



# SECURITIES ARBITRATION ALERT

## SECURITIES ARBITRATION ALERT 2023-31 (8/17/23)

*George H. Friedman, Editor-in-Chief*

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- *SEC Charges 11 Wall Street Firms with Widespread Recordkeeping Failure*, www.sec.gov (Aug. 8, 2023)

### DID YOU KNOW?

- Arbitration Played a Key Role in Keeping Labor Peace During WWII

**EXPUNGEMENT REG NOTICE ISSUED.** *FINRA on August 11 issued [Regulatory Notice 23-12](#), FINRA Adopts Amendments to the Codes of Arbitration Procedure to Modify the Process Relating to the Expungement of Customer Dispute Information. As to effectiveness, the Notice states: "The amendments to Rules 12800 and 12805 apply to requests to expunge customer dispute information from the Central Registration Depository (CRD®) associated with a customer arbitration filed in the DRS arbitration forum on or after October 16, 2023. The amendments to Rules 13805 and 13806 apply to straight-in requests filed in the DRS arbitration forum on or after October 16, 2023." See our lead squib directly below.*

## **SQUIBS: IN-DEPTH ANALYSIS**

**FINRA ISSUES LONG-AWAITED REGULATORY NOTICE ON THE HIGHLY RESTRICTIVE 2023 EXPUNGEMENT RULE CHANGES.** *The Notice announces an effective date of October 16, 2023 for the new, restrictive rules, beginning a countdown for the last chance to preserve the opportunity to expunge many customer complaints from the Central Records Depository (CRD).* As we reported in SAA 2023-15 (Apr. 20), the SEC on **April 12, 2023** [approved](#) the final version of [SR-FINRA-2022-024](#), which makes substantial reforms to the process for expunging customer information from brokers' CRD records and profoundly limits the ability of brokers to seek such relief in the first place. Now, on **August 11, 2023**, after a long delay, FINRA has followed up by issuing [Regulatory Notice 23-12](#). Below, we explain which cases the new rules will affect and how those rules will affect those future expungement requests (subject to some questions of interpretation).

### **An Effective Date of October 16, but What Does that Mean?**

The [rule changes](#) include three sets of rules applying to expungements in different scenarios: 1) Rule 12800(d)-(f) applies to expungement of a Small Claims case (as currently defined in FINRA *Customer Code of Arbitration Procedure* Rule [12800\(a\)](#)) in the Small Claims proceeding itself; 2) Rule 12805 applies to expungement of a non-Small Claims customer-initiated arbitration in that proceeding; and 3) Rules 13805 and 13806 apply to “straight-in” expungement proceedings, which are arbitrations initiated by a broker for the purpose of expunging customer complaints. The Regulatory Notice states:

- The amendments to Rules 12800 and 12805 apply to requests to expunge customer dispute information from the Central Registration Depository (CRD<sup>®</sup>) associated with a customer arbitration filed in the DRS arbitration forum on or after October 16, 2023.
- The amendments to Rules 13805 and 13806 apply to straight-in requests filed in the DRS arbitration forum on or after October 16, 2023.

Although the second sentence is clear enough that straight-in requests filed by no later than October 15 will not be subject to the new rule changes, the first sentence is somewhat ambiguous as to whether the customer claim or the request for expungement must be filed by that date to be similarly grandfathered. Our interpretation is that the rules only apply to customer cases filed on or after the effective date and not to requests for arbitration in customer claims filed by October 15.

### **A Bevy of Restrictions on Straight-In Expungement Requests**

What happens once the new rules take effect? Rule 13805 imposes the strictest limits on the conditions for making expungement requests, prohibiting straight-in requests if:

- An arbitration panel held a hearing to consider the merits of expunging the same customer dispute information
- A court of competent jurisdiction previously denied such a request
- The panel or court found the broker liable in an arbitration or litigation involving the same customer dispute
- The arbitration, litigation or customer dispute has not yet closed

- The customer dispute information involves the same conduct that was the subject of a final regulatory action by a securities regulator or self-regulatory organization
- The broker waited more than six years after the pertinent arbitration or litigation closed to file the straight-in request (this time period will be limited to two years for requests to expunge this information filed on or after October 16, 2025) or
- The broker waited more than six years after any other customer dispute information was first reported to the CRD to file the straight-in request (this time period will be limited to three years for requests to expunge this information filed on or after October 16, 2026).

