



# SECURITIES ARBITRATION ALERT

## SECURITIES ARBITRATION ALERT 2023-39 (10/12/23)

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

### SQUIBS:

- [A Primer on Future Expungement Procedure](#)

### SHORT BRIEFS:

- [A Proposed Change to the FINRA Non-Attorney Rep Rules](#)
- [Securities Experts Roundtable Posts Annual Conference Recap](#)
- [Applications Now Open for 2024 ICC Mediation Competition](#)
- [Cryptocurrency Exchange's Customers Bound by Newly-Introduced Online PDAA](#)
- [Securities Experts Roundtable Publishes Its Latest FREE Newsletter](#)

### QUICK TAKES:

- *Axiell v. MECS*, No. 21-30105 (5th Cir. Jun. 14, 2023)
- *Ronnie v. U.S. Department of Labor*, No. 20-14214 (11th Cir. Sep. 25, 2023)
- *Harper v. Charter Communication, Inc.*, No. 22-16429 (9th Cir. Oct. 3, 2023)
- *Susquehanna Financial v. Martin*, FINRA ID NO. 23-00647 (Philadelphia, PA, Aug. 16, 2023)
- *Garofalo v. Shelton*, FINRA ID No. 22-01916 (Richmond, VA, Aug. 22, 2023)

### ARTICLES OF INTEREST:

- Lim, Jennifer, and Hee Suh, Jae, *SIAC Symposium 2023 Part 1: Charting the Future of International Arbitration – Geopolitics, the Next Generation of Dispute Resolution, and Draft 7th Edition of the SIAC Rules*, Kluwer Arbitration Blog (Sep. 30, 2023)
- *Former Football Star and Morgan Stanley Rep Gets FINRA Penalty*, Think Advisor (Sep. 26, 2023)
- *Battle of the Forms. Fifth Circuit Holds there was No Valid Agreement to Arbitrate Where Parties Exchanged their Own Forms with Different Terms*, Lexology (Sep. 28, 2023)
- *FINRA Study Tests Senior Vulnerability to Social Security Scams*, Plan Advisor (Sep. 29, 2023)
- *SEC Charges Newell Brands and Former CEO for Misleading Investors About Sales Performance*, www.sec.gov (Sep. 29, 2023)

### DID YOU KNOW?

- In Nine Months this Year, AAA Has Passed the 400,000 Cases Filed Mark

**ALERT! NO ALERT NEXT WEEK.** *We will be taking our somewhat delayed customary quarterly break in publishing the Securities Arbitration Alert. Look for the next edition of the SAA in your e-mailbox the week of October 22. In the meantime, follow us [@SecArbAlert](#) and sign up for updates on our weekly [blog](#) posts. Also see our long squib/mini-feature article on the expungement changes taking effect October 16 that appears directly below.*

[return to top](#)

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

**A PRIMER ON FUTURE EXPUNGEMENT PROCEDURE.** *As October 16, 2023, the effective date of a number of rule amendments affecting the expungement of customer dispute information, approaches, we thought it was time to summarize the proper procedure for expunging customer dispute information from FINRA’s Central Records Depository (CRD) under those revised rules.* As we reported in SAA 2023-15 (Apr. 20), the SEC [approved](#) the final version of [SR-FINRA-2022-024](#), which makes substantial reforms to the process for expunging customer dispute information from brokers’ CRD records and profoundly limits the ability of brokers to seek such relief in the first place. When FINRA issued [Regulatory Notice 23-12](#), setting the **October 16** effective date for the [rule changes](#), we described which cases will be governed by the new rules and the numerous ways these rules will limit brokers’ opportunities to request expungement through FINRA arbitration (see SAA 2023-31 (Aug. 17)). The main set of rules applicable to expungements under the new regime are: Rule 12800(d)-(f), which applies to expungement requests during simplified arbitrations of customer-initiated cases (involving \$50,000 in damages or less); 2) Rule 12805, which applies to expungement of other customer-initiated arbitrations (more than \$50,000 in, or an unspecified amount of, damages); and 3) Rules 13805 and 13806, which apply to “straight-in” expungement proceedings, those initiated by brokers for the purpose of expunging customer complaints.

