SECURITIES ARBITRATION ALERT 2024-05 (2/1/24)

George H. Friedman, Editor-in-Chief

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- ***J.R. v. Electronic Arts,* No. E080414 (Calif. Ct. App. 4 (Jan. 17, 2024)**
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DID YOU KNOW?

- **Various FINRA Financial Reports are Available Online**

FINRA DRS POSTS STATS FOR 2023. ARBITRATION FILINGS WERE UP.

FINRA Dispute Resolution Services has posted case statistics through December showing a comparatively strong year in arbitration filings – especially industry cases – and a bit of a recovery in mediations. We offer these headlines at the year's end: 1) overall arbitration filings for full-year 2023 – 3,382 cases – are up 27% for the year (was plus 30% in November); 2) cumulative customer claims increased 12% (was also 12% the prior two months); 3) industry arbitration filings were up 52% (this stat was up 63% in November); and 4) mediation cases rebounded a bit. The 3,382 arbitrations filed in 2023 translates to a decent year by recent measures. In 2022 there were 2,671

arbitration case filings for the entire year. The all-time high-water mark was in 2003, when that post tech-wreck figure was 8,945 cases. There were a cumulative 637 mediation cases in agreement, a 15% decrease from 2023.The mediation settlement rate was steady at 85%. We will provide an in-depth analysis of the 2023 stats in a future Alert.

SQUIBS: IN-DEPTH ANALYSIS

ARBITRATION AGREEMENT CALLING FOR "WHOLESALE" WAIVER OF PAGA RIGHTS NOT ENFORCEABLE. ***A predispute arbitration agreement ("PDAA") providing for the "wholesale waiver" of rights – individual and collective – under California's Private Attorneys General Act ("PAGA") is unenforceable.*** *DeMarinis v. Heritage Bank of Commerce,* No. A167091 (Calif. Ct. App. 1 Jan. 4, 2024) involves: "a putative class action and representative action brought by plaintiffs Nicole DeMarinis and Kelly Patire under the California Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) (PAGA) against defendant Heritage Bank of Commerce (Heritage Bank) for wage and hour and other Labor Code violations. Heritage Bank unsuccessfully moved to compel arbitration of plaintiffs' individual PAGA claims pursuant to a 'representative' action waiver in the parties' arbitration agreement."

Case History

The case history reveals that: "Relying principally on *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___ [142 S. Ct. 1906] (*Viking River*), Heritage Bank contends that the denial of arbitration was erroneous because the waiver provision is not, as the trial court ruled, an unenforceable 'wholesale' waiver of plaintiffs' PAGA claims, but instead is an enforceable waiver pertaining only to plaintiffs' 'nonindividual' PAGA claims." The Court rejects Heritage Bank's contentions and affirms.

No "Wholesale" Waivers Allowed

Why? "The waiver provision reflects the parties' agreement to waive their rights to bring any claims against one other 'in *any* purported class or *representative proceeding*. There shall be *no* right or authority for *any* dispute to be *brought, heard, or arbitrated* on a class, collective, or representative basis and the Arbitrator may not consolidate or join the claims of other persons or Parties who may be similarly situated.' (Emphasis added.) We conclude this provision is unenforceable under *Iskanian*'s principal rule, which '*Viking River* left undisturbed', because it requires plaintiffs to waive their right to bring any 'representative' PAGA claim 'in any forum,' arbitral or judicial (see *Iskanian, supra*, 59 Cal.4th at pp. 360, 383)" (emphasis in original; some citations omitted). And the final disposition: "we conclude the waiver provision in the arbitration agreement constitutes an unenforceable wholesale waiver of plaintiffs' rights to bring "representative" PAGA actions. Further, by operation of the nonseverability and poison pill clauses, the unenforceability of the waiver provision renders the entire arbitration agreement null and void. Accordingly, the trial court properly denied the motion to compel."
(ed: 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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CALIFORNIA COURT ENFORCES CLICKWRAP AGREEMENT CONTAINING ARBITRATION CLAUSE WITH DELEGATION. ***The Court in Jane Doe #1 (I.G.) v. Massage Envy Franchising, LLC, 2023 WL 8801517 (Cal. Ct. App. Dec. 20, 2023), enforces an online "clickwrap" agreement containing a predispute arbitration agreement ("PDAA") with a delegation provision, and rules that the arbitrator is to decide unconscionability issues.***

Online PDAA in Massage Scheduling App's TOS
First, the facts: "Plaintiff Jane Doe #1 (I.G.) alleges that she was sexually assaulted by a massage therapist at a location franchised by Defendants Massage Envy Franchising, LLC, and ME SPE Franchising, LLC, (collectively, Massage Envy) and operated by Chaoju Investment, LLC." Next, the issues and contentions: "Contending that Doe accepted an arbitration agreement while using its website to create an online profile for scheduling a massage and again while checking in at the franchised location, Massage Envy moved to compel arbitration."