Any broker intending to file a straight-in request that would be prohibited under any of these criteria must file it before the effective date of the rule changes.

### **New Limits on the Right to Expungement Requests in Customer Cases as Well**

Brokers will be barred from requesting expungement of customer cases if:

- An arbitration panel held a hearing to consider the merits of expunging the same customer dispute information or
- A court of competent jurisdiction previously denied such a request.

Brokers named as respondents may request arbitration for themselves, and any party may request expungement on behalf of a broker not named as a respondent (known as an on-behalf-of request), if that broker consents to the expungement request. In fact, a broker respondent in a non-Small Claims customer-initiated arbitration who fails to request expungement during that arbitration: “shall be prohibited from seeking to expunge the customer dispute information associated with the customer’s statement of claim in any subsequent proceeding.” Presumably, this prohibition only applies to customer cases subject to Rule 12805, since the waiver only appears in that rule and is not one of the restrictions on expungement listed in Rule 13805 (although a broker might not want to take a chance that the waiver applies to earlier customer disputes). On the other hand, there is no similar waiver if a broker respondent fails to request expungement during a Small Claims case, nor does the failure to file an on-behalf-of request prevent the non-party broker from requesting expungement as a straight-in request.

### **Other Procedural Hurdles and Pitfalls**

Rule 13806 requires the panel in a straight-in proceeding to be chair-eligible, trained in and accepting of FINRA’s [Expanded Expungement Guidance](#) (as must any arbitrator deciding an expungement request in a Small Claims case) and appointed at random without party input. The panel must deny expungement relief to a broker found liable in the proceeding, and withdrawing an expungement request in any proceeding also results in automatic denial. The rules also impose critical procedural time limitations. An expungement request in a Small Claims case must be filed within 30 days after the requesting party is notified of the appointment of an arbitrator, and in a non-Small Claims case no later than 60 days before the first scheduled hearing, unless in the latter case the panel grants a motion for extension of time to do so. The broker claimant in a straight-in request must serve the affected customers with the pleadings within 10 days after their filing: “unless the panel determines that extraordinary circumstances make such filing impracticable....” Rule 13805 also imposes strict pleading standards and protects the rights of customers to participate fully throughout the proceeding, and all three sets of

rules give state securities regulators the opportunity to do so as well. Finally, all arbitrators must agree to the grant of an expungement request, or the request is denied.

### **Another Unanswered Question About a Potential Pitfall**

As we previously stated, the same customer dispute information may only be expunged once, but the rules don't define what customer dispute information is or when it is the same. This poses a problem: Consider a broker who obtains expungement of a complaint one of his or her customers made to the broker's employer that was false or alleged misconduct with which he or she wasn't involved. If the customer subsequently files an arbitration based on the same complaint, is it a separate customer dispute because it gets a new occurrence number or is it the same dispute because it involves the same accounts, securities and conduct? We believe the likely answer is the former, because the rules do distinguish between "customer dispute information" and "the same conduct" in the context of regulatory actions. Furthermore, if the answer is the latter, that would be unfair to the broker because he or she would no longer be able to expunge the information, despite having a meritorious case for expungement.

*(ed: \*The Notice directs anyone with questions about it to contact: "Victoria Crane, Vice President and Associate General Counsel, Office of General Counsel, at (202) 728-8104 or [email](#); Mignon McLemore, Associate General Counsel, Office of General Counsel, at (202) 728-8151 or [email](#); or Bria Adams, Principal Counsel, Office of General Counsel, at (202) 728-8829 or [email](#)." \*\*The [form](#) to make an on-behalf-of request under the new rules is attached to the Notice. \*\*\*The Reg Notice is also available in [PDF format](#).*

*\*\*\*\*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](mailto:harryjacobowitz@optimum.net).)*

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### **SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW**

