SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2023-27 (7/20/23)

George H. Friedman, Editor-in-Chief

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- ***Huntington Way Associates LLC v. RRI Associates LLC,* No. 2022-0761-LWW (Del. Ch. Ct. Jun. 30, 2023)**
- ***Shucht v Innovative Biodefense, Inc.,* 2023 NY Slip Op 03031 (N.Y. App. Div., 2d Dept. Jun. 7, 2023)**
- ***Daniels v. Interactive Brokers,* FINRA ID No. 21-02903 (Los Angeles, CA, May 26, 2023)**
- ***Strickland v. Calton & Associates,* FINRA ID No. 22-02233 (Phoenix, AZ, May 31, 2023)**

ARTICLES OF INTEREST:

- **Nasir Gore, Kiran, and Shirlow, Esmé, *Three Years and Three Decades On: Reflecting on the Final Sunset of NAFTA and USMCA's Sunrise,* Kluwer Arbitration Blog (Jul. 1, 2023)**
- ***Finra Bars Ex-Wells Broker Fired Over Outside Activity, Debit Card Request,* AdvisorHub (Jul. 5, 2023)**
- ***JPMorgan Must Change 'Defamatory' U5, Pay $300K in Damages: Finra,* Financial Advisor IQ (Jul. 10, 2023)**
- ***JPMorgan Must Pay $2.5M Award to Advisor Fired Over Cash Deposit*, Financial Planning (Jul. 10, 2023)**
- ***If We've Said It Once, We've Said It 1,000 Times… Pay Those Arbitration Fees Early And Often!* Proskauer Rose LLP Blog (Jul. 11, 2023)**
- ***SEC Acknowledges JAMS Arbitration Issue, But Offers No Fix*, Insurance Newsnet (Jul. 11, 2023)**

DID YOU KNOW?

- **At the Year's Midpoint, AAA Has Passed the 300,000 Cases Filed Mark**

SQUIBS: IN-DEPTH ANALYSIS

LATEST *NEUTRAL CORNER* FROM FINRA DISPUTE RESOLUTION SERVICES HITS THE ELECTRONIC NEWSSTAND. ***FINRA Dispute Resolution Services ("DRS") has posted the latest edition of* The Neutral Corner *newsletter for arbitrators and mediators ("TNC"), on the Authority's Website***. We present essentially *verbatim* the table of contents of Volume 2023-2, which was released on **July 6**.

Mission Statement

FINRA Dispute Resolution Services Mediation Program by Narielle Robinson, National Mediation Administrator, FINRA Mediation

FINRA Dispute Resolution Services (DRS) and FINRA News

- Arbitration Case Filings and Trends
- Approved Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information
- Proposed Rule Change to Amend the Codes of Arbitration Procedure to Make Various Clarifying and Technical Changes
- Virtual Arbitration Hearing Statistics
- Initial Prehearing Conference (IPHC) Script Updates
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- Practising Law Institute Securities Arbitration 2023: September 7, 2023

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Quarterly Arbitrator Disclosure Reminder

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FINRA Offices

(ed: TNC *is a wonderful resource not only for arbitrators and mediators, but parties as well. Past issues can be found here.)*

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FINRA PANEL AWARDS BROKER $2.5 MILLION AND U5 REFORMATION OVER STINGING PARTIAL DISSENT. ***A registered representative won a big award of monetary damages against his former employer from a majority of a three-member arbitration panel, but the only arbitrator to offer an explanation strongly disagreed with the decision to award any damages.*** The Award in question was *Han v. J.P. Morgan Securities, LLC*, No. 18-02978 (New York, NY, July 7, 2023). Claimant Liet Han: "asserted the following causes of action: wrongful termination; breach of contract; unjust enrichment and quantum meruit; severance; and defamation." Among other things, Han requested at least $5 million in compensatory damages and expungement of his Form U5, the document in which a broker-dealer records the circumstances of a broker's termination from association with that firm.

An Unexplained Award …

In the Award, the majority of the Panel finds J.P. Morgan liable to Han for $2.5 million and the full Panel recommends the expungement of Han's Form U5. In particular, the Panel recommends: "The Reason for Termination shall be changed to 'Other' and The Termination Explanation shall be deleted in its entirety and replaced with the following language: 'J.P. Morgan Securities LLC or its affiliate exercised its right to terminate the Registered Representative as an At-Will employee.'… The Panel further recommends the expungement of all references to Occurrence Number 1964100 from the registration records maintained by the CRD for Liet Han." However, the Award doesn't state that the expunged information is defamatory, as is common in Form U5 expungement Awards. The Panel also assessed $8,850 of the $11,650 in hearing fees to J.P. Morgan.

