SECURITIES ARBITRATION ALERT 2022-42 (11/10/22)

George H. Friedman, Editor-in-Chief

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- ***RBC Fined For Failing to Monitor Employees' Outside Accounts*, Financial Advisor IQ (Nov. 1, 2022)**
- ***Why Private Equity Firms Should Pay Attention To The U.S. Consumer Financial Protection Bureau*, Mondaq (Nov. 2, 2022)**
- ***U.S. Department of Education Axes Arbitration Provisions in Final Student Loan Rules*, Consumer Finance Monitor Blog (Nov. 3, 2022)**
- ***More Reg BI Cases in the Pipeline, FINRA Chief Warns,* Think Advisor (Nov. 4, 2022)**

DID YOU KNOW?

- **Need a Costume for Halloween for Next Year? FINRA Has A Suggestion**

A NEW FEATURE ARTICLE. *Appearing in this week's* Alert *is a new feature article authored by PIABA,* Arbitration of Investor Claims in an Industry-Sponsored Forum - A Look Back at 20 Years of Lessons. *In it, co-authors, Courtney Werning, Jorge Riera, Dave Neuman, and Mike Edmiston, offer a detailed, yet succinct history of securities arbitration and look forward to the future. And we have our usual collection of Squibs, Short Briefs, Quick Takes, and Articles of Interest. In other words, another jam-packed new issue of the* Alert*!*

FEATURE ARTICLE

ARBITRATION OF INVESTOR CLAIMS IN AN INDUSTRY-SPONSORED FORUM - A LOOK BACK AT 20 YEARS OF LESSONS, *by Courtney Werning, Jorge Riera, Dave Neuman, and Mike Edmiston*. Industry-sponsored arbitration has long been the only option for investors who have claims against their financial advisors and brokerage firms. When an investor opens a brokerage account, in almost all cases he or she must sign away their right to a day in court should a dispute arise. For investors doing business at a FINRA-member brokerage firm, which means arbitration sponsored by the securities industry. Investor protection advocates have long argued that the arbitration system should be reformed to eliminate investors' obligations to take their claims to an industry-related forum. In 2002, the Securities Industry Conference on Arbitration ("SICA") piloted an experimental program giving investors the alternative choice to use non-SRO-sponsored arbitration forums. Twenty years later, we look back over the difficult lessons learned by SICA's failed experiment to address the unfairness (perceived or actual) of investors forced to take their disputes to a forum run by the securities industry. *Read more…*

(ed: Courtney Werning is a partner with Meyer Wilson in Columbus, Ohio. She has been representing investors in claims against investment advisers and brokerage firms for the last 10 years and runs her firm's investor claims practice group. She is joining the PIABA Board of Directors for its 2022-23 year. David Neuman is a partner with Israels & Neuman in Seattle. He focuses his practice on representing investors in arbitration, is a PIABA Board Member and serves as its Secretary. Jorge Riera is a former Senior Counsel for the SEC. He served in the SEC's Division of Enforcement for 10 years before founding Riera Law Firm and now focuses his practice on representing investors with claims against brokerage firms and investment advisers. He currently serves as Co-Chair of PIABA's Arbitration Committee. Michael Edmiston is an attorney with the Law Offices of Jonathan W. Evans & Associates in Studio City, California. His practice focuses on representing investors in claims against broker-dealers, Registered Investment Advisors, and insurance companies. He is the immediate past President of PIABA. A big "thank

you" goes to PIABA members Elliot Rosenberger and Makoa Kawabata for serving as Bluebook editors for this article.)
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SQUIBS: IN-DEPTH ANALYSIS

