion, finding the PAGA waiver in the arbitration provision unenforceable under then-controlling California law. Lyft appealed, and in June 2021 we affirmed the denial of Lyft's motion to compel arbitration.

SCOTUS Weighs In
Lyft petitioned the United States Supreme Court for a writ of certiorari. In June 2022, the Court granted Lyft's petition, vacated the judgment, and remanded the case for further consideration in light of *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___ [142 S.Ct. 1906, 213 L.Ed.2d 179] (*Viking River*). We recalled the remittitur, vacated our prior decision, and requested supplemental briefing from the parties on the application of *Viking River* to this case.

New Issue Post-*Viking*
Seifu concedes that under *Viking River* his claim for civil penalties based on alleged Labor Code violations he *personally* suffered (his individual PAGA claim) is subject to arbitration. We agree, and therefore reverse the denial of that portion of Lyft's motion to compel arbitration.

The crux of the parties' dispute here is the fate of Seifu's remaining claims for civil penalties based on alleged Labor Code violations suffered by *other employees* (his non-individual PAGA claims). Lyft argues that Seifu lacks standing to litigate the non-individual claims once his individual claims are sent to arbitration, and the former claims therefore must be dismissed. Seifu counters that, as a matter of state law, he retains standing to pursue the non-individual PAGA claims in court.

Ruling: PAGA Standing is a State Law Matter
We conclude that we are not bound by the analysis of PAGA standing set forth in *Viking River*. As Justice Sotomayor recognized in her concurring opinion, PAGA standing is a matter of state law that must be decided by California courts. Until we have guidance from the California Supreme Court, our review of PAGA and relevant state decisional authority leads us to conclude that a plaintiff is not stripped of standing to pursue non-individual PAGA claims simply because his or her individual PAGA claim is compelled to arbitration.[] We therefore reverse in part and affirm in part the trial court's order denying Lyft's motion to compel arbitration. We remand the matter to the trial court with directions to: (1) enter an order compelling Seifu to arbitrate his individual PAGA claim; and (2) conduct further proceedings regarding Seifu's non-individual claims consistent with this opinion.
(ed: We are sure this is by no means the end of it.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SEC TO OFFER FREE INVESTOR ED RESOURCES IN APRIL. The SEC announced via an **April 3** press release that it is providing a wealth of free investor ed materials during April. *SEC to Highlight Free Investor Education Resources During Financial Capability Month* states: "The Securities and Exchange Commission's Office of Investor Education and Advocacy (OIEA) today announced that its theme for April's National Financial Capability Month is, 'Investing for everyone.' All month long, SEC leadership and staff will promote the free tools and resources available on Investor.gov and participate in investor education events across the country with various audiences, including students, underrepresented communities, older investors, and the military." Continues the release: "Some of the SEC's latest resources to teach the importance of financial capability and provide tips on how to avoid becoming a victim of fraud, include: April's Financial Capability Month Investing Quiz; A high school classroom activity for teachers to use to enhance the educational content of the HoweyTrade Investment Program Avoid Fraud Videos; Investor Alert: "Exercise Caution with Crypto Asset

