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66 Fed. Reg. 8912 (February 5, 2001) 10

1 The FACA issues here have focused on whether self-regulatory organizations
2 ("SROs"), *e.g.*, NEW YORK STOCK EXCHANGE, INC. ("NYSE"), NATIONAL
3 ASSOCIATION OF SECURITIES DEALERS, INC. ("NASD"), are "quasi-public"
4 entities for purposes of FACA. Pursuant to the prompting/behest of defendant SEC,
5 SROs formed the SECURITIES INDUSTRY CONFERENCE ON ARBITRATION
6 ("SICA"), a securities industry dominated advisory committee, for the purpose of
7 rendering recommendations and advice pertaining to the securities arbitration
8 process to defendant SEC, a federal agency.

9 The FACA claim was revised in the First Amended Complaint for
10 Declaratory and Injunctive Relief ("Amended Complaint") of plaintiff HERBERT
11 LESLIE GREENBERG ("GREENBERG") to include additional facts demonstrating
12 how SROs are "permeated by" and/or "closely tied to" defendant SEC. Other facts
13 demonstrate that defendant SEC, Congress, SROs and prominent participants in the
14 securities industry --- apparently recognizing defendant SEC's permeation of and
15 close ties to the SROs --- have repeatedly proclaimed and/or admitted that SROs are
16 "quasi-public" entities.

17 SROs are much more "permeated by" and/or "closely tied to" defendant SEC
18 than ACFR was to the OMB. *A fortiori*, SROs enjoy "quasi-public" status for
19 purposes of FACA.

20 21 ARGUMENT

22 23 **I. SICA IS AN ADVISORY COMMITTEE FOR PURPOSES OF FACA**

24 25 **A. SICA Is "Utilized" By Defendant SEC**

26
27 "A committee is subject to the provisions of FACA if it is ... (C) ... utilized by
28 one or more agencies, in the interest of obtaining advice or recommendations for ...

1 one or more agencies ... of the Federal Government." 5 U.S.C. App. 2, § 3(2). The
2 United States Supreme Court and Court of Appeals have held that an advisory
3 committee is "utilized" by a federal agency and, thus, subject to FACA, if the
4 advisory committee was formed by a "quasi-public" entity to render advice and
5 recommendations to the federal agency. Public Citizen at 460-3; ALDF at 424-431.
6 "Utilized" deals solely with who formed the advisory committee. Id. Any
7 subsequent relationship between the federal agency and the advisory committee is
8 not relevant. Id.

9
10 **B. The Allegations**

11
12 SICA is a securities industry dominated organized group that was formed, at
13 the prompting/behest of defendant SEC, by SROs (NYSE and NASD) to provide
14 defendant SEC, a federal agency, with advice and recommendations on securities
15 arbitration matters. Amended Compl. ¶¶ 5-9, 14-17. Defendant SEC initially
16 desired to form an "advisory committee," but, instead, prompted the SROs to form
17 SICA with the same characteristics that defendant SEC had contemplated for its
18 own "advisory committee." Amended Compl. ¶¶ 8-9. SROs are "permeated by"
19 and/or "closely tied to" defendant SEC, *e.g.*, by rendering recommendations and
20 advice to defendant SEC, gathering information requested by defendant SEC,
21 registering as a SRO with defendant SEC and, thus, legally obligating themselves to
22 serve the public while submitting to extensive supervision by defendant SEC.
23 Amended Compl. ¶¶ 13(A). Congress, defendant SEC, various SROs and
24 prominent securities industry trade groups have repeatedly determined and/or
25 admitted or adoptively admitted that SROs are "quasi-public" entities. Amended
26
27
28

1 Compl. ¶ 13(B-D).¹

2
3 **C. An Entity Enjoys "Quasi-Public" Status If It Is "Permeated**
4 **By" And/Or "Closely Tied To" The Federal Government**

5
6 The legislative history of FACA reflects Congress's intent of a "most liberal"
7 application of FACA to groups with which the Federal Government has established
8 a "close liaison" by stating:

9 During the 91st Congress, the Subcommittee on
10 Intergovernmental Relations held seven days of hearings.... The
11 hearings disclosed that the OMB ... had established close liaison with
12 an Advisory Council on Federal Reports (ACFR) composed entirely of
13 business officials from each of the major industries, with whom OMB
14 consulted before approving forms, questionnaires, surveys, or
15 investigatory requests to be circulated to such industries. ...

