SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2023-43 (11/16/23)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **"Abraham Lincoln: An Early Champion of ADR"**

ALERT! EARLY *ALERT* NEXT WEEK. *We usually publish the* Alert *on Thursdays. Because of the upcoming Thanksgiving holiday, we plan to publish next Wednesday afternoon. Look for us in your email box on November 22. Our weekly blog selection will be posted on Friday, as usual. In the meantime, enjoy this 2014 blog post authored by your publisher that has held up well over time:* Just Like Thanksgiving and Black Friday: Five Truisms about Arbitration -- That Aren't True*. Who knew the Pilgrims didn't dress solely in black or wear buckled shoes? Or that, like Solomon, arbitrators don't split the baby in half?*

SQUIBS: IN-DEPTH ANALYSIS

FINRA PANEL GIVES LENGTHY EXPLANATION OF WHY IT AWARDS MORE THAN $1 MILLION TO CUSTOMER. ***The Award,* Inlow v Barrows,**

FINRA ID No. 22-01360 (Los Angeles, CA, Oct. 30, 2023) explains why it holds two brokers liable to the customer, but rejects liability against a third one and finds no liability under some causes of action. The Claimant, Ronald J. Inlow ("Inlow" or "Claimant"), filed the arbitration against the three brokers, Michael Barrows ("Barrows"), Eric J. Ludovico ("Ludovico") and Mark Stewart ("Stewart"), but not against any broker-dealer, alleging: "violations of federal securities laws; violations of California securities laws; violations of California Unfair, Unlawful, and Fraudulent Business Practices; breach of contract; common law fraud; breach of fiduciary duty; and negligence and gross negligence. The causes of action relate to GWG Holdings, Inc. L Bonds."

Why Two Brokers Are Liable

The Award is notable for expressly addressing all claims asserted by Inlow, whether or not they are successful. The Panel finds that Inlow has proven that both Barrows and Ludovico committed: "a violation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder…." The reason? "In making this determination, the Panel concluded that, on the basis of the evidence presented, Claimant did not show by a preponderance of the evidence that the securities in question in this case (GWG L-Bonds) were unsuitable for all customers, but did show by a preponderance of the evidence that such securities were unsuitable for Claimant Ronald J. Inlow in the quantities purchased." The Award declares that the elements of common law fraud are the same, so the Panel incorporates the foregoing conclusion in its evaluation of this count. Inlow similarly proves a claim for negligence against the same two brokers, but that claim is superseded by the findings of securities and common law fraud. Finally, the Panel finds that Inlow had a fiduciary relationship only with Barrows, not with Ludovico, and that Barrows violated his fiduciary duty. Barrows and Ludovico are jointly and severally liable for $1,035,360.46, plus interest since **August 1, 2023** and $10,655.68 in costs.

Why Not the Third One?

The Award does not directly explain Stewart's role, but it appears that it was supervisory. With respect to the negligence count, the Panel finds that Inlow has proven that: "Stewart was negligent with respect to his failure to adequately review and update his review of alternative investments on ACG's 'approved list', but has not proven … that such negligence was the proximate cause of GWG L Bonds remaining on ACG's 'approved list' as of the date of Claimant's purchases, in that the preponderance of evidence does not establish that such securities were not suitable for any customers, even if unsuitable for Claimant in the volumes purchased by him." Presumably, this is also why the Panel rejects the Section 10(b) and Rule 10b-5 claim against Stewart. Stewart is not liable for common law fraud because Claimant did not prove a conspiracy to commit fraud or that Stewart "culpably aided or abetted" the other brokers. Finally, the Panel finds that Stewart had no fiduciary relationship with Inlow.

What About the Other Causes of Action?

The Panel rejects Inlow's other claims in full. Causes of action for violation of the Securities Act of 1933 (included in the securities fraud count) and California

Corporations Code sections 25501 and 25504 both fail because the bond issuer, GWG Holdings, Inc., made no misrepresentations or omissions of material fact. The count for violation of the California Unfair Business Practice Act fails for two reasons: 1) there was no "on-going unfair business practice" and 2) Inlow did not prove that Stewart personally received any funds on which an award of restitution, the only available remedy under the statute, could be made. Finally, Inlow alleged the breach of two contracts: 1) the one between him and broker-dealer Accelerated Capital Group ("ACG") and 2) "Respondents' oaths and agreements to submission to FINRA rules and regulations, to which Claimant asserts he is a third party beneficiary." However, the claim for breach of the former contract fails because Inlow failed to prove "that any of Respondents were the alter-egos of ACG," and the claim for breach of the second one fails because Inlow was only an incidental beneficiary of that contract.