### **Pleadings**

Straight-in expungement arbitrations are initiated by a statement of claim filed by the broker requesting expungement: “against a member firm at which the person was associated at the time the customer dispute arose....” A broker named as a respondent in a customer-initiated arbitration must file a request to expunge that arbitration either in the answer to the customer’s statement of claim or “in a separate pleading requesting expungement.” Failure to do so will prevent the respondent broker from later filing a straight-in request to expunge the arbitration. A party to a customer-initiated arbitration may also file a request for expungement of the arbitration on behalf of a non-party broker, with that broker’s consent, by filing one of the same pleadings, along with a [Form Requesting Expungement on Behalf of an Unnamed Party](#); the latter document must be signed by both the broker and the party seeking expungement on the broker’s behalf. However, the failure to make a request on behalf of a non-party broker does not prevent that broker from filing a straight-in expungement request. The party requesting expungement, whether on their own behalf or on behalf of a non-party broker, must file the separate pleading no later than 30 days after FINRA notifies them of the appointment of an arbitrator in a simplified arbitration and no later than 60 days before the first scheduled hearing in a Rule 12805 expungement, unless the requesting party files a motion for extension of time to do so.

In any case, the expungement request must include (presented essentially *verbatim*): a) the applicable filing fee; b) the CRD number of the party requesting expungement; c) each CRD occurrence number that is the subject of the request; d) the case number and docket number associated with the customer dispute information, if applicable; and e) an

explanation of whether expungement of the same customer dispute information was (i) previously requested and, if so, (ii) how it was decided. The omission of any of this information will render the expungement request deficient and prevent its consideration by FINRA until it is corrected.

### **Notifying Interested Parties**

Customers aren't parties to straight-in arbitrations, but the claimant broker in one must serve the customer or customers whose investment-related arbitration, litigation or customer complaint is the subject of the expungement request with the statement of claim and any answer to it within 10 days after those pleadings are filed and also file a proof of service with the panel: "unless the panel determines that extraordinary circumstances make such service impracticable." FINRA serves the customers with any other relevant documents (*ed: the use of the phrase "extraordinary circumstances" strongly implies that one better have a very good excuse for failing to complete service*). FINRA must also notify the relevant state securities regulator ("regulator") of the expungement request; provide the regulator with access to relevant documents, subject to confidentiality restrictions; and, if the regulator's authorized representative notifies FINRA in a timely manner of their intention to attend and participate in the expungement hearing, notify them of the schedule of any prehearing conferences and hearings.

### **Who Decides?**

Under Rule 13806, straight-in expungement requests must be decided by a randomly selected three-member panel of chair-eligible public arbitrators who: "have evidenced successful completion of, and agreement with [enhanced expungement training](#) provided by FINRA and service as arbitrator through award on at least four customer-initiated arbitrations administered by FINRA ... or another self-regulatory organization, in which a hearing was held except a hearing [under the special proceedings option for simplified arbitrations]." Parties can no longer strike or stipulate to removal of arbitrators; they may only challenge an arbitrator for cause and, if the challenge is successful, FINRA will randomly select a new arbitrator who meets the same qualifications. Expungement requests made during a customer-initiated case will be decided by the panel appointed in that case.

### **How Expungement Requests Are Decided in Simplified Arbitrations**

Arbitrators may not grant an expungement hearing without first holding a full evidentiary hearing. However, they may decide a customer claim in a [simplified arbitration](#) either with a full hearing, a special proceeding (which is a limited hearing by telephone), or no hearing at all. A full hearing on a customer claim doubles as a hearing on the expungement request, whether made by a respondent broker or on behalf of a non-party broker, and the panel rules on the expungement request in the same award. If, on the other hand, the case is decided or dismissed without a hearing (even if it was originally scheduled for a hearing) or by using the special proceeding option, the arbitrator must hold a separate hearing, in which the customers may participate, to decide the expungement request and render that decision in a separate award after issuing the award on the customer claim. Respondents and non-party brokers who do not request

expungement during a simplified arbitration may request expungement of it in a straight-in expungement proceeding, but withdrawal of a pending expungement request results in an automatic denial of it with prejudice.

### **When and How Must Other Expungement Requests Be Decided?**

Under Rule 12805, if a customer-initiated arbitration is not decided by award or is decided in an award without a hearing, the panel may not decide the expungement request, although any broker who made such a request may file a later straight-in request to expunge that arbitration. If the customer claim is decided by award after a hearing, the panel may also grant expungement relief, but not without holding a separate hearing on the expungement request, at which the broker requesting it or on behalf of whom it is requested must appear in person or by video, as the panel decides. The panel must allow the customers, if they wish, to appear at the hearing, either *pro se* or through a representative, and testify, present witnesses, object to evidence, cross-examine the broker and the broker's witnesses and, if the panel permits the broker to do so, present opening and closing statements. All of these are also procedural requirements in a straight-in expungement under Rule 13805 but, in addition, an authorized representative of the appropriate regulator may provide its position on the expungement request, or attend a Rule 13805 hearing and introduce documentary, testimonial and other evidence, cross-examine witnesses and, if any party is permitted, present opening and closing statements. Of course, if a customer or regulator presents witnesses, the broker or their counsel may cross-examine those witnesses. If a broker withdraws a request, the panel will automatically deny it with prejudice.