Securities"; An article from OIEA Director Lori Schock, 'Unsolicited Investment Pitches: Don't Answer! Hang Up! Delete!'"
(ed: This is great investor protection advice for any time of year.)
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SECURITIES EXPERTS ROUNDTABLE PUBLISHES ITS LATEST FREE NEWSLETTER. The latest issue of the Securities Experts Roundtable's ("SER") quarterly newsletter, *The Expert's Examiner* (*"TEE"*) volume 2023-01, covering **January – March 2023**, hit the electronic newsstand **March 31**. This *free*, link-rich publication, which can be found on the Website's landing page ("Newsletter" tab), offers a wealth of information on financial services arbitration and ADR in general. Among the regular features are: **Recent News from the Arbitration Front; Expert Opinions: What are the Courts (and Arbitrators) Thinking?; Heard Through the Regulatory Grapevine -- Comment Letters and Speeches; Practice Management Tips**; and **Statistics, Events & Resources.** Content is provided by the Roundtable's members; the *Alert* is also a contributor. Signup is available online.
*(ed: *The non-profit SER, which was founded in 1992, is: "a group of professionals with significant experience as testifying and consulting experts in securities, business and investment-related litigation." **The* TEE *is a wonderful resource for the arbitration bar. Past issues are grouped here. ***Full disclosure:* SAA*'s publisher and editor-in-Chief George Friedman is an active member of the SER.)*
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GIBSON DUNN TO HOST FREE WEBINAR ON MASS ARBITRATIONS. The Gibson Dunn law firm will be hosting a free one-hour Webinar, *Mass Arbitration: Defense Strategies and Arbitration Agreement Drafting* on Wednesday, **April 19** at noon Eastern. Says the program description: "Mass arbitration is a growing phenomenon in which thousands of plaintiffs—often consumers, employees, or independent contractors—bring arbitration demands against a company at the same time. Pursuing arbitrations in this manner can impose significant, even crippling, costs on companies, particularly in light of the hefty filing fees that many arbitration providers charge. Many companies, however, have deployed successful strategies for deterring and defending against mass arbitrations, primarily through the careful drafting of their arbitration agreements. This webcast will describe some of these strategies, as well as recent developments in the law affecting mass arbitrations and the ethical concerns surrounding this issue." CLE credit is being offered.
*(ed: *Registration is done online. **Recall that as reported in SAA 2021-39 (Oct. 21), the American Arbitration Association released* Supplementary Rules for Multiple Case Filings *in August 2021.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Lipsett v. Banco Popular North America d/b/a/ Popular Community Bank*, No. 22 Civ. 3901 (VM) (S.D.N.Y. Dec. 9, 2022)**: "The Court must first assess whether a valid and enforceable agreement to arbitrate exists between Lipsett and BPNA. The Court

concludes that because Lipsett had no meaningful opportunity to opt out of arbitration in 2008, in other words to clearly manifest assent to arbitration at that time, no contract to arbitrate was formed. Accordingly, BPNA's addition of the arbitration provision is invalid and not binding as to Lipsett. Because the Court so concludes, it does not address the parties' remaining arguments regarding the scope and arbitrability of the arbitration provision."

***Sitrick Group, LLC v. Vivera Pharmaceuticals, Inc.*, No. B317546 (Calif. Ct. App. 2 Mar. 30, 2023)**: "The California Arbitration Act (the Act) (Code Civ Proc., § 1280 et seq.) requires potential and retained arbitrators to disclose, among other things, matters that the Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Ethics Standards) dictate must be disclosed. (§ 1281.9, subd. (a)(2).) Do the Ethics Standards require a retained arbitrator in a noncommercial case to disclose in one matter that he has been subsequently hired in a second matter by the same party and same law firm? We hold that the answer is 'no,' at least where the arbitrator has previously informed the parties—without any objection thereto—that no disclosure will be forthcoming in this scenario. Because the arbitrator's disclosures were proper here, the trial court properly overruled an objection based on inadequate disclosure. We accordingly affirm" (footnote omitted). (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Terrell v. Paradis de Golf Holding, LLC*, No. 48570 (Idaho Mar. 24, 2023)**: "In sum, the Terrells established that they purchased the real property at issue for their personal, residential use. As a result, their claims related to their use of the property associated with their personal residence were claims related to personal or household transactions, rather than commercial transactions. The Terrells' mere invocation of section 12-120(3) in their complaint, without any allegations establishing that the Terrells had entered into a commercial transaction, were insufficient to estop them from denying the existence of a commercial transaction for purposes of section 12-120(3). The district court therefore erred in relying on Garner to award attorney fees to Paradis."

***Phillips v. Asia Pacific*, FINRA ID No. 21-02729 (Honolulu, HI, Feb. 28, 2023)**: A customer alleging unauthorized trading and unsuitable investment recommendations is awarded over $3 million in damages (inclusive of $1,520,768 in punitive damages pursuant to *Park v. Mobil Oil Guam Inc.*, Supreme Court of Guam CV-a03-001 (2004)) against Respondent broker-dealer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Cullen v. Oppenheimer & Company*, FINRA ID No. 21-02816 (Los Angeles, CA, Mar. 2, 2023)**: An All-Public Panel awards two customers nearly $1.5 million in compensatory damages against Respondent broker-dealer relating to their investment in a private equity fund called Horizon Private Equity III. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Waihenya, Jacqueline, *Third Party Funding & Investment Arbitration – The Ménage À Trois Conundrum of International Arbitration?*, ADR JOURNAL Vol. 9.1 (2021): "This paper considers Third Party Funding as an evolving phenomenon within the context of international arbitration. This concept has grained significant ground particularly following the financial turmoil experienced during this new millennium, great technological strides and the emergence of high value awards on the global plane. The sector is largely variable and is becoming populated by players who though highly invested prefer to operate in the background with potential to significantly influence and alter the playing field. Considering that the sector is in flux and given its international nature subject to different and constantly conflicting dynamics in different jurisdiction there is a case to be made for policy and regulatory reform to respond to the ethical conundrums that have emerged and continue to develop."