16 From these initial hearings ... the subcommittee's interest was
17 extended to the broader problems of advisory committees throughout
18 the Federal Government.

19 ...

20 What kind of committees would this bring into coverage under
21 the legislation? The intention of the legislation is to interpret the words
22 "established" and "organized" in their most liberal sense, so that when
23 an officer brings together a group by formal or informal means, by
24 contract or other arrangement, and whether or not Federal money is
25 expended, to obtain advice and information such group is covered by
26 the provisions of this bill. Examples of such groups are the Advisory

27
28 ¹ The Court did not previously consider these allegations. (Minute Order, May 4,

1 Council on Federal Reports and committees of the national
2 academies....

3 Senate Report (92nd Congress, 2nd Session) ("Senate Report") No. 92-1098 (1972), at
4 2 and 8. SROs at the prompting/behest of defendant SEC created SICA, an advisory
5 committee to render advice and recommendations to defendant SEC in lieu of the
6 advisory committee defendant SEC previously considered establishing for itself.
7 Amended Compl. ¶¶ 7-9. Thus, defendant SEC brought SICA together "by formal
8 or informal means, by contract or other arrangement ... to obtain advice and
9 information." Senate Report at 8. Congress intended that FACA apply to both
10 ACFR and national academies. Senate Report at 2 and 8. ACFR, unlike national
11 academies, was neither chartered nor funded by the Federal Government. Senate
12 Report at 2.

13 The Congressional admonition to interpret words "in their most liberal sense"
14 to render committees subject to FACA comports well with common use in the law
15 of corporations that "quasi-public" corporations are "private corporations that have
16 accepted from the state the grant of a franchise or contract involving the
17 performance of public duties." See 1 W. Fletcher, Cyclopedia of the Law of
18 Corporations § 63 (2006 online ed.). "The term 'quasi-public corporation' has been
19 applied without sharp distinction to (1) public service corporations operating under
20 private corporation laws and as private corporations and (2) those that organically
21 are 'quasi-public,' as well as partially public in their ends and purposes." Id.

22 Congress intended that advisory committees formed by ACFR be considered
23 "quasi-public" for purposes of FACA. The case that SROs are "quasi-public"
24 entities for purposes of FACA is much more compelling. ACFR was "composed
25 entirely of business officials from each of the major industries" who had
26 "established close liaison" with the relevant federal agency; whereas, defendant
27

28 2007 ["Order"], fn. 3).

1 SEC's relationship with SROs, includes, supervision of and delegation of securities
2 law enforcement duties to the SROs. Senate Report at 2; Amended Compl. ¶ 13(A).

3 In Public Citizen, dealing with an advisory committee formed by the
4 American Bar Association ("ABA"), an entity not created or permeated by the
5 Federal Government, the Court stated, in part:

6 [T]he (Senate) Report manifested a clear intent not to restrict
7 FACA's coverage to advisory committees funded by the Federal
8 Government.... [T]he examples the Senate Report offers - "the
9 Advisory Council on Federal Reports ... and committees of the national
10 academies ..." ... - are limited to groups organized by, or closely tied to,
11 the Federal Government, and thus enjoying quasi-public status.

12 ...

13 [F]ACA applies to advisory committees established by the
14 Federal Government in a generous sense of that term, encompassing
15 groups formed indirectly by quasi-public organizations ... "for" public
16 agencies as well as "by" such agencies themselves.

17 [T]he initial House and Senate bills' limited extension to
18 advisory groups "established," on a broad understanding of that word,
19 by the Federal Government, whether those groups were established by
20 the Executive Branch or by statute or whether they were the offspring
21 of some organization created or permeated by the Federal Government.

22 (Emphasis added.) Id. at 460-3. Public Citizen held that entities not chartered by
23 the Federal Government, but "closely tied to" or "permeated by" the Federal
24 Government enjoyed "quasi-public" status. Id. at 461. Public Citizen deals with the
25 ABA, "a private voluntary association of approximately 343,000 attorneys," and its
26 Standing Committee on Federal Judiciary. Id. at 440 and 443. SROs, unlike the
27 ABA, are federally licensed, supervised by a federal agency and delegated by
28 defendant SEC to enforce federal securities laws. Amended Compl. ¶ 13(A).