UPDATE: ALLEGING ARBITRATOR BIAS, OPPENHEIMER MOVES TO VACATE FINRA PANEL'S $36+ MILLION AWARD. ***Oppenheimer has moved to vacate a massive Award rendered against it by a FINRA Panel***. We reported in SAA 2022-35 (Sep. 15) that a Majority-Public FINRA Panel had hit Oppenheimer with a $36+ million Award arising out of losses suffered by several investors in a Ponzi scheme perpetrated by a former adviser. The claims asserted in *Robinson v. Oppenheimer & Co., Inc.*, FINRA ID No. 21-02234 (Atlanta, GA, Sep. 6, 2022), were for: "violations of FINRA Rules; negligence; breach of fiduciary duty; violation of the Georgia RICO statute; and breach of contract. The causes of action relate to Claimants' investments in Horizon Private Equity III." The Claimants were each awarded almost $5.7 million in compensatory damages and almost $11.4 million in punitive and more than $14.2 million in treble damages pursuant to Georgia's RICO statute – O,C.G.A. § 16-14-6(c) -- which provides: "Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred." The award also included more than $5.3 million in attorney fees and $98,655 in costs.

Award Challenge Promised…
Our editorial comment in # 35 was: "According to media reports, Oppenheimer may challenge the Award." We later reported in SAA 2022-36 (Sep. 22) that, according to a **September 15** *InvestmentNews* story, that certainly appeared to be the case. The article stated that the firm is alleging "evident partiality" by one of the arbitrators. The specifics? "[T]he lawyer for the eight claimants, some of whom had been in the service and went on to be airline pilots, shed light on the broker-dealer's claim of bias, saying that an attorney for Oppenheimer took issue with an informal conversation between one of the arbitrators, who had been in the military, and one of the investor claimants…. Oppenheimer wants to argue that the common military experience created a conflict because of the affinity that arose from that.'" The story added that Oppenheimer would shortly move to vacate the Award. This next step was referenced in the firm's **September 7** Form 8-K filed with the SEC: "Oppenheimer intends to move to vacate the award in federal court on a number of grounds, including, but not limited to, allowing the hearing to proceed without Mr. Woods and other key parties and witnesses; prematurely rendering an award for damages while a court-appointed receiver continues to collect assets on behalf of all impacted investors, including the Claimants; *issuing an award where there was evident partiality against Oppenheimer by one of the arbitrators;* and allowing the hearing to proceed when the claims were ineligible for arbitration under FINRA rules that relate to statutes of limitations" (emphasis added).

… Promise Fulfilled
Oppenheimer on **October 6** challenged the Award in the Georgia Superior Court, Dekalb County. The matter is *Oppenheimer & Co., Inc. v. Robinson*, and seeks vacatur under Federal Arbitration Act ("FAA") section 10 and O.C.G.A. § 9-9-13, or modification under FAA section 11 and O.C.G.A. § 9-9-14. The Award and appeal are referenced in the firm's quarterly income statement.
*(ed: *We were only able to get the Motion to Vacate/Modify. No attachments were available on the FINRA Website. **We will keep our eye on this one.)*
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THINK THE "RIGGED PANELS" CASE IS DONE? THINK AGAIN. ***Those who thought this one was finished need to rethink their assumptions, as an appeal has been filed with the Georgia Supreme Court***. We reported in SAAs 2022-31 (Aug. 11) & -30 (Aug. 4) that the Georgia Court of Appeals had "unvacated" the Award in the so-called "rigged panels" case. The *Alert*'s readers are very familiar with this saga, which we've covered extensively and blogged about on February 2, 9, 25, and 29. We also provided in-depth coverage of the appellate decision in an **August 10** *Alert* Blog post, *Expanded Coverage: Unanimous Georgia Court of Appeals Tosses Trial Court's Award Vacatur in "Rigged Panels" Case.*

Brief History: Award Vacated
To review succinctly, Fulton County Superior Court Judge **Belinda E. Edwards** in *Leggett v. Wells Fargo Clearing Services, LLC*, No. 2019CV328949 (Ga. Super Jan. 25, 2022), vacated the Award in what might be considered a primer on the basic Federal Arbitration Act grounds for vacating an award (i.e., fraud, arbitrator bias, arbitrator misconduct in not hearing relevant or material evidence or failing to grant a reasonable postponement request; or the panel exceeding authority). Although the Trial Court found these bases for vacating the Award, Judge Edwards weighed in on interference with the Neutral List Selection System with some scathing verbiage:

> The Court's factual review of the record evidence leads to its finding that Wells Fargo and its counsel manipulated the FINRA arbitrator selection process in violation of the FINRA Code of Arbitration Procedure, denying the Investors' their contractual right to a neutral, computer-generated list of potential arbitrators. Wells Fargo and its counsel, Terry Weiss, admit that FINRA provides any client Terry Weiss represents with a subset of arbitrators in which certain arbitrators (at least three, but perhaps more) are removed from the list Wells Fargo agreed, by contract, to provide to the Investors in the event of a dispute. Permitting one lawyer to secretly red line the neutral list makes the list anything but neutral, and calls into question the entire fairness of the arbitral forum.

Award "Unvacated"
Wells appealed, and in a unanimous decision the Georgia Court of Appeals reinstated the Award in *Wells Fargo Clearing Services, LLC v. Leggett*, No. A22A1149 (Ga. Ct. App. Aug. 2, 2022). The unanimous decision rejects all bases upon which Judge Edwards

vacated the Award. As to "secret deals" between FINRA and Wells' then-attorney Terry Weiss, the Court says:

> Nothing indicates that Wells Fargo 'manipulated' the arbitrator pool. It simply asked that [Arbitrator] Pinckney be removed under FINRA Rule 12407. We fail to see how the Director's decision to grant that request — which was made after all parties had a chance to address the issue — constituted manipulation by Wells Fargo.[] Although the investors claim that a 'secret agreement' existed between FINRA and Weiss to automatically exclude the *Postell* arbitrators from any arbitrator list generated on a case involving Weiss, there is no evidence that such agreement was at play here, given Pinckney's inclusion on the initial list. Even if an agreement exists, the investors have not shown that it impacted this arbitration."

Appeal to Georgia Supreme Court Filed

Our editorial comment in # 31 was: "Dare we say it? Barring further appeals, this might be the end of this one …." Alas, Leggett on **August 22** filed a Petition for *Certiorari*, seeking review by the Georgia Supreme Court. The case is No. S23C0074 and can be found at https://www.gasupreme.us/docket-search/. The case is set for argument in **December**.

(ed: We can't say we are surprised.)

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

BERKSON ASSUMES PRESIDENCY OF PIABA. The Public Investors Advocate Bar Association ("PIABA") announced in an **October 27** Press Release that **Hugh D. Berkson** of McCarthy, Lebit, Crystal & Liffman was elected President at its just-concluded annual meeting. The Release contained a prepared statement about his priorities for this upcoming year. We will be interviewing Mr. Berkson for the next *Alert*, but for now we present the major headers from his statement: **1) PIABA will continue to push to remedy the longstanding problem of unpaid arbitration awards; 2) PIABA will seek to build upon the unprecedented success it has achieved over past … year in exposing the injustices wrought by the use – and in some cases, the flagrant abuse - of forced arbitration clauses by RIAs; and 3) PIABA will continue to promote passage of the Investor Justice Act.** The Release also reports that long-time Executive Director **Robin Ringo** will be retiring in **March** after 26 years of service. Her successor is **Jennifer Shaw**, "an attorney and former regulator, most recently of the Oklahoma State Securities Regulator's office."

(ed: We wish all three individuals the best of luck in their respective new endeavors.)