***Turkey Ordered to Pay $1.4bn to Iraq in Kurdistan Oil Arbitration Case*, Middle East Eye (Mar. 25, 2023)**: "An international arbitration court has ruled against Turkey in a long-running dispute with the Iraqi government regarding crude oil exports from the autonomous Kurdistan region, two Turkish sources familiar with the issue, but not authorised to speak to the press, told Middle East Eye.[] The Iraqi oil ministry in a separate statement on Saturday welcomed the favourable ruling from the International Court of Arbitration that had been issued on Thursday, saying that the judgement confirmed that Iraqi national oil company SOMO is the only entity authorised to manage oil export operations through the Turkish port of Ceyhan."

***SEC Awards More Than $12 Million to Two Whistleblowers*, www.sec.gov (Mar. 31, 2023)**: "The Securities and Exchange Commission today announced awards of more than $12 million to two whistleblowers who provided information and assistance in a successful SEC enforcement action.[] The first whistleblower prompted the opening of the investigation and provided information on violations that would otherwise have been difficult to detect. This whistleblower identified key witnesses, helped staff understand complex fact patterns and issues, and made persistent efforts to remedy the issues. As a result, this whistleblower will receive an award of more than $9 million. The second whistleblower submitted important new information during the course of the investigation and will receive an award of more than $3 million."

***Trade Groups and Policymakers Criticize CFPB Nonbank Registries Pointing to Overreach*, Lexology (Apr. 3, 2023)**: "Trade associations, the U.S. Small Business Administration (SBA) Office of Advocacy and Congress criticized Consumer Financial Protection Bureau (CFPB) overreach during the comment period for two proposals regarding public registry listings for certain nonbanks. In addition to raising several legal concerns about the CFPB's actions, including potential circumvention of Congress' previous actions under the Congressional Review Act (CRA), groups also outlined practical concerns about the CFPB's lack of understanding of the laws and regulations that industries under its jurisdiction are already following. They also highlighted unnecessary costs burdens that would also harm consumers."

***Contract Term Public Registry is "Unjustified Attack" on Arbitration*, CUNA News (Apr. 4, 2023)**: "CUNA and other organizations wrote in opposition to the Consumer Financial Protection Bureau's (CFPB) recent proposal to create a public registry of companies that use certain contract terms and agreements, most significantly, arbitration agreements.[] 'The core of this Proposed Rule is a wholly impermissible and unjustified attack on arbitration agreements that violates the Dodd-Frank Act and the Congressional Review Act (CRA), as well as the protections for arbitration agreements that Congress put in place when it enacted the Federal Arbitration Act (FAA),' the letter reads."

***SEC Rings Up Merrill Lynch for $9.7M Over Undisclosed Fees*, Financial Advisor IQ (Apr. 4, 2023)**: "Merrill Lynch on Monday settled charges with the Securities and Exchange Commission, which alleged that the firm had charged advisory clients more than $4 million in undisclosed foreign exchange fees. The fees, collected on transfers to or from thousands of client accounts, were in part paid to financial advisors, the regulator charged.[] The brokerage agreed to pay disgorgement, prejudgment interest and a civil penalty totaling nearly $9.7 million, and it will distribute funds to harmed clients, according to the SEC's order."
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DID YOU KNOW?

JAMS ALSO HAS A CODE OF ETHICS FOR ARBITRATORS. Our readers know that there's an AAA/ABA *Code of Ethics for Arbitrators in Business Disputes (2004)*. But did you know that there's also a JAMS *Arbitrators Ethics Guidelines*? The purpose of these guidelines is: "to provide basic guidance to JAMS Arbitrators regarding ethical issues that may arise during or related to the Arbitration process."
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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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