### **When an Award Grants Expungement**

In order to award expungement relief, a panel must still make a finding of one or more grounds currently identified in Rule [2080\(b\)\(1\)](#), but must now do so unanimously and may not base expungement relief on any other grounds. In addition: "The panel must indicate in the arbitration award which of the grounds for expungement ... serves as the basis for its expungement order, provide a written explanation of its reason(s) for its finding that one or more of those grounds apply to the facts of the request, and identify any specific documentary, testimonial or other evidence on which the panel relied in awarding relief." However: "The panel shall not give any evidentiary weight to a customer's decision not to attend or participate in an expungement hearing when making a determination of whether expungement is appropriate."

*(ed: \*The earlier article on the regulatory notice, containing important information about the limitations on seeking expungement originally published in SAA 2023-31, appears as a blog post [here](#). \*\*SAA Editorial Board member David E. Robbins authored two feature articles on the new rules: [FINRA's New Expungement Rules – Balancing Interests But Adding Roadblocks](#) (Feb. 23, 2023) and [SEC Revamps FINRA's Expungement Procedures](#) (May 18, 2023). \*\*\*These webpages containing the current versions of Rules [12805](#) and [13805](#) include a drop-down menu of past and, more importantly for our present purpose, future versions (click the dates under the word "Versions" in the upper right corner). \*\*\*\*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).)

[return to top](#)

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

**A PROPOSED CHANGE TO THE FINRA NON-ATTORNEY REP RULES.** As we were putting this issue together came word that FINRA has proposed changes to its non-attorney rep rules. In brief: the authority on **October 5** filed SR-FINRA-2023-013, *Proposed Rule Change to Amend the Codes of Arbitration Procedure and Code of Mediation Procedure to Revise and Restate the Qualifications for Representatives in Arbitrations and Mediations*. The [text](#) states that the intent is to amend the Codes: “to revise and restate the qualifications for representatives in arbitrations and mediations in the forum administered by FINRA Dispute Resolution Services (‘DRS’); to disallow compensated representatives who are not attorneys from representing parties in the DRS forum; to codify that a student enrolled in a law school participating in a law school clinical program or its equivalent and practicing under the supervision of an attorney may represent investors in the DRS forum; and to clarify the circumstances in which any person, including attorneys, would be prohibited from representing parties in the DRS forum.”

*(ed: We will provide further coverage after our break, by which point the rule filing will have been published in the Federal Register, and the due date for comments set.)*

[return to top](#)

### **SECURITIES EXPERTS ROUNDTABLE POSTS ANNUAL CONFERENCE**

**RECAP.** The Securities Experts Roundtable (“SER”) has released on its [Website](#) a recap of its recently-concluded annual conference, which was held **September 22-23** in Boston. The link and video-rich [2023 Annual Member Meeting & Conference Recap](#) features: the President’s message; Reg BI panel; FINRA Dispute Resolution Services update; and several other panels and workshops. Links to program materials are also provided. 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.”

*(ed: \*Kudos to SER for making available this material. \*\*Full disclosure: SAA’s publisher and editor-in-Chief George Friedman is an active member of the SER.)*

[return to top](#)

### **APPLICATIONS NOW OPEN FOR 2024 ICC MEDIATION COMPETITION.**

The ICC announced on **September 26** that its *2024 Mediation Competition* will take place **February 5 – 10, 2024** in Paris. Says the [event webpage](#): “The ICC Mediation Competition is one of the biggest educational competitions worldwide dedicated exclusively to international commercial mediation.[] ICC’s largest educational event of the year, ICC Mediation Week (#ICCMW), will be hosted in Paris. The ICC Mediation Competition gathers 350+ students and coaches, as well as 150+ professional mediators, academics from across the world and numerous volunteers, sponsors and observers.[]

During the ICC Mediation Competition, students representing 48 University teams will compete to resolve international business disputes through mediation guided by professional mediators under the ICC Mediation Rules. Their performance is evaluated by some of the world’s leading dispute resolution specialists who participate as judges.”