The Denial of Other Relief

Inlow and the respondents also requested attorney fees, but the Panel denies both motions. It explains its denial of Inlow's motion as follows: "Under California law, attorneys' fees may be awarded only if authorized by contract or by statute. Claimant did not present into evidence any contract to which Claimant was a party or third party beneficiary providing for the recovery of attorneys' fees by the prevailing party. The only claim asserted by Claimant which provides a statutory basis for recovery of attorneys' fees was the claim under California Corporations Code Sections 25501 and 25504. As discussed above, Claimant did not prevail on that claim." The Panel does not address Inlow's request for other remedies, including punitive damages, and denies the brokers' requests for expungement relief, including the one by Stewart.

(ed: 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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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 2023-3, which was released on **September 29**.

Mission Statement

Objection, Your Neutral: Handling Objections in the FINRA Arbitration Forum by Cassie Dimitry, FINRA Intern

FINRA Dispute Resolution Services (DRS) and FINRA News

- Arbitration Case Filings and Trends

- 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
- Approved Rule Change to Amend the Codes of Arbitration Procedure to Make Various Clarifying and Technical Changes
- Implementing Lowenstein Recommendations
- SEC Response to Congress: Mandatory Arbitration Among SEC-Registered Investment Advisers
- 2023 Demographic Survey
- Register for the DR Portal Today

Mediation Update

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(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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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

NOTE TO SCOTUS: WHAT'S HAPPENING WITH *MORONEY?* *Law Offices of Crystal Moroney, P.C. v. Consumer Financial Protection Bureau*, No. 22-1233 was one of the arbitration-centric cases at SCOTUS referenced in SAA 2023-36 (Sep. 21) and in our recent blog post, *First Monday in October Coming Soon: Some Arbitration-Centric Cases Worth Following*. We reported as follows: "On **June 21**, Moroney filed a

Certiorari Petition identifying this issue for review: "Whether the Consumer Financial Protection Agency's funding structure—which imposes no meaningful constraints on the authority of the President or CFPB to choose the Bureau's amount of annual public funding—violates the Appropriations Clause, U.S. Const. Art. I, Sec. 9, Cl. 7, and renders unenforceable the CID [Civil Investigative Demand] issued in this case." Note that we later reported in SAA 2023-10 (Mar. 9) that the Supreme Court had granted a Petition in No. 22-448, seeking review of *Community Financial Services Ass'n of America v. CFPB*, No. 21-50826 (5th Cir. Oct. 19, 2022). There, a unanimous Fifth Circuit held that the CFPB's funding method is unconstitutional. We see a *Cert.* grant coming in *Moroney*, which is set for consideration at the Court's **September 26** conference, and then the two cases being consolidated." That date has come and gone, with no word from the Court. The status remains: "DISTRIBUTED for Conference of 9/26/2023."
*(ed: **Community Financial *has since been argued. So much for that part of our prediction.)*
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DISTRICT COURT: COURT DECIDES IF NON-PARTY CAN USE DELEGATION CLAUSE TO INVOKE EQUITABLE ESTOPPEL. The story of *Young v. Bytedance, Inc*., No. 22-cv-01883-VC (N.D. Calif. Oct. 26, 2023), can be told by quoting the Opinion. First, the facts: "This is a proposed class action filed by two plaintiffs who were hired by a company, Telus International, to moderate content for TikTok. The plaintiffs allege they suffered psychological harm as a result of their working conditions. They have sued TikTok, but not Telus." Next, the procedural history: "One of the plaintiffs, Ashley Velez, signed an arbitration agreement with Telus. TikTok was not a party to the agreement, and it was not named as a third-party beneficiary. TikTok nonetheless moves to compel Velez to arbitration, invoking the doctrine of equitable estoppel. The theory is that it would be unfair for Velez to avoid the consequences of an arbitration agreement covering the conditions of her employment by suing a third party, and not her employer, based on those conditions." Next, the core holding: "This motion presents two questions. First, who decides whether the doctrine of equitable estoppel requires Velez to arbitrate her dispute with TikTok? The arbitration agreement between Velez and Telus has a delegation provision, so TikTok contends that the question whether equitable estoppel applies must be decided by the arbitrator. That is wrong. It's difficult to understand how any nonparty seeking to compel arbitration on equitable estoppel grounds could ever invoke a delegation provision. But even if that were possible in some circumstance, it's not possible here, because it's clear that the delegation provision in the arbitration agreement does not apply to disputes between Velez and nonparties like TikTok." Last, the disposition: "The second question (which is for the Court and not the arbitrator to decide) is whether equitable estoppel applies. It does, so the motion to compel Velez to arbitration is granted."
*(ed: *Seems right. **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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AAA LAUNCHES AI TRANSCRIPTION SERVICES. The AAA announced via a **September 18** Press Release that it has: "unveiled a new series of deposition and hearing service offerings, which includes cutting-edge solutions such as transcription enabled by artificial intelligence (AI)." As described in the Release, *AAA-ICDR® Launches New Suite of Deposition & Hearing Services, Including AI-Powered Transcription Cutting-Edge Technology to be Offered Alongside Case Management Services, Domestically & Internationally, for Virtual, Hybrid & In-Person Proceedings,* the new transcription services include (*ed: repeated* verbatim):