Plaintiff's Consent to TOS …
And the holding: "Based on the uncontradicted evidence presented in the trial court, Doe expressly assented to Massage Envy's Terms of Use Agreement when she created a profile on Massage Envy's website to access its scheduling service and affirmatively indicated her acceptance of the agreement, the terms of which included an arbitration clause. Because the arbitration agreement contains a clear and unmistakable delegation clause, Doe's unconscionability and scoping arguments are properly directed to the arbitrator. Accordingly, the trial court should have granted the motion to compel arbitration."

… Manifested by Actions
Last, the Court's reasoning: "Here, Doe assented to the Terms of Use Agreement when she created a profile on Massage Envy's website to use Massage Envy's appointment booking service. Doe created her profile on a single page. To create a profile, Doe had to click a box manifesting her assent to the Terms of Service Agreement, which were provided by a hyperlink in the text adjacent to the box, which was indicated by a different color and underlining. In short, there was a clear and straightforward process by which Doe, with ready access [to] the full text of the Terms of Use Agreement, expressly manifested her assent."
(ed: Seems right, although we're sometimes surprised to see this outcome from a California court.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

AAA AMENDS MASS ARBITRATION RULES. The American Arbitration Association ("AAA") has made changes to the *AAA-ICDR Mass Arbitration Supplementary Rules*, effective **January 15**. Announced in a press release, the key changes are (*ed: repeated* verbatim):

- **Streamlined Process:** Virtual hearings are now the preferred method, leveraging technology for increased efficiency and accessibility.
- **Early Resolution Opportunities:** A flat Initiation Fee covers an administrative review of the filing, an administrative conference call with the AAA, and appointment of a Global Mediator and/or Process Arbitrator, facilitating quicker settlement analysis and discussions.
- **Reduced Friction:** New attestation requirements help ensure accurate filings and pleadings, minimizing delays and unnecessary complexities.
- **Cost Predictability:** Staged fees beyond the Initiation Fee provide transparent and manageable expenses as cases progress.
- **Expert Guidance:** Access to a skilled AAA Global Mediator at the outset empowers parties to explore amicable solutions with experienced guidance.
- **Process Efficiency:** An expanded Process Arbitrator role tackles potential hurdles early, allowing parties to focus on substantive issues.

The changes are more fully described in a factsheet, and in an article by AAA Vice President **Neil B. Currie**.
*(ed: *Wonder what drove the changes? **The factsheet says the amendments: "aim to reduce friction and enhance process efficiency." ***The fee changes: "… focus on early resolution opportunities and cost predictability, with flat initiation fees and staged fees for both consumer and employment/workplace mass arbitrations, ensuring a transparent and manageable expense structure as cases progress.")*
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DISAPPOINTED APPELLANT SEEKS REHEARING OF MANIFEST DISREGARD ARGUMENT IN FEDERAL COURT OF APPEALS. In SAA 2024-04 (Jan. 25), we reported on *Buck v. Compton*, No. 23-5092/23-5095 (6th Cir., Dec. 20, 2023), which affirmed the lower court's refusal to vacate a FINRA Award, *Compton v. Merrill Lynch Pierce Fenner & Smith, Inc.*, No. 20-02468 (Memphis, TN, May 6, 2022). This Award held broker Thomas Joseph Buck ("Buck") liable for a total of more than $7.5 million in compensatory damages, interest, treble damages and attorney fees. We summarized the gist of the appellate decision as follows: "While recognizing that it recently stated in dicta that manifest disregard of the law 'is "part and parcel of" § 10(a)(4),' the Court nevertheless declare[d]: 'Even assuming the standard survives *Hall Street [Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)], Buck's claims of legal error do not amount to manifest disregard of the law.'" Now, we learn that Buck has filed a *pro se* petition for rehearing. Although containing the case's District Court caption and incorrectly entitled "Mr. Buck's Petition for a Rehearing Pursuant to Rules 35 and 40 of the Federal Rules of Civil Procedure," it was filed in the Court of Appeals and addressed to the Judges of that Court (*ed: Mr. Buck likely meant to cite Rules 35 and 40 of the Federal Rules of Appellate Procedure*). The petition declares: "The panel decision conflicts with a decision of the United States Supreme Court or of the court to which it is addressed (with citation to the conflicting case or cases) and consideration by the full court, therefore necessary to secure and maintain uniformity or the court's decisions…."
*(ed: *An Alert h/t to David E. Robbins, Esq. of Kaufmann Gildin & Robbins LLP in New York for alerting us to this filing. **We expect the Court will deny the petition for*