1 Public Citizen presented a "close question" when dealing with application of FACA
2 to the ABA's Standing Committee, but involves separation of powers issues that
3 militate against finding FACA applicability. Id. at 465 and 466 ["That construing
4 FACA to apply to the Justice Department's consultations with the ABA Committee
5 would present formidable constitutional difficulties is undeniable."] Here, there is
6 no separation of powers issue to militate against application of FACA to SICA.
7 Thus, as applicable here, Public Citizen holds that entities "permeated by" or
8 "closely tied to the Federal Government," *e.g.*, ACFR, enjoy "quasi-public status."

9 Following Public Citizen, ALDF, involving committees of the National
10 Academy of Sciences ("NAS"), the "paradigmatic example" of advisory committees
11 formed by a "quasi-public" entity that was created by (*vis-à-vis* "permeated by" or
12 "closely tied to") the Federal Government, the Court set forth the characteristics of
13 that example, by stating:

14 The National Academy of Sciences (NAS) ... was chartered by
15 Congress....

16 ...

17 [N]AS Committees were the "paradigmatic example" because the
18 NAS is a "quasi-public organization in receipt of public funds." ...
19 [T]he definition given by the Court to an advisory committee utilized
20 by the federal government focuses not so much on *how* it is used but
21 whether or not the character of its creating institution can be thought to
22 have a quasi-public status.

23 ...

24 [W]hat *is* part of the holding however, is its conclusion that by
25 employing the term "utilized," in addition to "established," Congress
26 had in mind an extension of the Act's coverage to include the offspring
27 of "quasi-public" organizations "permeated by the Federal
28 government."

1 ...

2 [Q]uasi-public does not have an independent meaning divorced
3 from the Court's reference in *Public Citizen*. The term merely stood for
4 a set of qualities that the Court thought critical. And the NAS is
5 imbued with those very characteristics:

6

7 [I]n *Public Citizen*, the Court asked only whether particular
8 committees asserted to be "utilized" by the government as FACA
9 advisory committees were formed (established) by a non-governmental
10 organization that was "created or permeated by the Federal
11 Government." 491 U.S. at 463.

12 ...

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

16 (Emphasis in original.) (Underline emphasis only added.) *Id.* at 424-31. The Court
17 set forth characteristics of the "paradigmatic example" of an advisory committee
18 chartered by the Federal Government. The specific characteristics of NAS are not
19 applicable here as SROs are not chartered by the Federal Government. As
20 applicable here, *ALDF* held that entities "permeated by the Federal Government,"
21 also, enjoy "quasi-public" status for purposes of FACA. *Id.* Further, defendant SEC
22 does rely upon SICA's "work product." Amended Compl. ¶¶ 7-9, 14-17, 19-27;
23 Answer to First Amended Compl. ¶ 39 and Affirmative Defense 1.a.²

24
25 ² Defendant SEC "relies on the Committee's work product" in its "deliberative
26 process." In response to the Freedom of Information Act claim in the Amended
27 Complaint, which is based upon a request for all documents dealing with its
28 communications with SICA, defendant SEC asserts, in part, the affirmative defense
of "FOIA Exemption 5, 5 U.S.C. 552(b)(5)." Answer ¶ 39 and Affirmative Defense
1.a. Exemption 5 is also known as the "deliberative process" privilege. *Maricopa*

1 SICA was specifically formed by SROs at the prompting/behest of defendant
2 SEC to render recommendations and advice to defendant SEC, a federal agency.
3 Amended Compl. ¶¶ 7-9. Defendant SEC "permeates" and/or is "closely tied to" the
4 SROs. Amended Compl. ¶ 13; Subsection D, *infra*. Thus, for purposes of FACA, the
5 SROs are "quasi-public" entities and, therefore, SICA was "utilized" by defendant
6 SEC.

7
8 **D. SROs Are "Permeated By" and/or "Closely Tied To"**
9 **Defendant SEC and, Thus, Enjoy "Quasi-Public Status"**

10
11 The term "self-regulatory organization" means any national securities
12 exchange, registered securities association, or registered clearing agency. 15 U.S.C.
13 § 78a, et. seq. ("Exchange Act") § 3(26)). The NYSE and NASD are SROs. SROs
14 are associations intended to set industry rules that rise above the interests of
15 particular firms and professionals. The relationship between defendant SEC and
16 SROs is much more extensive than the relationship between ACFR and the OMB.

