SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2023-29 (8/3/23)

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SQUIBS: IN-DEPTH ANALYSIS

NINTH CIRCUIT AFTER SCOTUS REMAND: UPON FURTHER REVIEW, WE'RE GOOD WITH OUR ORIGINAL DECISION. ***The Ninth Circuit has acted on the remand from SCOTUS on whether FAA section 1 exempts delivery drivers, sticking with its original holding that it does.*** Domino's Pizza had asked the Supreme Court to determine whether the Federal Arbitration Act ("FAA") section 1 exemption for transportation workers extends to delivery drivers. The Court left this issue open when it decided *Southwest v. Saxon* in **June 2022.** To review, FAA section 1 exempts from the Act: "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Court's decision in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), held unanimously that the exemption of

"workers engaged in foreign or interstate commerce" includes classes of workers who are part of the flow or stream of interstate commerce, and that there is no FAA requirement that these individuals actually cross state lines. The SCOTUS decision in *Southwest* was narrow, and specifically did not embrace the issue of FAA coverage of delivery drivers.

Post-*Southwest* Petition

We reported in SAA 2022-01 (Jan. 13) on *Carmona v. Domino's Pizza, LLC,* 21 F.4th 627 (9th Cir. 2021), *petition for reh'g den.* (2022), where a unanimous Ninth Circuit embraced the "stream" or "flow" of interstate commerce doctrine. Said the Opinion: "Domino's sells pizza to the public primarily through franchisees. Domino's buys various goods, such as mushrooms, that are used by its franchisees in making pizzas, from suppliers outside of California. Those goods are then delivered by third parties to the Domino's Southern California Supply Chain Center ('Supply Center'). At the Supply Center, Domino's employees reapportion, weigh, package, and otherwise prepare the goods to be sent to franchisees. Domino's franchisees in Southern California order the goods either online or by calling the Supply Center, and the plaintiff drivers ('D&S drivers'), who are employees of Domino's, then deliver the goods to the franchisees." Crossing state lines was not part of the drivers' job." A **June 2022** *Certiorari* Petition in *Domino's Pizza, LLC v. Carmona*, No. 21-1572 presented this question: "Whether drivers making solely in-state deliveries of goods ordered by in-state customers from an in-state warehouse are nevertheless a 'class of workers engaged in foreign or interstate commerce' for purposes of Section 1 of the Federal Arbitration Act simply because some of those goods crossed state lines before coming to rest at the warehouse?"

Ninth Circuit Ruling Vacated and Remanded for Reconsideration

As reported in SAA 2022-40 (Oct. 27), the Supreme Court's **October 2022** Order List seemingly buttoned up the open issues: "The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Southwest Airlines Co. v. Saxon*, 596 U. S. --- (2022)."

Ninth Circuit on Remand: We're Good

The Ninth Circuit on remand in No. 21-55009 (Jul. 21, 2023), stands by its original holding: "Our prior opinion held that the FAA exempted the claims in this case because the D&S drivers were part of a 'class of workers engaged in foreign or interstate commerce,' U.S.C. § 1; *Carmona*, 21 F.4th at 628. Although we noted that the 'nature of the business for which a class of workers performed their activities' was a 'critical factor' in the § 1 analysis, id. at 629 (cleaned up), we in the end focused heavily on what the class of workers to which the plaintiffs belonged actually did. Relying on *Rittmann* [*v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020)], we stressed that because 'the D&S drivers, like the Amazon package delivery drivers, transport [interstate] goods for the last leg to their final destinations,' they are engaged in interstate commerce under § 1. Id. at 630 (cleaned up). Nothing in *Saxon* undermines that reasoning" (footnote omitted).

*(ed: *We're not sure what this means. SCOTUS likely will tell us. **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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EX-TWITTER EMPLOYEE FILES CLASS ACTION PETITION TO COMPEL ARBITRATION. ***In an unusual move, one of the many former Twitter employees fired after Elon Musk's purchase of the company brought a class action to force Twitter and its successor company to honor thousands of arbitration agreements signed by himself and other ex-employees of the social media giant.*** We don't normally cover the mere filing of petitions to compel, let alone ones not involving securities arbitration, but we think that this one is so remarkable that it is worth making an exception to that rule. Fabien Ho Ching Ma filed the petition on July 3, 2023 in the U.S. District Court for the Northern District of California, against Twitter Inc. and the corporation into which it was merged, X Corp.: "on his own behalf and on behalf of other similarly situated former Twitter employees with whom Twitter has refused to engage in arbitration — despite having compelled employees to arbitrate their claims…."