**A LOOK BEHIND THE FINRA DRS MIDYEAR STATS THROUGH JUNE: THE SURGE IN CUSTOMER CASES.** As reported recently, FINRA Dispute Resolution Services ("DRS") recently posted case [statistics](#) through **June**, with recent trends continuing to show a very strong year in arbitration filings. To review briefly, overall [arbitration filings](#) through June – 1,708 cases – are up 35% for the year (was plus 37% in **May**), while customer arbitration filings were up 22% (down from plus 24% in May). What's behind the customer surge in industry arbitration filings? "The usual suspects plus Reg-BI breaches." We examined the "Top 15 Controversy Types in Customer Arbitrations" [stats](#) to determine where customer filings might end up at the end of the year. Specifically, we looked at these controversy types: breach of fiduciary duty; negligence; failure to supervise; breach of contract; misrepresentation; and breach of Reg-BI. All six categories are projected to increase as a group by nearly 15%, as this chart shows:

Category	2,022	2023 June	2023 Proj	Diff	% Chg
Breach of fiduciary duty	1,340	769	1,538	198	14.8
Negligence	1,261	703	1,406	145	11.5
Failure to supervise	1,075	588	1,176	101	9.4
Breach of contract	1,048	581	1,162	114	10.9
Misrepresentation	990	548	1,096	106	10.7
Breach of Reg-BI	216	218	436	220	101.9
<b>Totals</b>	<b>5,930</b>	<b>3,407</b>	<b>6,814</b>	<b>884</b>	<b>14.9</b>

(ed: \*We will check in periodically. \*\*Past year stats can be found [here.](#))  
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**EN BANC PA APPELLATE COURT DECLINES TO ENFORCE UBER’S ONLINE PDAA.** The facts in [Chilutti v. Uber Technologies, Inc.](#), No. 1023 EDA 2021 (Pa. Super. Jul. 19, 2023) (en banc), are not unusual. Chilutti, who is wheelchair bound – was injured in a motor vehicle accident on the way home from a medical appointment, while riding in a car provided by Uber. As our readers know, the online Uber passenger signup app has a predispute arbitration agreement (“PDAA”). The core issue for the Court was: “whether a party should be deprived of their [Pennsylvania] constitutional right to a jury trial when they purportedly enter into an arbitration agreement via a set of hyperlinked ‘terms and conditions’ on a website or smartphone application that they never clicked on, viewed, or read.” In a 6-3 ruling, the Court declines to enforce the PDAA and establishes the standard for PDAA use in a consumer context: “Because the constitutional right to a jury trial should be afforded the greatest protection under the courts of this Commonwealth, we conclude that ... a stricter burden of proof is necessary to demonstrate a party’s unambiguous manifestation of assent to arbitration. This is accomplished by the following: (1) explicitly stating on the registration websites and application screens that a consumer is waiving a right to a jury trial when they agree to the company’s ‘terms and conditions,’ and the registration process cannot be completed until the consumer is fully informed of that waiver; and (2) when the agreements are available for viewing after a user has clicked on the hyperlink, the waiver should not be hidden in the ‘terms and conditions’ provision but should appear at the top of the first page in bold, capitalized text” (footnote omitted).

(ed: \*We reported in SAA 2022-45 (Dec. 1) on a prior iteration of this case, [Chilutti v. Uber Technologies, Inc.](#), 2022 PA Super 172 (Oct. 12, 2022). \*\*This reminds us of [Atalese v. U.S. Legal Services Group, L.P.](#), 219 N.J. 430 (2014), where the NJ Supreme Court held that PDAA’s in typical consumer relationships must demonstrate a clear and unambiguous waiver of the constitutional right to court trial.)

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**AAA OFFERS SELF-PACED ONLINE COURSE ON RECOVERING ATTORNEYS’ FEES, INTEREST, AND COSTS.** The AAA has made available a self-paced online course, [Everything an Advocate Needs to Know About Winning](#)

[Attorney Fees and Costs in an Arbitration](#). Says the description for the 90-minute program: “Attorney fees, arbitration costs and interest often constitute a significant portion of an arbitration award. This Webinar focuses on how arbitrators decide whether to award attorney fees, arbitration costs and interest, and in what amounts. This perspective will help you better advance your client's interests in arbitration whether you are seeking, or opposing, fee and cost awards.” Serving as faculty are: “**Jonathan Polland**, Polland Resolution Services; and **Dana Welch**, Dana Welch ADR. Registration – \$50 – is done [online](#). CLE is not available, but registrants: “may be able to use a copy of the certificate available at the conclusion of the course to submit for CLE credit ....” (ed: \*This is a seldom-covered but important topic. \*\*Questions? Contact AAA Education Services at [aaaeducation@adr.org](mailto:aaaeducation@adr.org) or 212-484-4096.)

