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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HERBERT LESLIE GREENBERG, Plaintiff, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant.	CASE NO. CV 06-7878-GHK(CTx) **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** HEARING DATE: April 2, 2007 TIME: 9:30 A.M. JUDGE: Honorable George H. King Filed concurrently: 1. Request for Judicial Notice In Opposition to Defendant's Motion to Dismiss

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SUMMARY OF ARGUMENT

I. VIOLATION OF FEDERAL ADVISORY COMMITTEE ACT

For purposes of the Federal Advisory Committee Act, 5 U.S.C. App. 2, §§1-16 ("FACA"), an advisory committee formed by a "quasi-public" entity to provide advice and recommendations to a federal agency is "utilized" by that federal agency. When an advisory committee has been formed by a "quasi-public" entity, "utilized" is based solely upon who formed the advisory committee.

"Quasi-public" entities are essentially public (as in services rendered) due to government mandated responsibilities although privately owned and operated. The "quasi-public" entities here are self-regulatory organizations ("SROs"), e.g., NEW YORK STOCK EXCHANGE, INC. ("NYSE"), NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. ("NASD"). Defendant SECURITIES AND EXCHANGE COMMISSION ("SEC"), a federal agency, is required to exercise comprehensive oversight under federal law of the SROs. Defendant SEC, Congress and prominent participants in the securities industry have repeatedly proclaimed that SROs are "quasi-public" entities.

The SECURITIES INDUSTRY CONFERENCE ON ARBITRATION ("SICA"), an advisory committee, was formed by SROs to provide defendant SEC with recommendations and advice pertaining to the securities arbitration process.

Defendant SEC's argument that an advisory committee, which was formed by a "quasi-public" entity, must be subject to "actual management and control" by a federal agency in order to be "utilized" for purposes of FACA has been rejected by a Court of Appeals and by Congress. Such a test is only relevant where other than a "quasi-public" entity forms the advisory committee --- not the situation here.

At best, the Motion to Dismiss ("Motion") raises a question of fact as to whether SROs possess characteristics of "quasi-public" entities.

II. VIOLATIONS OF ADMINISTRATIVE PROCEDURE ACT

Both Administrative Procedure Act, 5 U.S.C. §551-706 ("APA") § 706(1) ["action unlawfully withheld or unreasonably delayed"] and APA § 706(2)(A) ["action ... not in accordance with law"] are applicable to the facts pleaded in the Complaint for Declaratory and Injunctive Relief ("Complaint") and are subject to review by this Court.

Plaintiff HERBERT LESLIE GREENBERG ("GREENBERG") filed Petition for Rulemaking (SEC File No. 4-502)("Petition") with defendant SEC. Pursuant to SEC General Rule 192[1] ("Rule 192"), defendant SEC is required to make recommendations and transmit those recommendations and the Petition to defendant SEC's Commissioners ("Commissioners"). After unreasonable delay, defendant SEC has failed to make recommendations and transmit those recommendations and the Petition to the Commissioners. In so failing, defendant SEC has violated APA § 706(1). As a petitioner, plaintiff GREENBERG seeks enforcement of rights specifically afforded in Rule 192. Such is not a "review." APA § 706(1) does not require a "final action" --- it relates to a failure to act. Therefore, defendant SEC's contentions related to "final action" are not applicable.

At best, the Motion asks the Court to determine, as a matter of law, whether defendant SEC "unreasonably delayed" action on the Petition.

Approximately thirty (30) years ago, defendant SEC, through its Securities Exchange Act Releases, promulgated an official statement of policy to use SICA as an advisory committee, without complying with the mandates of FACA. That act

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[1] "Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary. … The Secretary shall … refer it to the appropriate division … for consideration and recommendation. Such recommendations shall be transmitted with the petition to the Commission for such action as the Commission deems appropriate." (Emphasis added.) (Rules of Practice, Rule 192; 17 C.F.R. 201.192(a))

constitutes a violation of APA § 706(2)(A). The promulgation of an official statement of policy qualifies as final "agency action" under APA § 706(2)(A).

III. MANDAMUS

"Mandamus" is one of a series of prayed remedies, including, "such other and further relief as the Court may deem just and proper." It was not pleaded as a claim for relief. A motion to dismiss is applicable to claims for relief, not prayed for remedies.

IV. OBJECTIONS TO DEFENDANT SEC'S ATTEMPT TO INTRODUCE EVIDENCE

The Motion attempts to introduce alleged facts and speculations rather than accept the facts set forth in the Complaint. Plaintiff GREENBERG objects to defendant SEC's attempts to cause the Court to go beyond the four corners of the Complaint in deciding the Motion.