The Arbitration Agreements and JAMS Rules
The petition alleges that these former Twitter employees signed "substantially identical" agreements that required the arbitration of employment disputes under the aegis of Judicial Arbitration and Mediation Services ("JAMS") pursuant to the then-current JAMS rules, and, in particular, the forum's *Employment Arbitration Rules and Procedures* and its *Employment Arbitration Minimum Standards of Procedural Fairness* ("Minimum Standards"). Standard 6 of the latter requires employees to pay an initial Case Management Fee and employers to pay all other costs of the arbitration, including arbitrators' fees.

Twitter's Alleged Refusal to Comply
According to the Petition: "Since Elon Musk's acquisition of Twitter in October 2022, the company has been accused of a variety of unlawful acts" against the former employees. "Approximately 2,000 of Twitter's former employees have attempted to pursue arbitration claims against the company, following Twitter's successfully moving to compel arbitration in several federal class action cases in court against it." However, the Petition further alleges, Twitter subsequently requested that all arbitration fees be split equally among the parties in arbitrations scheduled in most states and, after counsel for the former employees objected, the company refused to pay the amounts mandated by the Minimum Standards. JAMS in turn refuses: "to arbitrate any disputes in which Twitter refused to pay its required fees and claimants did not waive application of the Minimum Standards."

The Requested Relief
The Petition's Prayer for Relief states: "Plaintiff requests that the Court: "1. Enter an Order requiring that Twitter arbitrate the claims of Petitioner and those similarly situated pursuant to the terms of their arbitration agreements, including by complying with JAMS

Minimum Standards and paying the arbitration fees and costs JAMS determines are necessary to empanel arbitrators and proceed with arbitrations. 2. Award any additional relief to which Petitioner and those similarly situated are entitled."
*(ed: *We will follow this one. **An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this petition. ***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 DRS POSTS STATS THROUGH JUNE. A STRONG YEAR IN ARBITRATION FILINGS CONTINUES. FINRA Dispute Resolution Services ("DRS") has posted case statistics through **June**, with recent trends continuing to show a very strong year in arbitration filings – especially industry cases – and a continued drop-off in mediations. We offer these headlines at the year's midpoint: 1) overall arbitration filings through June – 1,708 cases – are up 35% for the year (was plus 37% in **May**); 2) cumulative customer claims increased 22% (was plus 20% last month); 3) industry arbitration filings were up 58% (from up 64% in May); and 4) the long-term decline in mediation cases continues. There were 264 new arbitrations filed in June, compared to 402 new cases in May. Overall arbitration turnaround times were 16.0 months (a slight decrease), with hearing cases now taking 17.9 months (also a slight decline). There were 365 mediation cases in agreement, a 22% decrease from 2022. This stat has been declining steadily in recent months, and is way down from May 2022's torrid plus 137% pace. The mediation settlement rate was steady at 85%. There are now 8,230 DRS arbitrators, 4,011 public and 4,219 non-public. This stat was up across the board last month. Pending cases stand at 3,322, down 14 from May.
*(ed: *If the trend holds, the 1,708 arbitrations filed through June straight-lines to a bit over 3,400 yearly arbitration filings, a decent year by recent measures. Last year showed 2,671 arbitration cases filings. The all-time high-water mark was 2003, when that post tech-wreck figure was 8,945 cases. **We will in a future* Alert *offer our analysis of what's behind the recent surges in both customer and industry claims. ***Past year stats can be found here.)*
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"EXPERT DETERMINATION" IS NOT ARBITRATION, SO MOTION TO COMPEL FAILS. The parties' agreement to submit financial disputes to an accounting firm for expert review and determination was not an arbitration agreement, the Third Circuit holds unanimously in *Sapp v. Industrial Action Services LLC*, No. 22-2181 (3rd Cir. Jul. 20, 2023). The Opinion captures the core facts and holding. First, the facts: "The parties agreed in an asset purchase agreement that certain narrow factual questions about the preparation of two forms of financial statements be sent to an accounting firm—i.e., an expert in preparing financial statements. The accounting firm then had 30 days to audit the statements and send back final drafts. The parties did not label this process. They