*rehearing. ***We want to take this opportunity to make a correction of our summary of the Court of Appeals decision: our description of the Award erroneously repeated the attorney fee component of the award. ****Email us at Help@SecArbAlert.com for a copy of the 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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FINAL REMINDER: NY CITY BAR ANNUAL SECURITIES & ENFORCEMENT INSTITUTE IS FEBRUARY 7. As reported previously, the Association of the Bar of the City of New York will be holding its annual *Securities Litigation & Enforcement Institute 2024* on **February 7** from 9 am to 5 pm, in person in New York City. The program description states: "This full-day program will provide a comprehensive overview of recent trends, developments and cutting-edge issues in securities litigation, regulation and enforcement. The panels will include prominent securities litigators, senior in-house counsel at major financial institutions, representatives of the SEC and corporations, and nationally recognized trial lawyers." The program boasts an impressive agenda and faculty, and offers CLE credit from California, New Jersey, New York, and Pennsylvania.
(ed: Registration ranges from $249 for government/nonprofit/academic/judiciary who are Association members to $649 for nonmembers and can be done online.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Lipsett v. Popular Bank*, 2024WL 111247 (2nd Cir. Jan. 10, 2024)**: "We conclude that, for an existing customer in Lipsett's circumstances, the 2014 Notice and the 2013–14 Agreement's arbitration provisions are insufficiently clear or conspicuous to represent a 'definite offer' to arbitrate this dispute. While the 2014 Notice draws attention to the arbitration provision, it misleadingly states that there "*continues* to be a Mandatory Arbitration Provision." This statement signals to a reasonable customer like Lipsett, who was not previously informed of the arbitration provision or consented to arbitration and therefore not bound by any previous iteration of the arbitration provision, that it does not apply to him and that his agreement with the Bank remained effectively unchanged. See *Express Indus. & Terminal Corp.*, 93 N.Y.2d at 589 (requiring an 'objective meeting of the minds' before finding a binding and enforceable contract). The 2014 Notice renders the arbitration provision *less* conspicuous" (emphasis in original; some citations omitted).

***Hasty v. American Automobile Assn. of Northern Cal., Nev. & Utah*, No. C097674 (Calif. Ct. App. 3 Jan. 16, 2024)**: "Plaintiff Aljarice Hasty sued defendant American Automobile Association of Northern California, Nevada & Utah (Association) for claims arising out of her employment. The Association filed a petition to compel arbitration and a motion to stay the action pursuant to an arbitration agreement that was signed as part of Hasty's employment contract (petition). The trial court found the arbitration agreement was unconscionable and exercised its discretion to decline severance of the

unconscionable terms. The Association appeals and argues the trial court erred in finding both procedural and substantive unconscionability and it abused its discretion by not severing any unconscionable terms.[] We conclude the arbitration agreement was both procedurally and substantively unconscionable and the trial court did not abuse its discretion by declining to sever the unconscionable terms. We thus affirm." (*An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***J.R. v. Electronic Arts*, No. E080414 (Calif. Ct. App. 4 (Jan. 17, 2024):** "Electronic Arts Inc. (EA) appeals from the trial court's denial of its motion to compel arbitration of claims brought by J.R. II, a minor. The trial court denied the motion to compel on the ground that J.R. II had exercised his power under Family Code section 6710 to disaffirm all of his contracts with EA, including the arbitration agreement and the delegation provision within it. On appeal, EA argues that because of the delegation provision, an arbitrator rather than a court should decide issues of arbitrability, including J.R. II's disaffirmance defense. We reject EA's arguments and affirm."