ARGUMENT

I. MOTION TO DISMISS LEGAL STANDARDS

A complaint should not be dismissed for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6) unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Johnson v. Knowles, 113 F.3d 1114, 1117 (9th Cir. 1997). When the legal sufficiency of a complaint's allegations is tested with a

motion under Rule 12(b)(6), "[r]eview is limited to the complaint." Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9th Cir. 1993). All factual allegations set forth in the complaint are taken as true and construed in the light most favorable to the plaintiff. Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996). The Court must give the plaintiff the benefit of every inference that reasonably may be drawn from well-pleaded facts. Tyler v. Cisneros, 136 F.3d 603, 607 (9th Cir. 1998).

"Denial of leave to amend 'is improper unless it is clear . . . that the complaint could not be saved by any amendment.'" Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1061 (9th Cir. 2004); Center For Biological Diversity v. Veneman, 394 F.3d 1108, 1109-1114 (9th Cir. 2005).

Generally, the Court "may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). Rule 12(b)(6) expressly provides that "when matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." (Emphasis added.) Fed.R.Civ.P. 12(b)(6). There are, however, two exceptions to the requirement that consideration of extrinsic evidence converts a Rule 12(b)(6) motion to a motion for summary judgment. Lee, 250 F.3d at 688.

First, the Court "may consider material which is properly submitted as part of the complaint on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment." Id. If the documents are not physically attached to the complaint, they may be considered if the documents' authenticity is not contested and the plaintiff's complaint necessarily relies on them. Id. at 689.

Second, pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of "matters of public record" without converting a motion to dismiss into a motion for summary judgment. MGIC Indem. Corp. v. Weisman, 803 F.2d

500, 504 (9th Cir. 1986). However, the Court may not take judicial notice of a fact that is "subject to reasonable dispute." Fed.R.Evid. 201(b).

II. SICA IS AN ADVISORY COMMITTEE FOR PURPOSES OF FACA

A. The Allegations

SICA is an advisory committee that was formed by SROs (NYSE and NASD) to provide defendant SEC, a federal agency, with advice and recommendations on securities arbitration matters. (Compl. ¶¶ 4-11.) SROs are "quasi-public" organizations with numerous public obligations imposed by federal law and subject to defendant SEC's regulatory authority. (Compl. ¶ 4.) Defendant SEC initially desired to form an "advisory committee," but, instead, permitted the SROs to form SICA with the same characteristics that defendant SEC had contemplated for its own "advisory committee." (Compl. ¶¶ 4-8.)

B. SICA, Formed by "Quasi-Public" Entities, Is "Utilized" By Defendant SEC

"A committee is subject to the provisions of FACA if it is ... (C) ... utilized by one or more agencies, in the interest of obtaining advice or recommendations for ... one or more agencies ... of the Federal Government." 5 U.S.C. App. 2, § 3(2). The United States Supreme Court and a Court of Appeals have held that an advisory committee is "utilized" by a federal agency and, thus, subject to FACA, if the advisory committee was formed by a "quasi-public" entity to render advice and recommendations to the federal agency. "Utilized" deals solely with who formed the advisory committee.

In Public Citizen v. Department of Justice, 491 U.S. 440, 109 S.Ct. 2558, 105

L.Ed.2d 377 (1989)("Public Citizen"), the Court clearly stated that an advisory committee is "utilized" when formed by a "quasi-public" organization for a federal agency and, thus, is subject to FACA, by stating:

> [T]he phrase "or utilized" therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations ... "for" public agencies....

(Emphasis added.) Id. at 462.

Following Public Citizen, the Court in Animal Legal Defense Fund, Inc. v. Shalala, 104 F.3d 424 (D.C. Cir. 1997) cert. denied, 118 S. Ct. 367 (1997)("ALDF") held, for purposes of FACA, advisory committees are "utilized" when formed by "quasi-public" entities. The Court stated:

> [T]he definition given by the Court to an advisory committee utilized by the federal government focuses not so much on *how* it is used but whether or not the character of its creating institution can be thought to have a quasi-public status.
>
> ...
>
> [W]e also recognized, as indeed we were compelled to do by the Supreme Court's *Public Citizen* opinion, that if a committee advising the government were established by a "semiprivate" (read: quasi-public) agency instead of a government agency, it would meet the alternative test set forth by the Supreme Court.
>
> ...
>
> To sum up, under *Public Citizen*, the Guide Committee must be regarded as utilized by HHS because it relies on the Committee's work product and because it was formed by the NAS, a quasi-public entity.

(Emphasis in original.) Id. at 428-431.

The Motion has confused the word "utilized," as set forth in FACA, with the word "operated." (Motion, Page 1, Line 9 and Page 2, Line 8 ["M.1:9 and 2.8"].) It also confuses "utilizes" (in an operational sense) with "utilized" in a FACA sense. (M.11:4-14.) Whether or not and/or how an advisory committee, formed by a "quasi-public" entity, is subsequently "operated" by the federal agency is not relevant to the analysis of whether the advisory committee is "utilized" and, thus, subject to FACA and its procedural mandates.