… But an Explanatory Dissent

In a lengthy dissent from the damage award, Public Arbitrator Mitchell Regenbogen fills in a number of the factual details. According to him: "the Claimant and his wife orchestrated an attempt to deposit over $15,000 in cash without complying with the requirement to make a currency transaction report (CTR) for cash transactions over $10,000, an offense that the undisputed record shows is known as unlawful financial 'structuring,' the first step in the serious crime of money-laundering.[] … Rather than Claimant simply going to the teller and completing the CTR, he and his wife 'pulled back' the cash and deposited an amount under $10,000 in order to avoid the 'form,' with Claimant depositing on the next business day the exact balance that was pulled back. A 'pullback' the undisputed record showed, is a red flag for unlawful structuring." Moreover, he did this despite: "years of training as a registered representative and a member of the financial services industry, which training included specific and repeated admonitions against the exact behavior he and his wife engaged in…." Nonetheless, Arbitrator Regenbogen acknowledges that there was no evidence that the Claimant intended to engage in money laundering.

A Scathing Evaluation of the Claimant's Credibility

Arbitrator Regenbogen's assessment of the evidence presented by the Claimant is best summarized in this passage of his dissent: "I find that the only objective evaluation of the Claimant's and his wife's testimony compels the conclusion that they were simply

untrue, and that despite the Claimant's assertions of ignorance, absent-mindedness, self-serving excuses and denials of his own statements and trying to foist all of the blame on his wife (this coming from a sophisticated Claimant who kept reminding the Panel that he handled a $147 million book of business for Respondent), the facts speak for themselves…."

And Some Choice Words for His Colleagues

Finally, the dissenter does not spare his fellow panelists from criticism, beginning his opinion: "The majority ignores the law and the facts, and inappropriately treats the Claimant as a victim, in order to 'compensate' the Claimant at the expense of Respondent for a situation that was entirely of the Claimant's making." He further admonishes in conclusion that the majority arbitrators: "are giving license to registered representatives to illegally structure transactions, are rendering employer and FINRA investigations meaningless, with the majority's only requirement for doing so being offered self-serving and theatrical stories created after the fact. They are punishing the Respondent for complying with the law and rewarding the Claimant enormously for ignoring it…. Nevertheless, the majority has decided to award an unconscionable $2,500,000 to the Claimant for 'compensation.' One can only look incredulously at this record and ask 'compensation for Respondent having done what'?"

*(ed: *According to a July 12 story in* Barrons, *J.P. Morgan plans to appeal.**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

FINRA BOARD MET IN PERSON LAST WEEK. NO DISPUTE RESOLUTION RULEMAKING ITEMS ON THE AGENDA. FINRA's Board of Governors met in person **July 12–13**; there were no dispute resolution rulemaking items on the Agenda. Added the meeting announcement: "As is customary for our mid-year meeting, the Board will engage in a series of general policy discussions on a range of issues. Among the topics on the agenda, the Board will discuss the evolving state of our industry, current developments in artificial intelligence, and FINRA's longer-term financial planning." As usual, we will follow up after the meeting results are posted. The schedule for the rest of 2023 is: **September 13–14**; and **December 6–7**.)

(ed: We'll tweet any news as soon as we have it.)

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FINRA LAUNCHES ENHANCED ARBITRATOR TRAINING ON EXPUNGEMENT. FINRA on **July 5** announced that it had launched new online *Enhanced Expungement Training.* FINRA's Website offers this description: "The Enhanced Expungement Training provides an overview of revisions to the Codes of Arbitration Procedure to modify the process relating to the expungement of customer dispute information. FINRA will issue a Regulatory Notice announcing the effective date