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AAA TO CO-HOST IN-PERSON NOVEMBER COLLOQUIUM ON INTERNATIONAL DISPUTE RESOLUTION. The AAA will be co-hosting an 11-hour long, in-person seminar, *37th AAA- ICDR – ICC – ICSID Joint Colloquium on International Arbitration – Who Is In Charge?*, **November 14** in New York City. Says the Webpage Agenda: "Since 1983, three of the leading international arbitral institutions

cosponsor a joint colloquium that covers significant topics in the field of international commercial arbitration. The joint colloquium brings world-renowned international arbitrators and practitioners to attend, present and discuss some of the most significant developments in the field." The main topics are: **Recent Institutional Developments at the AAA-ICDR/ICC/ICSID; Conflicts of Interest and Disclosures – Codes of Conduct; The In-House and Government Counsel's Roundtable; and International Arbitration Scenarios – "What Would You Do?"** CLE credit is available.
*(ed: *Registration, which is done online, is $400 for general admission and $250 for in-house counsel. **The program will take place at the New York City Bar Association, 42 West 44th Street in Manhattan. ***Questions? Email Alyssa Montano at montanoa@adr.org or call 212-484-3281.)*
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FINAL DOE STUDENT LOAN RULE BANS PDAAS AND CLASS ACTION WAIVERS. The Department of Education ("DOE") on **November 1** released its long-awaited final regulations on federal student loans. The new rules published in the *Federal Register* (Vol. 87, No. 210, P. 65904) ban use of mandatory predispute arbitration agreements ("PDAA") and class action waivers. Says the Reg: "We also are amending the Direct Loan Program regulations to prohibit participating schools from using certain contractual provisions regarding dispute resolution processes and to require certain notifications and disclosures by institutions (institutions or schools) regarding their use of mandatory arbitration…. We also limit the use of certain contractual provisions regarding dispute resolution processes by participating institutions and require certain notifications and disclosures by institutions regarding their use of mandatory arbitration…. [The Rules] prohibit institutions that wish to participate in title IV programs from requiring borrowers to agree to mandatory pre-dispute arbitration agreements or waiver of class action lawsuits."
*(ed: *The Rules are effective July 1, 2023. **Former CFPB Director Richard Cordray is the DOE's Chief Operating Officer of Federal Student Aid. ***Seems to us there are likely Federal Arbitration Act preemption challenges ahead.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Robinson Nursing & Rehabilitation Center, LLC v. Phillips*, 2022 Ark. 193 (Nov. 3, 2022)**: "Appellant Robinson Nursing and Rehabilitation Center, LLC (Robinson), appeals from a Pulaski County Circuit Court order granting in part and denying in part its motion to enforce arbitration agreements and to compel class members with arbitration agreements to submit their claims to binding arbitration. For reversal, Robinson argues that law of the case controls, the arbitration agreements are valid, and the affirmative defenses pled by appellee Andrew Phillips fail. Phillips, as personal representative of the Estate of Dorothy Phillips, on behalf of the wrongful-death beneficiaries, and as class representative in this class-action suit, cross-appeals and asserts that the circuit court's order redefines class membership and acts as a final disposition of the case. We remand to the circuit court with instructions…. The circuit court again made no findings, other than granting in part and denying in part as to certain residents, without stating the basis

for its decision. In order to conduct a proper appellate review, we must know the circuit court's rationale for its decision."

***Davis v. Shiekh Shoes, Inc.*, No. A161961 (Calif. Ct. App. 2 Oct. 31, 2022)**: "Nineteen months after plaintiff Britani Davis filed suit against her former employer Shiekh Shoes, LLC (Shiekh), Shiekh moved to compel arbitration of Davis's claims. The trial court denied the motion, finding Shiekh waived its right to invoke arbitration by unreasonably delaying its arbitration demand and acting inconsistently with an intent to arbitrate. We affirm." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*