called it neither arbitration nor expert determination (two common forms of alternative dispute resolution)." And the holding: "Arbitration is an ever-growing trend that many parties prefer and courts routinely enforce. Yet that trend cannot continue so far that arbitration is forced on parties who never agreed to it. That is what happened here…. The accounting firm had limited authority, a narrow scope of duty, a short deadline, and no procedures for conducting discovery or accepting legal arguments. This context calls for an expert determination; thus we part from the District Court's decision compelling arbitration, vacate its entry of judgment, and remand for further proceedings consistent with this opinion."
(ed: As we say from time to time: "When in doubt, spell it out.")
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ARBITRATOR'S FAILURE TO DISCLOSE PAST ATTORNEY-CLIENT RELATIONSHIP RESULTS IN AWARD VACATUR. In this AAA case, the Court in *Equicare Health Inc. v. Varian Med. Sys., Inc*., 5:21-mc-80183-EJD (N.D. Cal. Apr. 19, 2023), finds several problems with an arbitrator's lack of disclosure: "AAA Commercial Arbitration Rule 17(a) required Mr. Dosker to disclose 'any circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including . . . *any past or present relationship* with the parties *or their representative*s.' (emphasis added). The AAA disclosure form Mr. Dosker completed also obligated him to 'disclose any *past or present relationship* with the parties, their *counsel*, or potential witnesses, direct or indirect, whether financial, *professional*, social or *of any other kind*.' (emphasis added). And finally, California Civil Procedure Code § 1281.9(a)(5) requires neutral arbitrators to disclose '[a]ny attorney-client relationship the proposed neutral arbitrator has or had with any party or lawyer for a party to the arbitration proceeding.' Cal. Civ. Proc. Code § 1281.9(a)(5). Even though the Court may not vacate the arbitration award based solely on noncompliance with these provisions, the uniform obligations across these rules for an arbitrator to disclose past attorney-client relationships—regardless of age, duration, or involvement—strongly support a finding that Mr. Dosker's failure to do so gave rise to a 'reasonable impression of partiality.'[] Finally, the arbitration proceedings here also reflect other developments that could raise a reasonable impression of Mr. Dosker's partiality—if not actual bias—in favor of Ms. Ta."
(ed: As the ADR providers stress, "disclose, disclose, disclose.")
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Berkelhammer v. ADP TotalSource Group Inc*., No. 22-1618 (3rd Cir. Jul. 17, 2023)**: **"**Beth Berkelhammer and Naomi Ruiz participated in the ADP TotalSource Retirement Savings Plan 'Plan'), an investment portfolio managed by NFP Retirement, Inc. ('NFP'). Displeased with NFP's performance, they filed suit under § 502(a)(2) of the Employment Retirement Income Security Act of 1974 ('ERISA') not for their own losses, but derivatively on behalf of the Plan. The Plan's contract with NFP contained an agreement to arbitrate disputes between the two entities. Berkelhammer and Ruiz say that since they did not personally agree to arbitrate, the arbitration provision does not reach their claims. The District Court disagreed, holding that Berkelhammer and Ruiz stand in the Plan's

contractual shoes and must accept the terms of the Plan's contract. We agree and will affirm."

***Holley-Gallegly v. TA Operating LLC*, No. 22-55950 (9th Cir. Jul. 21, 2023)**: "Defendant-Appellant TA Operating LLC (TA) appeals the district court's denial of its motion to compel arbitration of employment-related claims brought by Plaintiff-Appellee Kenneth Holley-Gallegly. Because the district court erred in finding that the arbitration agreement's delegation clause was unenforceable, we vacate the district court's order and direct it to order the arbitrator to decide enforceability in the first instance." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Victory Insurance Co. v. Downing*, 2023 MT 139 (Jul. 18, 2023)**: "Victory cites our decision in *Schuster v. Northwestern Energy Co*., 2013 MT 364, 373 Mont. 54, 314 P.3d 650. In that case, we held that the Montana Public Service Commission (PSC) was not vested with judicial powers and thus had no authority to award monetary damages to a customer whose injury was caused by the utility's alleged negligence. *Schuster*, ¶ 13. We noted that if the PSC determined that the utility had acted in violation of administrative rules, then it could take action for that violation. *Schuster*, ¶ 14. Victory cites S*chuster* to support the proposition that administrative agencies are not authorized to arbitrate controversies between private parties. But the Commissioner here—unlike the PSC in *Schuster*—acted within the authority vested by the Legislature when it brought an enforcement action under the Insurance Code and sought fines in addition to reimbursement for Clear Spring…. The District Court correctly applied the law when it denied Victory's writ of prohibition because the Commissioner's action to enforce the Insurance Code was within the agency's jurisdiction and Victory had a plain, speedy, and adequate remedy of judicial review."