SICA was formed by SROs, "quasi-public" entities, to render recommendations and advice to defendant SEC, a federal agency. Thus, for purposes of FACA, SICA was "utilized" by defendant SEC.

C. SROs Are "Quasi-Public" Organizations

The term "self-regulatory organization" means any national securities exchange, registered securities association, or registered clearing agency. 15 U.S.C. § 78a, et. seq. ("Exchange Act") § 3(26)). The NYSE and NASD are SROs. SROs are associations intended to set industry rules that rise above the interests of particular firms and professionals. SROs have "quasi-public" status in that government relies heavily on them to regulate the securities industry.

1. Congress, Defendant SEC and Major Participants In The Securities Industry Have Repeatedly Acknowledged That SROs Are "Quasi-Public" Entities

Congress, defendant SEC and other major participants in the securities industry have repeatedly acknowledged that SROs are "quasi-public" agencies.

> As Congress has stated on a number of occasions, SROs are 'quasi-public agencies, not private clubs, and . . . their goal is the

> prevention of inequitable and unfair practices and the advancement of the public interest.' [31]... 31 Securities Industry Report of the Subcommittee on Securities, S. Doc. No. 13, 93d Cong., 1st Sess. 156 (1973).

(Emphasis added.) Exchange Act Release No. 34-43860 (January 19, 2001); 66 Fed. Reg. 8912, 8913 (February 5, 2001).

"A National Securities Exchange is a quasi-public institution." (Emphasis added.) SEC Report of Special Study of Securities Market, H.R. Doc. No. 95, 88th Cong., 1st Sess., 804 (1963).

SEC Commissioner ANNETTE NAZARETH has stated that SROs are "quasi-public entities" and "quasi-public institutions." See Request for Judicial Notice ("Request"), Exhibits A.2 and B.4-5, respectively.

In a letter of comment to defendant SEC, the SECURITIES INDUSTRY ASSOCIATION, "which brings together the shared interests of nearly 600 securities firms," agreed, "SROs are 'quasi-public agencies'." See Request, Exhibit C.2; Compl. ¶ 5(B). In an interview with CNBC, NYSE Chairman Marshall N. Carter described the NYSE as a "quasi-public utility." See Request, Exhibit D.1.

2. Defendant SEC Has Comprehensive Oversight under Federal Law of SROs

SROs serve, under defendant SEC's supervision, a public regulatory function. See generally Sparta Surgical Corp. v. NASD, Inc., 159 F.3d 1209, 1210-14 (9th Cir. 1998). Defendant SEC is the agency principally responsible for the administration and enforcement of the federal securities laws and regulations and, under these laws, has been entrusted with the comprehensive oversight of SROs such as the NASD and the NYSE. See generally S. Rep. 94-75, 94th Cong., 1st Sess. 22-23 (1975).

SROs are required to register with defendant SEC, to promulgate rules

governing the conduct of their members, and to enforce compliance by their members with those rules and with the federal securities laws. See Section 6 of the Exchange Act, 15 U.S.C. § 78f (regarding securities exchanges); Section 15A of the Exchange Act, 15 U.S.C. § 78o-3 (regarding securities associations); Section 19(g) of the Exchange Act, 15 U.S.C. § 78s(g) (enforce compliance with rules).

In general, any securities brokerage firm must be a member of a SRO – either a registered national securities association, or a national securities exchange (or both). Section 15(b)(8), 15 U.S.C. § 78o(b)(8).

Defendant SEC, in short, has comprehensive oversight under federal law of the SROs. In Jevne v. Superior Court (JB Oxford Holdings, Inc.) (2005) 35 Cal.4th 935, 28 Cal.Rptr.3rd 685, 111 P.3d 954, the Court stated:

> The SEC next expressed these views in January 2003 in an amicus curiae brief submitted to the federal district court in *Mayo v. Dean Witter Reynolds, Inc.* (2003) 258 F.Supp.2d 1097 (*Mayo*). ... In that brief, the SEC stated: "The Commission is of the view that in light of the Commission's comprehensive oversight under federal law of the SROs...."

(Underline emphasis added.) Id. at 957.

3. For Purposes of FACA, SROs Are Not "Private"

SROs are only "private" in the sense that they are not federal agencies for purposes of affording them immunity from otherwise violations of constitutionally protected rights, which is not relevant to whether SROs are "quasi-public" entities for purposes of FACA. In ALDF, the Court rejected the application of such "private" reasoning to FACA by stating:

> Whether an organization has sufficient governmental characteristics to implicate the First Amendment is hardly the same

> question (nor does it even bear on the issue) as whether an organization is quasi-public for purposes of the Supreme Court's analysis in *Public Citizen.*

Id. at 429. In Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir.), cert. denied, 525 U.S. 982, 142 L. Ed. 2d 399, 119 S. Ct. 445, 119 S. Ct. 465 (1998), the Court summarized the issue as follows:

> A threshold requirement of any constitutional claim is the presence of state action. ... Private entities like the NYSE and the NASD may be held to constitutional standards if their actions are "fairly attributable" to the state.