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### **QUICK TAKES: CASES AND AWARDS WORTH READING**

[Burnett v. HomeServices of America, Inc.](#), No. 22-2664 (8th Cir. Aug. 2, 2023):

“HomeServices is neither a party nor a third-party beneficiary of the Listing Agreements or the Arbitration Agreements. Thus, the Arbitration Agreements are inapplicable to any dispute between the unnamed class members and HomeServices. Our conclusion is buttressed by the Arbitration Agreements’ express statement that ‘[n]either party’—the sellers and non-parties ReeceNichols or BHH KC—‘will be entitled to join or consolidate disputes by or against others in any arbitration.’ This clause ‘demonstrat[es] the narrow, party-specific scope of the Arbitration Agreements.’ We further note that the class members’ claims do not allege that non-signatory HomeServices breached duties to them ‘purportedly assigned it by the agreement.’ We, therefore, hold that the district court did not err in denying HomeServices’s motion to compel the unnamed class members to arbitrate their claims against it” (footnotes and citations omitted; brackets in original).

[Boshears v. PeopleConnect, Inc.](#), No. 22-35262 (9th Cir. Aug. 3, 2023): “Because [FAA] § 16(a) grants us jurisdiction to review only an order denying a motion to compel arbitration, and because the district court’s denial of [Communications Decency Act] § 230 immunity is not part of such an order, we lack jurisdiction to review it. We dismiss this portion of PeopleConnect’s appeal.”

[Devas Multimedia Private, Ltd. v. Antrix Corp Ltd.](#), No. 20-360 (9th Cir. Aug. 1, 2023) (unpublished): “These three companion appeals concern an agreement between two Indian corporations: Devas Multimedia Private Ltd. (‘Devas’) and Antrix Corp. Ltd. (‘Antrix’). In the Confirmation Appeal (20-36024), Antrix challenges the district court’s orders denying its motion to dismiss and confirming an International Chamber of Commerce (‘ICC’) arbitration award in favor of Devas. In the Registration Appeals (22-35085 and 22-35103), Antrix and Devas challenge the district court’s order granting the motion of CC/Devas (Mauritius) Ltd., Telcom Devas Mauritius Ltd., Devas Employees Mauritius Private Ltd., and Devas Multimedia America, Inc. (collectively ‘Intervenors’) to register the judgment in the Eastern District of Virginia. We hold that the district court erred in exercising personal jurisdiction over Antrix, and we reverse.”

[Smith v. Worden Capital](#), FINRA ID No. 22-00145 (Birmingham, AL, Jul. 18, 2023): Two customers are awarded over \$2.7 million dollars in damages (inclusive of

\$1,100,000 in attorney fees and \$250,000 in disgorgement fees) relating to their unsuitable placement in alternative investments, such as real estate investment trusts. The customers are also awarded an additional \$1,000 as a monetary sanction against Respondent broker-dealer and one named broker relating to false statements they made regarding account statements. *Provided courtesy of SAC's ARBchek facility ([www.arbchek.com](http://www.arbchek.com)).*

**[Kondas v. The Huntington](#), FINRA ID No. 22-02136 (Pittsburgh, PA, Jul. 25, 2023):**

An Arbitrator explains why he has decided to deny a broker's request for reformation of his Form U5 record, finding that the statements and information contained in it are not defamatory or false. *Provided courtesy of SAC's ARBchek facility ([www.arbchek.com](http://www.arbchek.com)).*  
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#### **ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT**

**Cherdack, Melanie, [Vetting Cases and Drafting a Securities Arbitration Claim: The Keyboard Is Mightier Than the Market](#), PIABA BAR JOURNAL, Vol. 27, No. 3 (2020):**

“Drafting Securities Arbitration Claims in FINRA arbitration is an art, not a science. Properly vetting cases and crafting well thought out Statements of Claim can help position a savvy claimants' attorney for a successful case resolution.”