***Buzzfeed, Inc. v. Anderson*, No. 2022-0357-MTZ (Del. Ch. Ct. Oct. 28, 2022)**: "New Buzzfeed and its officers and directors named in the arbitrations filed a complaint in this Court seeking (i) to enjoin those arbitrations; (ii) a declaration that the plaintiffs are not bound by the arbitration provisions in the defendants' employment agreements with Old Buzzfeed; and (iii) a declaration that the defendants, as New Buzzfeed stockholders, are instead bound by the forum selection clause in New Buzzfeed's charter. The plaintiffs have moved for summary judgment. In that motion they contend: (i) this Court has the authority to decide whether the plaintiffs' claims are arbitrable; (ii) the Court should decide that those claims are not arbitrable and retain subject matter jurisdiction; and (iii) the Court should grant the plaintiffs the relief they seek. The defendants moved to dismiss the complaint, arguing this Court lacks subject matter jurisdiction over the plaintiffs' claims because they belong in arbitration. The defendants also argue this Court does not have personal jurisdiction over the nonresident defendants. For the reasons explained below, I conclude this Court has both subject matter jurisdiction over the plaintiffs' claims and personal jurisdiction over the defendants in this action. The defendants' motion to dismiss is denied. From there, I conclude the plaintiffs are entitled to a declaration that they are not bound by the arbitration provision in the Old Buzzfeed employment agreements, and to an anti-arbitration injunction. But the plaintiffs' request for a declaration that the defendants must bring their claims against the plaintiffs in this Court, as stockholders bound by the forum selection clause in New Buzzfeed's charter, seeks an improper advisory opinion. The plaintiffs' motion for summary judgment is granted in part and denied in part."

***Beverley v. Marano*, FINRA ID No. 21-01725 (New York, NY, Sep. 20, 2022)**: A Panel grants Respondents' Motion for Directed Verdict after finding that Claimant broker had not sustained her burden of proof with respect to the allegations asserted in the Statement of Claim. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Dejean v. Charles Schwab*, FINRA ID No. 21-02838 (Los Angeles, CA, Sep. 22, 2022)**: A customer alleging unauthorized trading and closure of his brokerage account loses his case against Respondent broker-dealer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Werner Eyskens, Ian A. Laird and Evelien Van Espen, *Commercial Space Industry Prepares for Increased Future Disputes Risk: Why Contracts Should Consider Including an International Commercial Arbitration Clause*, Crowell & Moring LLP Blog (Nov. 1, 2022): "On 29 September 2022, a panel discussion on new development in space law and arbitration was held in the context of the second World Arbitration Update conference (see www.worldarbitrationupdate.com). The key take-away from the panel discussion was that the space industry is currently booming and that it will face a likely rise in the number of disputes between commercial space actors…. Commercial actors should therefore consider carefully what dispute resolution clauses they will include in future agreements. When deciding between various options, the inclusion of a dispute resolution clause providing for international arbitration should be particularly considered for commercial actors in the space industry for the following reasons …."

***RBC Fined For Failing to Monitor Employees' Outside Accounts*, Financial Advisor IQ (Nov. 1, 2022)**: "RBC Capital Markets has agreed to pay a $360,000 fine after a Finra probe revealed shortcomings in the firm's monitoring of employees' personal accounts.[] According to a letter of acceptance, waiver and consent, published yesterday by the industry's self-regulator, RBC allegedly failed to establish and maintain a supervisory system 'reasonably designed to monitor employees' outside brokerage accounts' between June 2018 and February 2018."

***Why Private Equity Firms Should Pay Attention To The U.S. Consumer Financial Protection Bureau*, Mondaq (Nov. 2, 2022)**: "Private equity firms that invest in the consumer finance space (or want to) should take note that another regulator in Washington is looking to add itself to the alphabet soup of federal agencies that flex their muscles against the private equity industry. In the year since the Consumer Financial Protection Bureau (CFPB) has been under Director Rohit Chopra's leadership, the agency has fired warning shots at the private equity firms that provide the capital and strategic leadership to companies that offer financial products and services to consumers."

***U.S. Department of Education Axes Arbitration Provisions in Final Student Loan Rules*, Consumer Finance Monitor Blog (Nov. 3, 2022)** "The U.S. Department of Education recently announced final regulations, effective July 1, 2023, designed to expand and improve the major student loan discharge programs authorized by the Higher Education Act. Among other things, the final regulations prohibit institutions that participate in the Federal Direct Loan program from requiring borrowers to sign mandatory pre-dispute arbitration agreements or class-action waivers that would be applicable to disputes about Direct Loans. The Department's purported justification for prohibiting arbitration is a federal statute, 20 U.S.C. Section 1087d (a)(6), which authorizes the Secretary of Education to include in the regulations 'provisions as the Secretary determines are necessary to protect the interest of the United States and to promote the purposes of' the Direct Loan Program." (*ed: See our coverage elsewhere in this* Alert.)