Id. at 1200.

The Motion cites cases that do not involve the issue of whether SROs are "quasi-public" entities for purposes of FACA. In Desiderio v. NASD, 191 F.3d 198 (2nd Cir. 1999), the Court stated:

> A threshold requirement of plaintiff's constitutional claims is a demonstration that in denying plaintiff's constitutional rights, the defendant's conduct constituted state action. ... The NASD is a private actor, not a state actor.

Id. at 206. In Lang v. French, 974 F. Supp. 567 (E.D. La 1977), the Court stated:

> [S]ROs are private organizations that operate subject to a scheme of government regulation. They generally are not subject to the requirement applicable to a government agency. ... [S]elf-incrimination privilege does not apply to questioning in New York Stock Exchange proceeding.... [F]ifth, Sixth, and Seventh amendment to United States Constitution do not apply to New York Stock Exchange, which is not a government agency.... [N]ASD is not a federal agency....

Id. at 569.

The Motion cites irrelevant cases. There is no claim here that SROs are

government agencies. There is no constitutional or "state actor" issue here.

4. "Quasi-Public" Status, Not "Permeated," Is the Standard

In Public Citizen, the Court after, stating that advisory committees formed by "quasi-public" entities are "utilized" for purposes of FACA, tangentially mentioned that that comports well with the initial House and Senate bills, by stating:

> [F]ACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations ... "for" public agencies as well as "by" such agencies themselves.
>
> [I]t comports well with the initial House and Senate bills' limited extension to advisory groups "established," on a broad understanding of that word, by the Federal Government, whether those groups were established by the Executive Branch or by statute or whether they were the offspring of some organization created or permeated by the Federal Government.

(Emphasis added.) Public Citizen at 462-463. The amorphous concept of "permeated" is not the legal standard here. Even if it were, "in light of the Commission's comprehensive oversight under federal law of the SROs," SROs are "permeated" by defendant SEC and, thus, "quasi-public." See Section II.C.2, supra.

D. To Hold That SICA Is Not an Advisory Committee, Subject to FACA, Would Be Inconsistent With Congressional Intent

In Cummock v. Gore, 180 F.3d 282 (D.C. Cir. 1999), the Court described Congress's legislative purpose to protect against undue influence of industry leaders

and to open the advisory process to public scrutiny, by stating:

> Congress aimed, in short, "'to control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals.'"
>
> ...
>
> [I]n passing this legislation, Congress emphasized ... "the risk that governmental officials would be unduly influenced by industry leaders"....

Id. at 285-291. The facts here demonstrate that the secretive relationship between defendant SEC and SICA should be subject to public scrutiny.

SICA is a securities industry dominated advisory committee. (Compl. ¶¶ 1(B), 5-10.) SICA operates out of public view. (Compl. ¶¶ 12, 43, 1(B).) Defendant SEC forwarded plaintiff GREENBERG's Petition to SICA to obtain its advice and recommendations. (Compl. ¶¶ 13-16.) The procedures advocated in the Petition "are contrary to the procedures promulgated by SICA and/or its member SROs." (Compl. ¶ 13.) In part, the Petition seeks to "permit arbitration panel members, should they elect to do so, to conduct legal research, or, in the alternative, forbid SRO sponsored arbitration forums from restricting arbitrators from conducting legal research." (Compl. ¶ 13(A).) At one of its private meetings, SICA determined that the proposals "run counter to SROs goals" and "strict application of the law would be harmful to investors," while six representatives of defendant SEC sat silently. (Compl. ¶ 18.) The public, if present at this private SICA meeting, could have asked obvious questions with regard to SICA's understandings. "What are the 'SROs goals'?" "Upon what basis did SICA decide that 'strict application of the law would be harmful to investors'?" "Would 'strict application of the law' be harmful to the securities industry?" "Does SICA advocate that arbitrators consciously disregard the law in their decision-making process?"

It would be contrary to the purposes of FACA to allow SICA and defendant

SEC to continue to shield their activities from the disinfectant of sunlight. SICA, a securities industry dominated advisory committee, is supposed to provide unbiased advice to defendant SEC on arbitration rules and procedures governing the operation, by SICA's members (SROs), of the arbitration forums before which securities disputes are required to be heard. The SROs' members, securities brokerage firms, are the parties against whom public investors assert claims. Therefore, SICA's conflicts of interest are obvious and rampant. Public investors should have assurance that securities arbitration rules and procedures will provide a level playing field. Accordingly, there is no policy justification to exclude SICA from the application of FACA.