***Baldone v. Raymond James*, FINRA ID No. 20-04216 (New Orleans, LA, Jan. 5, 2024)**: Two customers (the other named Claimants settled their case against Respondent), alleging they were over-concentrated in oil and gas investments and charged high commission fees, lose their case against Respondent broker-dealer. The Panel also holds Claimants liable to Respondent broker-dealer for monetary sanctions for failure to comply with FINRA's Discovery Guide and the Panel's Order regarding the production of discovery. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Boustead Securities v. EBET Incorporated*, FINRA ID No. 22-01229 (Los Angeles, CA, Jan. 5, 2024)**: In this large case, a broker-dealer is awarded over $15.1 million on its breach of contract claim relating to the parties' Engagement and Waiver Agreements. Respondent broker-dealer loses its Counterclaim for tortious interference. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Anlin Yen, *California Court of Appeal Finds Subpoena of Nonparties for Production/Appearance at Discovery Hearing Exceeds Arbitrator's Power*, Kluwer Arbitration Blog (Jan. 17, 2024): "In *McConnell v. Advantest Am., Inc*., the 4th District Court of Appeal in California (the 'Court') vacated an arbitral order compelling nonparties to appear at a discovery hearing for the sole purpose of receiving documents allegedly in their possession. 92 Cal. App. 5th 596. The subpoenas asked the nonparties to produce their communications with the respondent on seven different messaging and email platforms over a 43-month period. Previously, the 6th District Court of Appeal in *Aixtron, Inc. v. Veeco Instruments Inc*. had held that the U.S. Federal Arbitration Act does not give the arbitrator the power to order nonparty discovery and the California Arbitration Act does not authorize prehearing discovery from nonparties. *See* 52 Cal. App. 5th 360, 393-95. Relying upon *Aixtron*'s reading of §

1282.6 of the California Code of Civil Procedure, the Court found subpoenas for nonparties to appear and produce documents at a hearing for the purpose of discovery to be unauthorized. This blog post provides a brief overview of the underlying dispute and the Court's reasoning in making its decision" (*ed: links to cases added by the* Alert.)

***The Art of Mediation: Six Steps to Sussing Out the Subtitles*, JD Supra (Jan. 17, 2024)**: "The movie 'Annie Hall,' through the clever use of subtitles, illustrated clearly that, where matters of the heart are concerned, what one says is not what one means. A successful mediator understands this trope holds true during financial negotiations as well. The secret to a mediator's success is knowing how to puzzle out what people need from what they say they want. Here are six keys to decoding the positions that lawyers take during mediations."

***Modifications to the AAA Supplementary Rules and Fee Schedules Published and Effective Immediately*, JDSupra (Jan. 18, 2024)**: "On January 15, 2024, the American Arbitration Association (AAA) announced changes to the AAA-ICDR Mass Arbitration Supplementary Rules and Fee Schedules to take effect immediately. The AAA stated in a press release that these modifications result from 'listen[ing] to the needs of individuals and businesses involved in mass arbitrations' and are designed to "save time, reduce costs, and foster constructive dialogue." (*ed: See our coverage elsewhere in this* Alert.)

***Robinhood to Pay $7.5M to Exit Mass. Regulator Probe*, Law360 (Jan. 18, 2024)**: "Robinhood Financial LLC has agreed to pay $7.5 million and make sweeping changes to the 'gamification' of its platform under a deal announced Thursday by Massachusetts securities regulators, ending a three-year-old case that saw the online trader unsuccessfully plead its case to the state's top appellate court."

***Second Circuit Identifies Pitfalls to Avoid When Implementing Arbitration Provisions*, Lexology (Jan. 18, 2024)**: "Companies implementing arbitration provisions should ensure that they adequately inform customers about the provision and their options for opting out. The Second Circuit recently reaffirmed the importance of this exercise in *Lipsett v. Popular Bank*, 2024WL 111247 (2nd Cir. Jan. 10, 2024), finding a bank's arbitration provision unenforceable over a decade after it was first implemented."

***Updates on Verizon Mass Arbitration Appeal and Revised AAA Mass Arbitration Supplementary Rules*, Ballard Spahr Consumer Finance Blog (Jan. 22, 2024)**: "We previously wrote about a Ninth Circuit appeal taken by Verizon Wireless, Inc. after a California district court judge held that its arbitration agreement, which required mass arbitration disputes to be resolved by multiple rounds of bellwether arbitrations, was substantively unconscionable because it effectively eliminated the claims of thousands of Verizon customers who were required to wait for up to 156 years for the bellwether arbitrations to conclude. It has now been reported that the Verizon litigation has been settled, and the Ninth Circuit docket reflects that the appeal is being held in abeyance pending final court approval of the settlement. Accordingly, the Verizon appeal will not

provide much needed appellate guidance on the use of batching and bellwether procedures to resolve mass arbitration demands. While that window has closed, another one has opened. Effective January 15, 2024, the American Arbitration Association (AAA) amended its Supplementary Rules for Multiple Case Filings, renamed 'Mass Arbitration Supplementary Rules,' and associated fee schedule."
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DID YOU KNOW?

VARIOUS FINRA FINANCIAL REPORTS ARE AVAILABLE ONLINE. FINRA posts various reports on its Website, at https://www.finra.org/about/annual-reports. See:

- Annual Reports
- Fines Reports
- Annual Budgets
- Financial Policies

The Webpage also gathers certain financial policies.
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