17
18 **1. Defendant SEC Receives Advice and Recommendations**
19 **from SROs and Employs SROs to Gather Information on**
20 **Securities Matters**

21
22 SROs formed SICA, at defendant SEC's prompting/behest, exclusively to
23 provide advice and recommendations on securities arbitration matters to defendant

24
25

Audubon Soc. v. U.S. Forest Serv., 108 F.3d 1089 (9th Cir. 1997) ["To fall within
26 the "deliberative process" privilege of exemption 5, the materials in question must
27 be "predecisional" in nature and must also form part of the agency's "deliberative
28 process." ... A "predecisional" document is one "prepared in order to assist an
agency decisionmaker in arriving at his decision,"].

1 SEC and defendant SEC views SICA as its "sounding board." Amended Compl. ¶¶
2 5-9, 14-17. Defendant SEC solicits opinions, advice and/or recommendations of
3 and/or consults with SROs on securities related matters. Amended Compl. ¶
4 13(A)(2). Defendant SEC requests and/or encourages SROs to establish advisory
5 committees to render advice and/or recommendations to defendant SEC. Amended
6 Compl. ¶ 13(A)(3). SROs sponsor conferences to gather information and report that
7 information to defendant SEC. Amended Compl. ¶13(B)(10).

8 The relationship between ACFR and OMB was no different. Congress
9 concluded that those factors, alone, were sufficient to determine that ACFR enjoyed
10 "quasi-public" status.

11
12 **2. Congress, Defendant SEC and Major Participants In**
13 **The Securities Industry Have Repeatedly**
14 **Acknowledged That SROs Are "Quasi-Public" Entities**
15

16 Congress, defendant SEC, SROs and other major participants in the securities
17 industry have repeatedly acknowledged that SROs are, in substance, "permeated by"
18 and/or "closely tied to" defendant SEC.

19 As Congress has stated on a number of occasions, SROs are
20 'quasi-public agencies, not private clubs, and . . . their goal is the
21 prevention of inequitable and unfair practices and the advancement of
22 the public interest.' ³¹... 31 Securities Industry Report of the
23 Subcommittee on Securities, S. Doc. No. 13, 93d Cong., 1st Sess. 156
24 (1973).

25 Exchange Act Release No. 34-43860 (January 19, 2001); 66 Fed. Reg. 8912, 8913
26 (February 5, 2001). Amended Compl. ¶ 13(B)(1). Congress noted that SROs are
27 "quasi-public organizations, not private clubs." S. Rep. 94, 94th Cong., 1st Sess.
28

1 (April 14, 1975) at 29. *Accord*, 121 Cong. Rec. 10728, 10756 (April 17, 1975).
2 Amended Compl. ¶ 13(B)(2).

3 "A National Securities Exchange is a quasi-public institution." SEC Report
4 of Special Study of Securities Market, H.R. Doc. No. 95, 88th Cong., 1st Sess., 804
5 (1963). Amended Compl. ¶ 13(C)(1). ANNETTE NAZARETH, when serving as
6 SEC Commissioner and Director of defendant SEC's Division of Enforcement, has
7 stated that SROs are "quasi-public entities" and "quasi-public institutions."
8 Amended Compl. ¶ 13(C)(2)-(3).

9 Defendant SEC has adoptively admitted that SROs are "quasi-public" entities
10 when it allowed, without comment or correction, those it supervises and regulates to
11 proclaim publicly that a "quasi-public" status exists between defendant SEC and the
12 respective SROs. Amended Compl. ¶ 13(D). The SECURITIES INDUSTRY
13 ASSOCIATION, "which brings together the shared interests of nearly 600 securities
14 firms," has publicly stated, "SROs are 'quasi-public agencies'." Amended Compl. ¶
15 13(D)(1). The BOSTON STOCK EXCHANGE publicly stated, "SROs ... act as a
16 quasi-public entity responsible for oversight of the market and its participants."
17 Amended Compl. ¶ 13(D)(2). NYSE Chairman MARSHALL N. CARTER publicly
18 described the NYSE as a "quasi-public utility." Amended Compl. ¶ 13(D)(3).
19 NYSE Chairman WILLIAM H. DONALDSON, and, later, Chairman of defendant
20 SEC, publicly described the NYSE as "a quasi public utility." Amended Compl. ¶
21 13(D)(4).

22 Defendant SEC has repeatedly acknowledged that the SROs are, in substance,
23 "permeated by" and/or "closely tied to" defendant SEC.