Defendant SEC's position is ironic. Normally, defendant SEC proclaims that full disclosure is the best remedy to prevent investment fraud. However, here, defendant SEC resists public access to information on how SICA secretly advises it on matters of substantial public investor concern.

E. When an Advisory Committee Is Formed by a "Quasi-Public" Entity, Subsequent Actual Management and Control Is Not Relevant In Determining Whether The Advisory Committee Is "Utilized"

1. ALDF Rejected "Actual Management and Control" Test

In ALDF, the Court, relying upon Public Citizen, rejected the contention that an advisory committee formed by a "quasi-public" entity is "utilized" only if a federal agency exercises "actual management and control" over the advisory committee by stating:

> [T]he definition given by the Court to an advisory committee utilized by the federal government focuses not so much on *how* it is

used but whether or not the character of its creating institution can be thought to have a quasi-public status.

...

[W]e also recognized, as indeed we were compelled to do by the Supreme Court's *Public Citizen* opinion, that if a committee advising the government were established by a "semiprivate" (read: quasi-public) agency instead of a government agency, it would meet the alternative test set forth by the Supreme Court.

...

[A]ppellees ... believe that ... we narrowed the *Public Citizen* test so that no advisory committee, including one established by a quasi-public organization, could be deemed utilized unless the circumstances met the management and control by the government test. We think appellees ... badly overread our opinion. We did not even refer to the alternative prong of the utilize test that comes from *Public Citizen, i.e.*, whether an organization that establishes an advisory committee can be described as quasi-public.

...

To sum up, under Public Citizen, the Guide Committee must be regarded as utilized by HHS because it relies on the Committee's work product and because it was formed by the NAS, a quasi-public entity.

(Underlined emphasis added.) Id. at 428-431.

Thus, the Court of Appeals specifically rejected the "actual management and control" test where an advisory committee is formed by a "quasi-public" entity. "Actual management and control" is not relevant to the "alternative prong of the utilize test." Id. at 430.

/ / / / /

2. Congress Rejected "Actual Management and Control" Test

The General Services Administration ("GSA") is "responsible for all matters relating to advisory committees." 5 U.S.C. App. 2, § 7(a). In response to the decision in ALDF, in order to limit the application of FACA, the GSA unsuccessfully urged Congress to subject all advisory committees, even those formed by "quasi-public" entities, to an "actual management and control" test. G. Martin Wagner, Associate Administrator, GSA, stated:

> Addition of the proposed language to the statute would make clear, however, that the 'actual management and control' test applies regardless of what entity creates the committee. ... The D.C. Circuit's recent decision in Animal Legal Defense Fund v. Shalala, 104 F.3d 324 (D.C. Cir. 1997), which established separate definitions of 'utilized' committees, depending on whether they are created by a 'quasi-public' institution, would be overruled, and a single, harmonious, and consistent construction of FACA's scope would be adopted.

Statement of G. Martin Wagner, Associate Administrator, Office of Governmentwide Policy, GSA: Hearing on H.R. 2977 Before Subcommittee on Government Management, Information and Technology, Committee on Government Reform and Oversight, 143 Cong. Rec. D1217-01 (105th Congress, 11/5/97).

Similarly, the Office of Management and Budget unsuccessfully urged Congress to include the same "actual management and control" test by stating:

> This letter presents the views of the Administration on proposed legislation that would amend the Federal Advisory Committee Act, 5 U.S.C. App. 2, to clarify that the Act applies to committees that are subject to actual management and control by federal officials.
>
> The need for this legislation was created by the recent decision ... in *Animal Legal Defense Fund, Inc. v. Shalala*....

> [T]here is a risk that other entities outside the Federal government might subsequently be deemed 'quasi-public' and thus subject to FACA.
>
> [C]ongress can remedy the problem created by the recent court decision by clarifying that a 'utilized' committee means one that is subject to actual management and control by a federal agency.

Letter dated October 28, 1997 of Franklin D. Raines, Director, Executive Office of the President, Office of Management and Budget, employed by the Subcommittee on Government Management, in lieu of a committee statement: Hearing on H.R. 2977, 143 Cong. Rec. H10578-02 (105th Congress, 11/9/97).

When Congress passed the Federal Advisory Committee Act Amendments of 1997 (Pub. L. No. 105-153), it rejected both requests. FACA subjects only advisory committees formed by two specified "quasi-public" entities to an "actual management and control" test by stating:

> For the purpose of this Act ... (2) The term "advisory committee" means any committee ... except that such term excludes ... (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.
>
> ...
>
> An agency may not use any advice or recommendation provided by the National Academy of Sciences or National Academy of Public Administration that was developed by use of a committee created by that academy under an agreement with an agency, unless-- (1) the committee was not subject to any actual management or control by an agency or an officer of the Federal Government...