[Applications](#) are due **October 27** and are to be submitted via the event page.

(ed: Contact the Organizing Committee at [iccmediationcompetition@iccwbo.org](mailto:iccmediationcompetition@iccwbo.org). for more info.)

[return to top](#)

**CRYPTOCURRENCY EXCHANGE’S CUSTOMERS BOUND BY NEWLY-INTRODUCED ONLINE PDAA.** Customers of cryptocurrency exchange Gemini Trust Company were bound by a new online predispute arbitration agreement (“PDAA”), the Court holds in [Chablaney v Gemini Trust Co., LLC](#), 2023 NY Slip Op 33127(U) (Sup. Ct., NY Cty. Sep. 7, 2023). First, the facts: “Significantly, when Gemini decided to change its user agreement to provide for arbitration, they sent out an email highlighting that their alternative dispute provision had changed, included a hyperlink of the revised agreement (which users could access without agreeing to the terms of the revised agreement), encouraged users to read the revised agreement including its alternative dispute provision and provided an email address where users could email any questions that they had about the revised agreement (NYSCEF Doc. Nos. 25, 26). The complaint does not allege that the plaintiffs made any such inquiry or that they were otherwise not provided this information.[] In addition, on the ‘log-in’ screen, Gemini fully disclosed that the alternative dispute resolution provision had changed and indicated that by ‘signing in’ users were agreeing to be bound by the revised agreement including its dispute resolution provision.” And, the holding: “The plaintiffs signed in and by doing so agreed to the terms of the revised agreement, including the agreement to arbitrate (*Brooks v Lang Yang*, 216 AD3d 505, 506 [1st Dept 2023]). As such, the motion to compel arbitration is granted and this lawsuit as consolidated is stayed (CPLR 7503[a]).”

(ed: Seems right.)

[return to top](#)

**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 2023-03, covering **July – September 2023**, hit the electronic newsstand **October 6**. 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.)  
[return to top](#)

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

**[Axiall v. MECS](#)**, No. 21-30105 (5th Cir. Jun. 14, 2023): “This case presents a classic ‘battle of the forms.’ The parties, having exchanged their own forms with different terms, now dispute the nature of their relationship and the terms incorporated into any contract that may have been formed.... The forms exchanged by the parties did not agree on MECS’s proposed arbitration clause. MECS included an arbitration provision in the terms incorporated in its proposals and Order Acknowledgements, while Axiall’s forum selection clause in its Purchase Orders explicitly states that MECS agrees to ‘exclusive and sole jurisdiction and venue in Lake Charles, Louisiana or Calvert City, Kentucky, as determined by [Axiall].’ Because these communications do not evince agreement regarding jurisdiction, neither term is a part of the contract subsequently formed by the parties’ conduct.”

**[Harper v. Charter Communication, Inc.](#)**, No. 22-16429 (9th Cir. Oct. 3, 2023): “In deciding whether to compel arbitration under the [Federal Arbitration Act], a court’s inquiry is limited to two “gateway” issues: “(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” ‘As with any other contract dispute, we first look to the express terms’ of the agreement. Here, the parties’ Arbitration Agreement expressly excludes preexisting litigation, like Harper’s PAGA claims” (citations omitted). (*ed: An Alert h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

**[Ronnie v. U.S. Department of Labor](#)**, No. 20-14214 (11th Cir. Sep. 25, 2023): “This case presents us with an opportunity to clarify what a whistleblower plaintiff must allege to prove he had a ‘reasonable belief’ that his employer violated the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A. After careful review, and with the benefit of oral argument, we deny the petition.... Because Ronnie failed to allege sufficient facts to establish that a reasonable person with his training and experience would believe this conduct constituted a SOX violation, the ARB’s decision was not arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.”

**[Susquehanna Financial v. Martin](#)**, FINRA ID NO. 23-00647 (Philadelphia, PA, Aug. 16, 2023): A non-appearing registered representative is held liable to Claimant broker-dealers for the amount due and owing pursuant to an Offer Letter Agreement he signed as part of his employment. *Provided courtesy of SAC’s ARBchek facility ([www.arbchek.com](http://www.arbchek.com)).*

**[Garofalo v. Shelton](#)**, FINRA ID No. 22-01916 (Richmond, VA, Aug. 22, 2023): A Panel orders Respondent broker to rescind the filing of the Form 1099C issued against Claimant, but denies his request for monetary relief. The Panel also orders Claimant broker to pay \$5,000 to Respondent as a monetary sanction for his failure to comply with

the Panel Chair's previous orders regarding the production of documents. *Provided courtesy of SAC's ARBchek facility ([www.arbchek.com](http://www.arbchek.com)).*  
[return to top](#)