***More Reg BI Cases in the Pipeline, FINRA Chief Warns*, Think Advisor (Nov. 4, 2022):** "Robert Cook, president and CEO of the Financial Industry Regulatory Authority, said Friday that firms need to beef up their compliance with the Securities and Exchange Commission's Regulation Best Interest, and noted that more Reg BI-related enforcement cases are in the pipeline.[] Speaking at the ALI-CLE Life Insurance Products Conference in Washington, Cook said that FINRA's Reg BI-related exams have been 'evolving as [FINRA] has had more time with Reg BI and as firms have had more time' with the rule. FINRA exams will 'continue to evolve in terms of expectations and the depth of what we're looking for.'"

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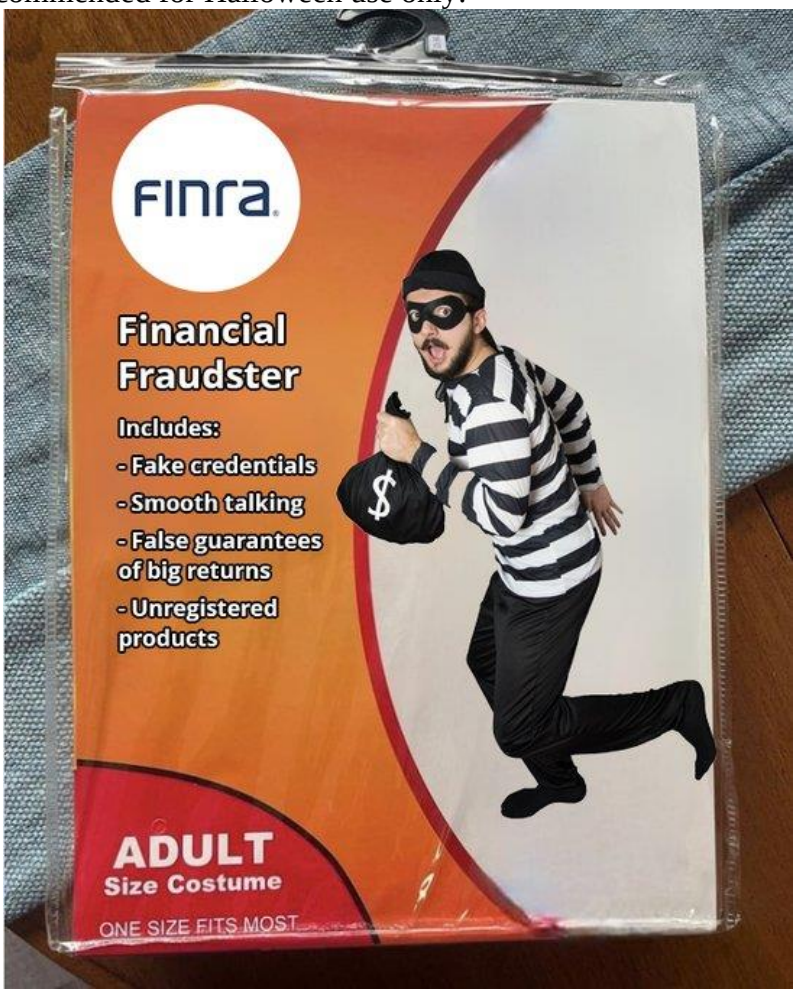
DID YOU KNOW?

NEED A COSTUME FOR HALLOWEEN FOR NEXT YEAR? FINRA HAS A SUGGESTION. FINRA on **October 31** tweeted this image of an innovative Halloween costume, "Recommended for Halloween use only."



*(ed: *We love it. **Photo reprinted with FINRA's permission.)*

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