24
25 **3. Defendant SEC Has Delegated Extensive Regulatory**
26 **Authority to SROs and Exercises Comprehensive**
27 **Oversight of SROs**
28

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

8 SROs are required to register with defendant SEC, to promulgate rules
9 governing the conduct of their members, and to enforce compliance by their
10 members with those rules and with the federal securities laws. See Section 6 of the
11 Exchange Act, 15 U.S.C. § 78f (regarding securities exchanges); Section 15A of the
12 Exchange Act, 15 U.S.C. § 78o-3 (regarding securities associations); Section 19(g)
13 of the Exchange Act, 15 U.S.C. § 78s(g) (enforce compliance with rules).

14
15
16
17 ³ The full extension of defendant SEC's argument is that any entity, if not chartered
18 by the Federal Government, even though regulated by a federal agency, could never
19 be "permeated by" or be "closely tied to" that federal agency for purposes of FACA.
20 In substance, defendant SEC argues that FACA is inapplicable to all advisory
committees of all regulated entities, unless the regulated entity was "formed" by the
Federal Government.

21 Defendant SEC claims that its relationship with SROs does not differ from its
22 regulatory supervision of securities brokerage firms. Motion at 8, fn. 12. However,
23 securities brokerage firms, which SROs supervise pursuant to delegation of
24 defendant SEC's enforcement authority, have no delegated duty to supervise other
member firms or enforce securities laws.

25 Defendant SEC claims, without specificity, "FDIC closely oversees banks,
26 and the FAA closely regulates airlines." Motion at 8, fn. 12. No clarification was
27 presented as to what the "regulates" or "oversees" involves, how "closely" is defined
28 or how that compares to the relationship of defendant SEC with the SROs. Defendant SEC does not claim that the FDIC delegates its regulatory authority to "banks" or that the FAA delegates its regulatory authority to "airlines."

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

4 Defendant SEC has comprehensive oversight of the SROs. In Jevne v.
5 Superior Court (JB Oxford Holdings, Inc.) (2005) 35 Cal.4th 935, 28 Cal.Rptr.3rd
6 685, 111 P.3d 954, the Court stated:

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

13 Id. at 957.

14 If the aforesaid relationship between defendant SEC and the SROs ---
15 delegation of federal law enforcement duties and extensive supervision --- does not
16 demonstrate that the SROs are "permeated by" and/or "closely tied to" defendant
17 SEC, for purposes of FACA, then no regulated entity could ever qualify as "quasi-
18 public" for purposes of FACA. Neither Congress nor the Courts granted such an
19 exclusion from application of FACA.

20
21 **E. Federal Funding is Not a Requisite in Determining**
22 **Whether an Entity Is "Quasi-Public"**

23
24 FACA's applicability is not dependent upon whether a federal agency
25 provides funding. Public Citizen at 461 ["(T)he Report manifested a clear intent not
26 to restrict FACA's coverage to advisory committees funded by the Federal
27 Government...."] (Emphasis added.). "[W]hether or not Federal money is
28

1 expended(,) to obtain advice and information such group is covered by the
2 provisions of this bill." Senate Report at 8.

3
4 **F. Management and Control Test Is Not Applicable**

5
6 A management and control test applies only when an advisory committee is
7 formed by other than a "quasi-public" entity and a government agency "actually
8 took over the management and control of such a committee." ALDF at 429 ["We
9 recognized, however, that if a government agency actually took over the
10 management of such a committee, it would be brought under FACA."]. In the
11 within action, the Amended Complaint alleges that SICA was formed by "quasi-
12 public" entities. Amended Comp. ¶¶ 5-9, 13-14.

13
14 **II. TO HOLD THAT SICA IS NOT AN ADVISORY COMMITTEE,**
15 **SUBJECT TO FACA, WOULD BE INCONSISTENT WITH**
16 **CONGRESSIONAL INTENT**

17
18 In Cummock v. Gore, 180 F.3d 282 (D.C. Cir. 1999), the Court described
19 Congress's legislative purpose⁴ to protect against undue influence of industry leaders
20 and to open the advisory process to public scrutiny by stating:

21
22 ⁴ In opening the hearings, Senator Metcalf, who had been
23 requested by Subcommittee Chairman Edmund S. Muskie to preside,
24 set the theme of the inquiry:

25 What we are dealing with, in these hearings, goes to the
26 bedrock of Government decision making. Information is
27 an important commodity in this capital. Those who get
28 information to policymakers, or get information for them,
can benefit, their cause, whatever it may be. Outsiders can
be adversely and unknowingly affected. And decision-
makers who get information from special interest groups

1 Congress aimed, in short, "to control the advisory committee
2 process and to open to public scrutiny the manner in which government
3 agencies obtain advice from private individuals."