***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).*

***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 granted Respondents Prehearing Motion to Dismiss pursuant to FINRA Rule 12206 (Six-year Eligibility Rule). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Efstathiou, Stefanie G. and Apostol, Mihaela, *Arbitration Tech Toolbox: ChatGPT – Arbitral Assistant or Fourth Arbitrator?*, Kluwer Arbitration Blog (Jul. 22, 2023):

"The prospect of integrating generative artificial intelligence (AI) into the adjudicatory decision-making process is not as distant as one might think. In February 2023, it was reported that a Colombian judge used ChatGPT in deciding a health insurance dispute. The judge asked both decisional and research questions and integrated those responses into his judgment. Another example comes from a court in Pakistan. One company has also explored the use of ChatGPT in mediation, ChatGPT was a party in a recent mock arbitration hearing based on the Vis Moot case, and Jus Mundi just announced its Jus AI. If judges and mediators can rely on ChatGPT, why not arbitrators?"

***Viking River Cruises Revisited*, Ballard Spahr, LLP Blog (Jul. 21, 2023)**: "We previously blogged about *Viking River Cruises, Inc. v. Moriana*, in which the U.S. Supreme Court held that individual employee claims under California's Labor Code Private Attorneys General Act (PAGA) are subject to arbitration under the Federal Arbitration Act (FAA). While the Court further ruled that representative employee PAGA claims are not preempted by the FAA, it nevertheless dismissed those claims for lack of standing based on its interpretation of California standing law.[] Recently, the California Supreme Court held in *Adolph v. Uber Technologies, Inc.* that *Viking River* misinterpreted California standing law and that employees may pursue representative PAGA claims in court even if their individual PAGA claims are subject to arbitration."

***CFPB and States Launch Enforcement Action Related to Student Loans*, JDSupra (Jul. 24, 2023)**: "On July 13, 2023, the CFPB and various state attorneys general, along with California's Department of Financial Protection and Innovation, filed an adversary proceeding against a sales training company for deceptive marketing and debt collection practices relating to the company's allegedly illegal student loan program.[] The eight-count complaint, filed in the United States Bankruptcy Court for the District of Delaware, alleges that the company improperly marketed predatory loans to its consumers and falsely guaranteed job placement. The complaint also alleges that the Company unilaterally changed the terms of the loans to require arbitration after the loans attracted regulatory scrutiny."

***Finra Bars Ex-Morgan Stanley Broker Fired Over Account Coding Issue*, AdvisorHub (Jul. 24, 2023)**: "A former Morgan Stanley broker with a quarter-century of experience has opted to leave the brokerage industry rather than cooperate with a regulatory investigation into his termination for allegedly miscoding trades on inherited accounts. [Broker], who worked at Morgan Stanley and its Smith Barney predecessor in Little Falls, New Jersey until 2020, agreed to a Financial Industry Regulatory Authority bar without admitting or denying the regulator's findings or the accusations behind his dismissal, according to a letter of settlement finalized July 19."

***Advisor Claims UBS Fired Him Because of Depression, Anxiety*, Financial Advisor IQ (Jul. 25, 2023)**: "A financial advisor fired by UBS has filed a lawsuit alleging that the firm refused to let him resume work after he took medical leave for treatment of depression.[] Advisor … joined UBS in December 2008 and worked out of a branch office in Erie, Pennsylvania, according to his lawsuit's complaint, filed last week in the

U.S. District Court for the Western District of Pennsylvania. [Adviser], who joined from Merrill Lynch, according to his BrokerCheck record, received a recruiting bonus in the amount of $454,670, secured by a promissory note that would be forgiven if [he] remained continuously employed with UBS through Jan. 2, 2018, according to the complaint."

***Ex-LPL Broker Suspended for Teaching Online Courses*, ThinkAdvisor (Jul. 25, 2023)**: "The Financial Industry Regulatory Authority suspended a former LPL Financial broker for six months and fined him $12,500 for offering paid online financial education courses after the firm disapproved of the activity and also consulting for a hedge fund without the firm's approval.[] Without admitting or denying FINRA's findings, [Broker] signed a letter of acceptance, waiver and consent on June 9 in which he consented to FINRA's sanctions."

***SEC Proposes Reforms Relating to Investment Advisers Operating Exclusively Through the Internet*, www.sec.gov (Jul. 26, 2023)**: "The Securities and Exchange Commission today proposed amendments to the rule permitting certain investment advisers that provide investment advisory services through the internet to register with the Commission. The proposed amendments generally would require an investment adviser relying on the internet adviser registration rule to have at all times an operational interactive website through which the adviser provides digital investment advisory services on an ongoing basis to more than one client. The proposed amendments would also eliminate the de minimis exception from the current rule by proposing to require that an internet investment adviser provide advice to all of its clients exclusively through an operational interactive website, and make certain corresponding changes to Form ADV."
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