**[Eleventh Circuit Joins Others on Applicability of Domestic FAA Grounds to Vacate Nondomestic Arbitration Awards](#), Troutman Pepper Blog (Aug. 4, 2023):** “Earlier this year the Eleventh Circuit Court of Appeals joined the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. circuits in the much-anticipated en banc decision of *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, where it held that the grounds for vacatur under Chapter 1 of the Federal Arbitration Act (FAA) may also apply to nondomestic arbitration awards (e.g., arbitration awards rendered in the U.S. but involving a non-U.S. party)” (footnote omitted).

**[Golden Rules for Investors: What to Know Before Buying Physical Precious Metals](#), [www.finra.org](http://www.finra.org) (Aug. 4, 2023):** “It’s a fantasy that may resonate with people of a certain era: swimming in a vault piled nearly to the ceiling with glittering gold bullion. This was a regular pastime of the cartoon character Scrooge McDuck in the late 1980s animated classic ‘Duck Tales.’[] It’s a scene that has led some to consider Scrooge McDuck one of the richest fictional characters. Of course, for most real investors, amassing and storing swimming pool-size portions of gold is impossible.[] There are a lot of ways to gain exposure to metals such as silver, gold, palladium and platinum. There are commodities futures, mutual funds and exchange-traded funds (ETFs). But investing in the physical metal can carry a lot of allure for some investors looking to diversify their investment portfolios.”

**[Brokers Get Another Month to Comment on Remote Work Pilot Program](#), Financial Planning (Aug. 7, 2023):** “Brokers are getting at least another month to comment on a proposal that would let them conduct their internal inspections of home and branch offices remotely.[] The Financial Industry Regulatory Authority, the broker-dealer industry's self-regulator, filed an amendment on Aug. 2 to a long-contemplated rule that

would let firms sign up for a three-year pilot program to see if their required inspections of home and branch offices could be done just as well remotely as in person. The rule had been scheduled for approval by the Securities and Exchange Commission on Aug. 1. FINRA's new amendment will now give the public another 21 days to submit comments, after which there will be 14 days for rebuttals.”

**[Finra Fines, Suspends Ex-LPL Broker in Another Case Over Forged, Falsified Signatures](#), [AdvisorHub](#) (Aug. 7, 2023):** “The Financial Industry Regulatory Authority imposed a ten-month suspension and \$7,500 fine on a former LPL Financial broker in St. Louis, Missouri for allegedly forging or falsifying signatures, according to a letter of settlement finalized Thursday.[] [Broker], who was terminated by LPL in October 2021, allegedly forged or falsified signatures of at least 99 customers on 159 account documents and forged the electronic signature of his business partner on 57 account documents from March 2020 to March 2021, Finra said.”

**[How the Online Dispute Resolution System Announced by Sebi will Work](#), [Indian Express](#) (Aug. 7, 2023):** “A new online dispute resolution (ODR) system involving institutions, conciliators and arbitrators for the capital market is on its way. On July 31, market regulator Securities and Exchange Board of India (Sebi) issued a circular, streamlining the existing dispute resolution mechanism in the securities market under the aegis of stock exchanges and depositories — Market Infrastructure Institutions — by establishing a common ODR portal. The new system will harness online conciliation and online arbitration for resolution of disputes arising in the securities market.”

**[SEC Charges 11 Wall Street Firms with Widespread Recordkeeping Failure](#), [www.sec.gov](#) (Aug. 8, 2023):** “The Securities and Exchange Commission today announced charges against 10 firms in their capacity as broker-dealers and one dually registered broker-dealer and investment adviser for widespread and longstanding failures by the firms and their employees to maintain and preserve electronic communications. The firms admitted the facts set forth in their respective SEC orders. They acknowledged that their conduct violated recordkeeping provisions of the federal securities laws, agreed to pay combined penalties of \$289 million as outlined below, and have begun implementing improvements to their compliance policies and procedures to address these violations.”

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### ***DID YOU KNOW?***

**ARBITRATION PLAYED A KEY ROLE IN KEEPING LABOR PEACE DURING WWII.** The World War II-themed movie *Oppenheimer* reminds us that arbitration helped to avoid labor strife during the war. How so? During World War II, it was essential that labor peace be maintained to ensure production of war-related materiel. **President Roosevelt** reinstated the World War I-era [National War Labor Board](#) to serve as final arbiter of labor disputes. In exchange for giving up their right to strike, the unions gained an impartial arbitration process to resolve their disputes with management.

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