of the revised rules.[] The revised rules require that expungement requests filed under the Industry Code be decided by a three-person panel randomly selected from a Special Arbitrator Roster…. The revised rules also require that expungement requests filed during simplified customer arbitrations be considered by public chair arbitrators who evidence successful completion of, and agreement with, the enhanced expungement training."
*(ed: *The course takes approximately one hour to complete. **Arbitrators must register via FINRA's Learning Management System. Wonder when that Reg Notice will issue?)*
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NINTH CIRCUIT HOLDS FRIVOLOUS EFFORTS TO ATTACK AWARD WARRANT RULE 11 SANCTIONS. *Richter v. Oracle America, Inc.*, No. 22-cv-04795-BLF (N.D. Calif. Jun. 15. 2023), is one of those cases where we can quote liberally from the decision to convey the core holding. First the facts: "The state court determined that Richter was bound by an arbitration agreement and, on May 3, 2019, it transferred all claims except those brought under the Private Attorney General Act to a JAMS arbitral proceeding. On August 22, 2022, Plaintiff filed her Complaint in this case in federal court." And then the applicable law on sanctions: "The Court now turns to the merits of the motion. As stated above, in the Ninth Circuit, Rule 11 sanctions are appropriate where: (1) attorneys make or use a court filing for an improper purpose; or (2) such a filing is frivolous. See *Townsend* [*v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (*en banc)*], 929 F.2d at 1362. A 'frivolous' argument or claim is one that is 'both baseless and made without a reasonable and competent inquiry.'" And the holding: "Oracle argues that the Complaint and PI Motion were both frivolous and made for an improper purpose…. With a reasonable and competent inquiry, Plaintiff's counsel should have-known that it could not relitigate the injunction in federal court. The Court agrees that the Complaint and PI Motion were frivolous…. Oracle also argues that the Complaint and PI Motion were filed for improper purposes, including harassment, delay, and increased cost to an adversary. The Court again agrees…. The Court here can infer an improper purpose on the basis that Plaintiff seeks to relitigate issues decided in state court. Therefore, sanctions are also warranted on the basis on improper purpose." The request for $152,067.07 in fees as sanctions was denied, however, but the denial: "is WITHOUT PREJUDICE to refiling a further motion that includes additional support for the amount of fees requested. Defendant must submit more specific billing records indicating the time for each task performed, as well as declarations from attorneys indicating the reasonableness of their requested rates" (internal citations omitted)."
*(ed: *We see this as the Court saying to counsel: "You should have known better." **An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*
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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 2023-02*,* covering **April – June 2023**, hit the electronic newsstand **July 11**. 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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QUICK TAKES: CASES AND AWARDS WORTH READING

***Henry v. Wilmington Trust NA*, No. 21-2801 (3rd Cir. Jun. 30, 2023)**: "Having confirmed our jurisdiction, we turn to the merits. The defendants argue that the District Court erred in concluding that the arbitration provision was unenforceable because Henry did not consent to it. Henry disagrees, but also argues on appeal that the class action waiver (and, by extension, the arbitration provision as a whole) is not enforceable because it requires him to waive statutory rights and remedies guaranteed by ERISA. We need address only the latter issue — whether the class action waiver amounts to an illegal waiver of statutory remedies — to resolve this appeal. We agree with Henry that the class action waiver is unenforceable because it requires him to waive statutory remedies. And because the class action waiver is expressly nonseverable from the rest of the arbitration provision, we will affirm the District Court's order declining to enforce the arbitration provision" (footnotes omitted).

***Huntington Way Associates LLC v. RRI Associates LLC*, No. 2022-0761-LWW (Del. Ch. Ct. Jun. 30, 2023)**: "The Westmont Members argue that the Tribunal manifestly disregarded the law in four ways. They say that the Tribunal: (1) 'abdicated' its duties as the third Qualified Appraiser under the LLC Agreement; (2) disregarded a contractually mandated interest-free payment schedule; (3) inappropriately awarded costs; and (4) violated tax law in declining to account for certain tax liabilities. None of these arguments amounts to a manifest disregard of the law that supports vacating the Final Award" (footnote omitted).

***Shucht v Innovative Biodefense, Inc.*, 2023 NY Slip Op 03031 (N.Y. App. Div., 2d Dept. Jun. 7, 2023)**: "In December 2018, the plaintiff moved for leave to renew his opposition to that branch of the defendants' prior motion which was to compel arbitration of the breach of contract cause of action, to stay the arbitration, and for leave to amend the complaint, inter alia, to add causes of action to recover damages for violations of the Labor Law and for reimbursement of arbitration fees. The Supreme Court denied the motion. The plaintiff appeals.[] Contrary to the Supreme Court's determination, the plaintiff's motion was properly denominated a motion for leave to renew …. Regardless,

the motion was properly denied. The plaintiff's lengthy delay of four years in making the motion warrants denial of the motion on the ground of laches (*see Arias-Paulino v Academy Bus Tours, Inc.*, 48 AD3d 350). The defendants were prejudiced by the lapse of time in that they proceeded with, and paid for, the arbitration of the dispute (*see White v Priester*, 78 AD3d 1169)."

***Strickland v. Calton & Associates*, FINRA ID No. 22-02233 (Phoenix, AZ, May 31, 2023)**: A customer's claims relating to her purchase of various real estate investment trusts, including American Realty Capital Healthcare Trust II Inc., are denied after the Panel grants Respondents' Prehearing Motion to Dismiss pursuant to FINRA Rule 12206 (Six-year Eligibility Rule). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Daniels v. Interactive Brokers*, FINRA ID No. 21-02903 (Los Angeles, CA, May 26, 2023)**: In this Consolidated Award, the Panel grants Respondent broker-dealer's Motion to Dismiss pursuant to FINRA Rule 12504(b) after finding that Claimant failed to state or prove any of his claims or any basis on which damages in any amount could be awarded. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Nasir Gore, Kiran, and Shirlow, Esmé, *Three Years and Three Decades On: Reflecting on the Final Sunset of NAFTA and USMCA's Sunrise*, Kluwer Arbitration Blog (Jul. 1, 2023): "On June 30, 2020, an era of international investment law and dispute resolution came to an end as the North American Free Trade Agreement (NAFTA) concluded its 27-year tenure with the entry into force of United States – Mexico – Canada Agreement (USMCA). Three years later, a further milestone is now marked: today, Canada, which is not a party to the investor-State dispute settlement (ISDS) mechanism provided in Chapter 14 of USMCA, has seen its consent for legacy claims under NAFTA expire. This post marks this important milestone and reflects on three decades of NAFTA to consider what a future with USMCA may hold."