• AI-powered transcription during hearings facilitated by AAA-ICDR utilizes voice recognition to create transcripts, which are also subject to two levels of human review and editing. The combination of AI technology and human review gives the AAA-ICDR's transcription platform a word accuracy of 99%.
• AI-powered transcriptions are permissible under AAA-ICDR rules, and the service is less than half the cost of traditional court reporting.
• Final, edited transcripts are delivered within three business days, with complimentary rough drafts available within 24 hours after proceedings.
• The AI-powered transcription service is fully compatible with virtual, hybrid, and in-person hearings and depositions, held all around the U.S. and the world.

(ed: Details are contained in a Factsheet.)

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QUICK TAKES: CASES AND AWARDS WORTH READING

***Women's Care Specialists, P.C. v. Potter*, Nos. SC-2022-0706, SC-2022-0707 (Ala. May 19, 2023)**: "Based on the foregoing, in appeal no. SC-2022-0706, we hold that Potter's breach of-contract claim and her tort claims against Women's Care are subject to arbitration. We therefore reverse the trial court's order denying Women's Care's motion to compel arbitration, and we remand the cause for an order or proceedings consistent with this opinion.[] In appeal no. SC-2022-0707, we hold that Potter's tort claims against the WC employees are subject to arbitration. We therefore reverse the trial court's order denying their motion to compel arbitration, and we remand the cause for an order or proceedings consistent with this opinion."

***Mattson Technology, Inc. v. Applied Materials, Inc.*, No. A165378 (Calif. Ct. App. 1 Nov. 1, 2023)**: "After many years at Applied Materials, Inc. (Applied), Canfeng Lai left for a new job at Mattson Technology, Inc. (Mattson). First, however, he emailed himself a number of files containing Applied trade secrets. Applied sued both Lai and Mattson for violating the Uniform Trade Secrets Act (Civ. Code, § 3426 et seq.; the Act)1 and, as against Lai, for breaching his employment contract. The court granted Lai's motion to compel arbitration under the arbitration clause in his employment contract but rejected Mattson's claim that it, too, was entitled to arbitrate. It then denied Mattson's motion to stay the litigation pending Lai's arbitration and issued a preliminary injunction to protect Applied's confidential information pending the proceedings.[] Mattson asserts all of these ruling were erroneous. We agree only in part. The court correctly found that Mattson, as a nonparty to Lai's employment contract with Applied, could not compel Applied to arbitrate against it. It also properly issued the preliminary injunction. However, it erred in