(Emphasis added.) 5 U.S.C. App. 2 §§ 3, 15.

Congress intended that an "actual management and control" test not apply to advisory committees, e.g., SICA, formed by "quasi-public" entities, e.g., SROs.

3. ALDF Court Further Rejected an "Actual Management and Control" Test

In response to a petition for rehearing *in banc* of ALDF, Circuit Judge Silberman, who filed the original opinion for the Court, set forth a separate statement. He concurred in the denial of the petition and emphasized that an "actual management and control" test is not applicable where an advisory committee was formed by a "quasi-public" entity. Judge Silberman stated:

> [T]he government's management and control ... is a separate test that we have developed to deal specifically with advisory committees that are *not* formed by 'quasi-public' organizations.

(Italic emphasis in original.) Animal Legal Defense Fund v. Shalala, 114 F.3d 1209 (D.C. Cir. 1999).

4. The Motion Cites Inapplicable Cases

The Motion cites cases that do not involve advisory committees formed by "quasi-public" entities or federal agencies or committees formed to provide advice to a federal agency. Therefore, they are not applicable. See, e.g., Aluminum Co. of Am. v. National Marine Fisheries Serv., 92 F.3d 902, 905 (9th Cir. 1996) ["[B]RWG and the AWG were not 'groups' formed by, at the prompting of, or solely for the federal government."]; Byrd v. EPA, 174 F.3d 239, 241 (D.C. Cir. 1999) ["Under a contractual arrangement with EPA, ERG, a private environmental consulting firm, convened and conducted the peer review."].

ALDF rejected the relevance of Washington Legal Found. v. United States Sentencing Comm'n, 17 F.3d 1446 (D.C. Cir. 1994) by stating:

> In *Washington Legal Found. v. United States Sentencing Comm'n*.... The primary issue in the case was whether the Sentencing

> Commission was an 'agency'.... We held that it was not because ... the Sentencing Commission is part of the judicial branch.... [T]he quasi-public prong simply did not have any relevance.

Id. at 430.

5. Payment of Advisory Committee's Costs Is Irrelevant

Whether a federal agency provides funds to an advisory committee is not relevant. Public Citizen, 491 U.S. 440 at 461 ["(T)he Report manifested a clear intent not to restrict FACA's coverage to advisory committees funded by the Federal Government...." (Emphasis added.)].

III. VIOLATION OF ADMINISTRATIVE PROCEDURE ACT

Plaintiff GREENBERG's APA Claim is two-pronged. The Claim is based upon APA § 706(1), dealing with inaction ("unlawfully withheld or unreasonably delayed") and the APA § 706(2)(A) dealing with "action ... not in accordance with law." The former relates to defendant SEC's unreasonable delay in acting upon the Petition. It is independent of any FACA violation. The latter deals with defendant SEC's publication of a policy statement, which sets forth a course of action in violation of FACA.

A. Defendant SEC Violated APA § 706(1)

Defendant SEC has violated APA § 706(1) ["The reviewing court shall - (1) compel agency action unlawfully withheld or unreasonably delayed; ...."]. Defendant SEC has unlawfully failed to act upon the Petition and/or has unreasonably delayed making recommendations upon and transmitting the Petition

to the Commissioners in violation of Rule 192. The very nature of a claim under APA § 706(1) is that there has been no action and, thus, in order to state a claim, there is no need for "final" action.

"The APA provides relief for a failure to act in §706(1): 'The reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed.'" Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 62, 124 S. Ct. 2373, 159 L.Ed. 2d 137 (2004). "A 'failure to act' is not the same thing as a 'denial.' The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request...." Id. at 63. For purposes of APA enforcement, "[a]gency rules ... have the force of law." Id. at 65 n.2.

In Center For Biological Diversity v. Veneman, 394 F.3d 1108 (9th Cir. 2005), the Court found that a claim under APA § 706(1) is proper where an agency fails to do an act required by its regulations by stating:

> [T]he Supreme Court held in *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004) ('*SUWA*'), that a claim under § 706(1) 'can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.' *Id.* at 2379.
>
> ...
>
> [T]he Center may be able to assert a 'discrete agency action that [the agency] is required to take' under § 1276(d)(1) of the WSRA by alleging specific failures of the Forest Service to consider specific rivers when planning for specific projects.
>
> ...
>
> [T]he Center may be able to allege a failure to comply with the regulations promulgated by the Departments of Agriculture and the Interior....

Id. at 1109-1114.