#### **ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT**

**Lim, Jennifer, and Hee Suh, Jae, *SIAC Symposium 2023 Part 1: Charting the Future of International Arbitration – Geopolitics, the Next Generation of Dispute Resolution, and Draft 7th Edition of the SIAC Rules*, Kluwer Arbitration Blog (Sep. 30, 2023):**

“The Singapore International Arbitration Centre (‘SIAC’) held the SIAC Symposium, its flagship conference, during the Singapore Convention Week on 28 August 2023. The SIAC Symposium featured a conversation with Minister K Shanmugam, SC (Minister for Home Affairs and Minister for Law, Singapore) and a plenary address by Justice Judith Prakash (Justice of the Court of Appeal, Supreme Court of Singapore). These sessions were followed by two panel discussions on the next generation of disputes in international arbitration and the draft 7th Edition of the SIAC Rules (‘Draft SIAC Rules’) in the morning, as well as six technology-driven and interactive panel discussions exploring regional and topical developments, trends and forecasts in the afternoon. This Part reports on the morning events, while Part 2 pertains to the afternoon sessions.”

**Former Football Star and Morgan Stanley Rep Gets FINRA Penalty, Think Advisor (Sep. 26, 2023):** “A former Morgan Stanley broker who played in the National Football League before entering the financial services industry was fined \$15,000 by the Financial Industry Regulatory Authority and suspended for four months from associating with any FINRA member for several alleged violations.[] The alleged violations ... included the use of his personal, unapproved cellphone to communicate with clients, the regulator said.”

**Battle of the Forms. Fifth Circuit Holds there was No Valid Agreement to Arbitrate Where Parties Exchanged their Own Forms with Different Terms, Lexology (Sep. 28, 2023):** “Plaintiff-Appellee Axiall Canada, Inc. (‘Axiall’) and Defendant-Appellant MECS, Inc. (‘MECS’) entered into a series of demister sales beginning in July 2019. For almost all of these transaction, MECS first issued a proposal to Axiall, Axiall next sent a Purchase Order, MECS then sent an Order Acknowledgement before shipping the demisters to Axiall, and, finally, Axiall accepted the demisters.”

**FINRA Study Tests Senior Vulnerability to Social Security Scams, Plan Advisor (Sep. 29, 2023):** “In an experiment designed to mimic a real-world imposter scam, 16.4% of older adults engaged without skepticism, but their psychological and behavioral measures were comparable to those in other engagement levels, according to a recent study by the Financial Industry Regulatory Authority and the Journal of the American Medical Association Network.[] As financial fraud targeting older adults is on the rise, the study investigated how vulnerable older adults are to government impersonation scams. In the cross-sectional study, conducted from October through December 2021, the firm surveyed 664 older adults among communities in the greater Chicago metropolitan area. Data analysis was performed from February through August 2023.”



[SEC Charges Newell Brands and Former CEO for Misleading Investors About Sales Performance](#), [www.sec.gov](http://www.sec.gov) (Sep. 29, 2023): “The Securities and Exchange Commission today charged Newell Brands Inc., a Georgia-based consumer products company and its former CEO, Michael Polk, with misleading investors about Newell’s core sales growth, a non-GAAP (Generally Accepted Accounting Principles) financial measure the company used to explain its underlying sales trends. Both parties agreed to settle the SEC charges.[] The SEC’s order finds that, in 2016 and 2017, Newell and Polk took actions that increased the company’s publicly disclosed core sales growth in ways that were out of step with Newell’s actual but undisclosed sales trends, allowing the company to announce ‘strong’ or ‘solid’ results in quarters it internally described as disappointing due to shortfalls in sales. According to the order, Newell pulled sales forward into earlier quarters without adequate disclosure and engaged in accounting practices that were inconsistent with GAAP, while overriding its internal accounting controls. Collectively, these measures gave the misleading appearance that Newell had achieved core sales growth in line with its targets and deprived investors of information relevant to an accurate and complete understanding of Newell’s actual sales trends.”

[return to top](#)

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

**IN NINE MONTHS THIS YEAR, AAA HAS PASSED THE 400,000 CASES FILED MARK.** According to a banner on the American Arbitration Association’s [landing page](#), this venerable institution has had 425,628 cases filed so far this year (through **October 2**). It has administered 7,826,240 cases since its founding in **1926**.

[return to top](#)

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