declining to stay the litigation against Mattson pending arbitration of its claims against Lai." (*An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***McInnis Electric Company v. Brasfield & Gorrie, LLC*, No. 2021-CA-01115-SCT (Miss. Oct. 19, 2023)**: "The instant matter stems from disagreements and a broken contract between a contractor and subcontractor allegedly brought on by the COVID-19 pandemic. They contest whether arbitration is appropriate to settle their disputes. The trial court compelled arbitration, and we affirm…. On appeal is the trial court's granting of Brasfield & Gorrie's motion to compel arbitration and stay litigation arising from McInnis's original complaint, addressed here in a two-part analysis. First, whether the parties entered into an agreement which requires arbitration, and, second, whether the claims raised by Mcinnis may be compelled under the arbitration agreement…. When both parties agreed to terms that expressly invoked the rules of the American Arbitration Association, they manifested their intent to be bound by such rules and the assignment of the scope of arbitrability as determined under the group's rules. Agreeing to the American Arbitration Association rules is tantamount to agreeing to delegate scope questions to the arbitrators."

***Gordon v. New England Securities*, FINRA ID No. 23-00598 (Phoenix, AZ, Sep. 26, 2023)**: A Panel grants without prejudice Respondent broker-dealer's Pre-Hearing Motion to Dismiss pursuant to FINRA Rule 13206 (Six-year Eligibility Rule for Industry Disputes), after finding that Claimant's request for expungement of two customer complaints from his CRD record is time-barred. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Siegel v. LPL Financial*, FINRA ID No. 22-00133 (Detroit, MI, Sep. 27, 2023)**: A Panel grants Respondent broker-dealer's Motion for Sanctions pursuant to FINRA Rule 12212(c), and dismisses the Claimant's case with prejudice after he failed to comply with the Panel's previous Order to Show Cause for his failure to appear in this matter. Three Non-Party brokers are each granted expungement of this matter from their respective CRD records. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Meshel, Tamar and Yahya, Moin A., *The Gatekeepers of the Federal Arbitration Act: An Empirical Analysis of the FAA in the Lower Courts* (September 27, 2023): "This article presents the results of the first comprehensive empirical study of motions to compel arbitration under the Federal Arbitration Act (FAA). Arbitration has become a divisive issue both in the United States Supreme Court and in American society, fueling calls to restrict or entirely ban its use in certain contexts, such as employment and consumer disputes. At the same time, little empirical attention has been paid to how thousands of arbitration cases are actually argued before and decided by the lower courts—the gatekeepers of the FAA—who retain considerable discretion to refuse to enforce arbitration agreements…. The goal of our study is explanatory rather than

normative. We aim to provide a detailed and objective account of parties' and lower courts' approaches to FAA arbitration. This account is not merely of academic interest to those studying arbitration or judicial decision-making. It also offers important insights for parties' litigation strategy and equips policy-makers with important empirical data for evaluating the FAA."

***Private Equity Bigwig Wins $3.2M From UBS After Losses*, FA Magazine (Nov. 1, 2023)**: "Wealthy investors are still showing little forgiveness about a controversial options strategy offered by UBS.[] An arbitration panel has ordered UBS to pay $3.2 million in damages to a well-known New York private equity executive and his wife who said the bank committed fraud when it put them in the risky and controversial vehicle. The strategy, known as the Yield Enhancement Strategy, or 'YES,' has cost the bank millions in damages as well as $25 million to settle Securities and Exchange Commission fraud charges."

***Attention Employers: New California Employment Laws have Arrived*, Lexology (Nov. 1, 2023)**: "Earlier this month, California Gov. Gavin Newsom, a Democrat, finished signing 890 bills into law from the 2023 legislative session. Several of these bills are employment related and have far-reaching implications for employers (and their HR teams tasked with administering changes).[] Below we break down the key employment-related laws enacted this session. These laws become effective January 1, 2024, but employers should review their policies and practices now to be sure they are prepared to address these changes…. SB 365 provides that trial court proceedings will not be automatically stayed during the pendency of an appeal of an order dismissing or denying a petition to compel arbitration. This amendment to California Code of Civil Procedure § 1294 essentially means employers may be forced to continue litigating in court even while challenging on appeal a denial of the right to arbitrate. It's likely this new law will face challenges, with opponents arguing it is preempted by the Federal Arbitration Act."