The Complaint alleges that, after unreasonable delay, defendant SEC has failed to make recommendations and transmit the recommendations and the Petition to the Commissioners, as it is specifically required to do pursuant to Rule 192. In May 2005, plaintiff GREENBERG filed the Petition, where the relief sought would be beneficial to securities arbitrators, attorneys representing parties before SRO sponsored arbitration and public investors, including plaintiff GREENBERG. (Compl. ¶¶ 13, 3.) After approximately two (2) years, defendant SEC has failed and/or unreasonably delayed to act upon the Petition. (Compl. ¶¶ 15-21.) Rule 192 requires defendant SEC to make recommendations upon the Petition and transmit those recommendations and the Petition to the Commissioners. (Compl. ¶ 1(C).) Defendant SEC has made no recommendation. (Compl. ¶¶ 20-21.) Defendant SEC has forwarded the Petition to SICA, a securities industry dominated advisory committee, while defendant SEC should reasonably have known that SICA opposes the requests in the Petition, and failed to assign a return due date. (Compl. ¶¶ 13-21, 5-12.) Defendant SEC awaits a "formal response or final recommendation from SICA" before taking further action, without reasonable assurance that it will be forthcoming. (Compl. ¶ ¶ 20-21.)

The previously mentioned allegations are not dependent upon the FACA Claim. However, the propriety of the FACA Claim should buttress the allegations of unreasonable delay and would affect the design of appropriate relief.

This action does not seek to micromanage defendant SEC's recommendations, but to cause compliance with Rule 192 --- timely make a recommendation and transmit it, with the Petition, to the Commissioners. The Complaint does not seek an "interlocutory review of ongoing agency decisionmaking (sic)," but seeks enforcement of rights specifically afforded in Rule 192. (M.15:1-4.) Such is not a "review." APA § 706(1) deals with a federal agency's unreasonably delay or failure to act. Whether or not there has been any "final action" by defendant SEC, therefore, once again, is not relevant. There is no allegation that defendant SEC's

Commissioners are legally obligated to act upon the Petition in any particular manner, but that the Petition and recommendations are required to be transmitted to the Commissioners.

At best, the Motion asks this Court to determine, as a matter of law, whether defendant SEC's delay is unreasonable.

B. Defendant SEC Violated APA § 706(2)(A)

As previously noted, the second prong of the APA Claim contained in the Complaint deals with APA § 706(2)(A), which provides, "The reviewing court shall ... (2) hold unlawful and set aside agency action ... (A) ... not in accordance with law...." Defendant SEC promulgated a statement of policy to use SICA as an advisory committee in such a manner to violate FACA and has done so since 1977.

Defendant SEC promulgated Securities Exchange Act Release Nos. 34-12974 and 34-13470[2], which specified its policy of relying upon SICA for advice and recommendations concerning securities arbitration procedures. (Compl. ¶¶ 6-7.) "Agency action" includes "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice

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[2] "Designation of an Advisory Committee ... [T]he Commission will designate an advisory committee to develop specific recommendations for implementation of the investor dispute resolution system. Among other things, the advisory committee will be expected to submit to the Commission ... (c) recommendations concerning...." (Emphasis added.) Securities Exchange Act Release No. 34-12974 (November 15, 1976).

"The Securities and Exchange Commission today announced that ... the organization of such a conference by the self-regulatory agencies is a proper exercise of self-regulatory authority.... [T]he product of the conference (will) be ... along the line enunciated in Securities Exchange Release No. 34-12974 (November 15, 1976)...." (Emphasis added.) Securities Exchange Release No. 34-13470 (April 26, 1977).

requirements of an agency and includes...." 5 U.S.C. § 551 (13)(4). Defendant SEC's pronouncement of policy was announced approximately thirty (30) years ago and has been in effect since that time. (Compl ¶¶ 6-7, 10.) Defendant SEC's action was "final."

IV. MANDAMUS

"Mandamus" is one of a series of prayed for remedies, including, "such other and further relief as the Court may deem just and proper." (Compl. pages 19-20.) It was not pleaded as a claim for relief. Motions to dismiss are limited to claims for relief. Fed.R.Civ.P. 12(b)(6) ["[T]he following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted...."]. Mandamus is a remedy, not a cause of action. Accordingly, federal rules do not permit dismissal of a remedy. Hence, the motion to dismiss mandamus is improper.

V. OBJECTIONS TO PURPORTED EVIDENCE

While defendant SEC takes pains to convince the Court that it has not filed a Motion for Summary Judgment, it attempts to introduce purported facts that go beyond the four corners of the Complaint. Fed.R.Civ.P. 12(b). It attempts to cause the Court to decide the Motion based upon unsworn testimony, purported facts and allegations for which it filed no request for judicial notice, and none could be properly granted.