***Finra Bars Ex-Wells Broker Fired Over Outside Activity, Debit Card Request*, AdvisorHub (Jul. 5, 2023)**: "The Financial Industry Regulatory Authority barred a former Wells Fargo Advisors broker and 17-year wirehouse veteran who declined to cooperate with an investigation into his firing, according to a letter of settlement finalized on Wednesday.[] [Broker], who was terminated by Wells in April 2022, accepted the bar without admitting or denying the allegations and represented himself in the case.[] Finra initiated its investigation … over the U5 termination form filed by Wells, which stated that he failed to receive approval to engage in outside business activity and submitted a service request to obtain a debit card in his name but drawn on a client's business account, according to his BrokerCheck records."

***JPMorgan Must Change 'Defamatory' U5, Pay $300K in Damages*: *Finra*, Financial Advisor IQ (Jul. 10, 2023)**: "A private client banker fired by **JPMorgan Chase** has been

granted expungement of what he called defamatory Form U5 discharge language and awarded $300,000 in compensatory damages against the firm. [Adviser], who worked in a Chase branch in Mount Prospect, Illinois, was terminated by J.P. Morgan Securities on Jan. 3, 2020, according to his BrokerCheck record. In its Form U5 filing, the firm indicated that [he] was discharged for 'allegedly violating employer's process for computer maintenance transactions.' Translation: [he] was terminated for 'updating the driver's license expiration of his boss's son, who was not in the office,' according to Chicago-based attorney Les Blau, one of two attorneys who represented Iglesias in the expungement case decided last week by a Financial Industry Regulatory Authority arbitration panel."

***JPMorgan Must Pay $2.5M Award to Advisor Fired Over Cash Deposit*, Financial Planning (Jul. 10, 2023)**: "A financial advisor who lost his job at J.P. Morgan Securities over allegations that he skirted anti-money laundering laws won a FINRA arbitration award of $2.5 million from his former employer. [Adviser] was fired from JPMorgan in January 2018 after his wife decided to break $15,000 in cash into two parts for deposit at their bank following their discovery that putting the money in all at once would require her to fill out a currency transaction report. That document, also known as a CTR, is used to combat money laundering and is required for all cash transactions over $10,000." (*ed: See our coverage elsewhere in this* Alert.)

***If We've Said It Once, We've Said It 1,000 Times… Pay Those Arbitration Fees Early And Often!* Proskauer Rose LLP Blog (Jul. 11, 2023)**: "Many California employers and their counsel remain blissfully ignorant of the latest 'gotcha' law in California, which can easily derail an otherwise perfectly planned arbitration. Back in 2019, the California legislature, an implacable foe of arbitration agreements, set a booby trap for unsuspecting employers by requiring the timely payment of arbitration fees and costs on pain of 'waiving' the right to arbitrate. (The same gotcha applies to consumer arbitrations.)[] Specifically, Section 1281.98(a)(1) of the Code of Civil Procedure provides that in an employment or consumer arbitration, if the drafting party (i.e., the defendant) does not pay the invoiced costs and fees to the arbitration provider within 30 days of the due date, that party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel the employee or consumer to proceed with that arbitration.'"

***SEC Acknowledges JAMS Arbitration Issue, But Offers No Fix*, Insurance Newsnet (Jul. 11, 2023)**: "A California retiree suspects his investment advisor has cost him a quarter million dollars from improper trading or spending and decides to take legal action. But, like many in similar situations, the retiree discovers a clause in his contract with the advisor requires any dispute be mediated [sic] by JAMS, a for-profit organization of alternative arbitration formerly known as Judicial Arbitration and Mediation Services. The fees for employing JAMS could be as high a $450,000, however, thus making the effort prohibitive.[] It's not an isolated case. Attorneys and arbitration experts say the JAMS forced arbitration process for registered investment advisors harms investors and allows RIAs, who seemingly serve as their clients'

fiduciaries, to exploit the provisions and use them as a shield to avoid liability for their misconduct."
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DID YOU KNOW?

AT THE YEAR'S MIDPOINT, AAA HAS PASSED THE 300,000 CASES FILED MARK. According to a banner on the American Arbitration Association's landing page, the AAA has had 304,381 cases filed through **July 6**. It has administered 7,701,008 cases since its founding in **1926**.
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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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