***Why Won't AI Replace Quantum Experts?*, Kluwer Arbitration Blog (Nov. 2, 2023)**: "I recently had a conversation with a friend who expressed his worries about the potential implications of artificial intelligence ("AI"), such as ChatGPT, on the future of human labor. He voiced particular concerns regarding the displacement of humans' roles in business analytics, the field in which his expertise lies…. Others have published posts (e.g., here and here), commenting on how ChatGPT may impact dispute resolution or international arbitration. In this post, I focus on my view as it relates to quantum experts."

***Finra Arbitrators Exonerate Raymond James in Scam Targeting Ecuadorian Investors*, InvestmentNews (Nov. 3, 2023)**: "Finra arbitrators rarely reveal the reasoning behind their decisions. But this week, a panel went into unusual detail to explain to Latin American victims of a Ponzi scheme why they won't be able to collect damages against a major brokerage.[] More than 100 claimants, most of them from Ecuador, filed an arbitration claim in August 2018 against Raymond James Associates, Raymond James Financial Services and Insight Securities, a Chicago-based independent broker-dealer. They alleged they were ripped off in a financial fraud perpetrated by developers of real

estate projects in Florida that sold shares in private placements sold by Biscayne Capital…. After 304 hearing sessions involving 93 witnesses — many of whom testified through an interpreter and over Zoom — and reviewing approximately 10,000 exhibits over the course of 2½ years, a panel of three public arbitrators unanimously ruled that the investors failed to meet the burden of proof to show that Raymond James violated Florida laws or Securities and Exchange Commission or Financial Regulatory Authority Inc. rules."

***Morgan Stanley Claws Back $1 Million From Ex-Broker in Oregon*, Advisor Hub (Nov. 6, 2023)**: "An arbitrator ordered an ex-Morgan Stanley broker in Portland, Oregon to pay back over $1 million tied to his recruiting bonus, according to an award issued by the Financial Industry Regulatory Authority on Friday. [Broker] was ordered to pay Morgan Stanley $1,004,071 plus interest for breaching a promissory note signed June 6, 2020, when he joined the firm from JPMorgan Chase & Co. He additionally was ordered to pay $3,650 in fees and attorney's costs, according to the award" (link to Award added).

***State Regulators, PIABA Back Finra Against Claim it's Unconstitutional*, InvestmentNews (Nov. 7):** "Two groups sometimes at odds with Finra over how best to protect investors are backing the regulator against a lawsuit that questions its constitutionality.[] The Financial Industry Regulatory Authority Inc. is defending itself against a claim brought by Alpine Securities Corp., a firm Finra expelled in March 2022 for misusing customer funds, charging unreasonable fees and making unauthorized trades and capital withdrawals…. The North American Securities Administrators Association, the membership organization for state regulators, said Finra plays a critical regulatory role. In an amicus brief filed with the D.C. Court of Appeals, NASAA said Finra sets and enforces standards for approximately 3,400 brokerage firms and 624,000 registered representatives, maintains critical databases, such as the Central Registration Depository and the Investment Adviser Registration Depository, and performs market surveillance."

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DID YOU KNOW?

"ABRAHAM LINCOLN: AN EARLY CHAMPION OF ADR". So reads the Website Massachusetts Dispute Resolution Services. Specifically: "Four significant points emerge from looking at Lincoln's legal career. The first is that Lincoln, 150 years before his time, used and supported alternative dispute resolution.[] Second, as a lawyer, Lincoln encouraged the peaceful resolution of disputes by not charging his clients for cases that settled on the courthouse steps.[] Third, Lincoln so fundamentally believed in non-adversarial settlement that he wrote a speech for a bar association that actually discouraged litigation.[] Finally, Lincoln's sense of moral duty, evidenced by not only his significant acts as president, but also in his commitment to resolve disputes through non-adversarial means as a lawyer, transcends time.[] Obviously, Lincoln never heard of the acronym 'ADR,' as the term came into wide usage by American lawyers well over a century after his death. Yet, the practice of civil litigators to resort to alternative dispute resolution by mediation or arbitration was well established among the American bar before the Civil War."

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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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