Plaintiff GREENBERG objects to defendant SEC's attempts to cause the Court to go beyond the four corners of the Complaint in deciding the Motion, e.g., "Factual Background: ... SICA, we briefly describe the origin and functions of that entity" even though it is described as being "for background purposes only." (M.3-4

and fns. 3 and 4.) In Maxcess, Inc. v. Lucent Techs., Inc., 433 F.3d 1337, 1340 n.3 (1lth Cir. 2005), cited in the Motion, the Court admitted a document as it was "central to a plaintiff's claim." The Court stated:

> [A] document outside the four corners of the complaint may still be considered if it is central to the plaintiff's claims.... [C]ontracts such as the one in this case are central to a plaintiff's claim.

Id. at 1340 n.3. Here, SICA's Twelfth Report is far from "central" to the allegations and was not "incorporated by reference" and not "integral" to support the allegations. (M.4:22 n.3.) (Compl. ¶ 8(D).) See Wietschner v. Monterey Pasta Co., 294 F. Supp. 2d 1102, 1109 (N.D. Cal. 2003). Similarly, neither SEC Release No. 34-16390 nor its purported content was referenced in the Complaint. (M.4:4-7.) Likewise, defendant SEC cites an article that allegedly appeared in the New York Times with respect to alleged characteristics of the NYSE. (M.12:9-10, 24-26 fn. 8.)

Defendant SEC claims, "While the SEC staff has sent plaintiff a copy of SICA's letter addressing his petition, the SEC has not yet taken final action regarding Petition 4-502." (M.6:3-5.) The statement contradicts allegations in the Complaint and attempts to introduce new material. (Compl. ¶ 21.)

In substance, defendant SEC claims/predicts that it will take final agency action with respect to the Petition. (M.15:8-9 ["once the SEC completes its consideration"]; M.15:17 ["once the SEC has completed its consideration"]; M.16:27-17.1 ["once the SEC acts on his rulemaking petition."]). The Complaint alleges otherwise. (Compl. ¶¶ 13-21.)

Plaintiff GREENBERG objects to defendant SEC's improper attempt to go beyond the four corners of the Complaint and requests that the Court not consider the purported evidence or information in ruling upon the Motion.

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VI. TEMPORARY STAY OF FOIA CLAIM MOOT

Plaintiff GREENBERG has no objection to a temporary stay, the specific terms of which are set forth in the Motion. (M.3:18-28 fn. 2.) However, the proposed temporary stay will be moot at or about the date of hearing of the Motion.

VII. CONCLUSION

To hold, as a matter of law, that SROs are not "quasi-public" entities or that SICA, an advisory committee that was formed by SROs, is not "utilized" by defendant SEC would be contrary to well-established legal authority and repeatedly stated understandings of Congress, defendant SEC and major participants in the securities industry. Opening an advisory committee to the disinfectant of sunlight would serve the public good, especially where the advisory committee is dominated by the securities industry and provides secret advice and recommendations to defendant SEC on matters of securities arbitration of customer disputes. Public investors should know of and be able to question SICA's advice, e.g., "strict application of the law would be harmful to investors," and its motives.

APA §§ 706(1) and (2)(A) are clearly applicable as to the facts pleaded in the Complaint.

At best, the Motion raises questions of fact as to whether SROs are "quasi-public" entities and/or whether defendant SEC's handling of the Petition was "unreasonably delayed."

WHEREFORE, plaintiff GREENBERG respectfully asks this Court to deny the Motion.

DATED: March 15, 2007

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HERBERT LESLIE GREENBERG
Plaintiff In Propria Persona

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is: 10732 Farragut Drive, Culver City, CA 90230-4105

Telephone No. (310) 838-8105; Facsimile No. (310) 838-8105.

On March 16, 2007 I served true copies of documents entitled:

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

upon the parties in this action addressed as stated on the attached service list:

[ ] **OFFICE MAIL:.** By placing in sealed envelope(s), which I place for collection and mailing today following the ordinary business practices. I am readily familiar with this office's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the United States Postal Service on the same day in the ordinary course of business.

[X] **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service at Culver City, CA, with first class postage thereon fully prepaid.

[ ] **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Culver City, CA, with Express Mail postage paid.

[ ] **HAND DELIVERY: I** caused to be had delivered each such envelope to the office of the addressee.

[ ] **FEDERAL EXPRESS BY AGREEMENT OF ALL PARTIES:** by placing in sealed envelope(s) designed by Federal Express with delivery fees paid or provided for, which I deposited in a facility regularly maintained by Federal Express or delivered to a Federal Express courier, at Culver City, CA.

[ ] **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

[ ] **FAX (BY AGREEMENT ONLY):** By transmitting the document by facsimile transmission. The transmission was reported complete and without error.

[X] **(Federal)** I declare that I am employed in the office of a member of the bar of this Court, at whose direction the service was made. I declare under penalty of perjury that the foregoing is true and correct.

DATED: March 16, 2007

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PAULETTE D. GREENBERG

HERBERT LESLIE GREENBERG v. SEC

United States District Court - Central District of California

Case No. CV 06-7878 GHK (CTx)

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