4 ...

5 [I]n passing this legislation, Congress emphasized ... "the risk
6 that governmental officials would be unduly influenced by industry
7 leaders"....

8 Id. at 285-291.

9 The facts here demonstrate that the secretive relationship between defendant
10 SEC and SICA should be subject to public scrutiny. It would be contrary to
11 Congress's intent to allow SICA and defendant SEC to continue to shield their
12 activities from the disinfectant of sunlight. There is no policy justification to
13 exclude SICA from the application of FACA.

14 The facts pleaded in the Amended Complaint set forth an example of where
15 SICA, operating in private, has the inclination and the ability to stifle Petitions for
16 Rulemaking that seek benefits for public investors. SICA is a securities industry
17 dominated advisory committee. Amended Compl. ¶¶ 5-9, 14. SICA operates out of
18 public view. Amended Compl. ¶¶ 18, 50. Defendant SEC forwarded plaintiff
19 GREENBERG's Petition for Rulemaking (SEC File No. 4-4-502)("Petition") to
20 SICA to obtain its advice and recommendations. Amended Compl. ¶¶ 19-21. The
21 procedures advocated in the Petition "are contrary to the procedures promulgated by

22
23 who are not subject to rebuttal because opposing interests
24 do not know about meetings --- and could not get in the
25 door if they did --- may not make tempered judgments. We
26 are looking at two fundamentals, disclosure and counsel,
27 the rights of people to find out what is going on and, if
28 they want, to do something about it.

(Senate Report at 4.)

1 SICA and/or its member SROs." Amended Compl. ¶ 19. In part, the Petition seeks
2 to "permit arbitration panel members, should they elect to do so, to conduct legal
3 research, or, in the alternative, forbid SRO sponsored arbitration forums from
4 restricting arbitrators from conducting legal research." Amended Compl. ¶ 19(A).
5 At one of its private meetings, SICA determined that the proposals "run counter to
6 SROs goals" and "strict application of the law would be harmful to investors," while
7 six representatives of defendant SEC sat silently. Amended Compl. ¶ 24(C). The
8 public, if present at this private SICA meeting, could have asked obvious questions
9 with regard to SICA's understandings. "What are the 'SROs goals'?" "Upon what
10 basis did SICA decide that 'strict application of the law would be harmful to
11 investors'?" "Would 'strict application of the law' be harmful to the securities
12 industry?" "Does SICA advocate that arbitrators consciously disregard the law in
13 their decision-making process?"

14 15 **III. OBJECTIONS TO PURPORTED EVIDENCE**

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17 Plaintiff GREENBERG objects to defendant SEC's attempts to cause the
18 Court to go beyond the four-corners of the Amended Complaint in deciding the
19 Motion, *e.g.*, "[W]e briefly revisit that entity's (SICA's) origin and functions."
20 Motion at 3:6-7.

21 While defendant SEC takes pains to convince the Court that it has not filed a
22 Motion for Summary Judgment, it attempts to introduce purported facts that go
23 beyond the four-corners of the Amended Complaint. Motion at 4, fn. 3. Defendant
24 SEC attempts to cause the Court to decide the Motion based upon unsworn
25 testimony, purported facts and allegations for which it filed no request for judicial
26 notice, and none could be properly granted. Fed. R.Civ. P. 12(b).

27 Contrary to the pleaded allegations, defendant SEC attempts to portray SICA
28 as an unbiased group as opposed to "a structured group dominated by the securities

1 industry" "formed by SROS, at the prompting/behest and with the guidance of
2 defendant SEC, for the specific purpose of obtaining advice and recommendations
3 on matters related to rules governing arbitration before forums sponsored by SROs."
4 Motion at 3:11 - 4:11; Amended Compl. ¶¶ 6-7. Disputes as to the characterization
5 of an advisory committee is not new.⁵ Additionally, defendant SEC incorrectly
6 implies that FACA is not applicable where the product of an advisory committee
7 might be put forth for public review and comment. Motion at 4:8-11.⁶ Further,
8 without any substantiation or clarification, defendant claims, "FDIC closely
9 oversees banks, and the FAA closely regulates airlines." Motion at 8, fn. 12.

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12 ⁵ "The Standing Committee purported to be nonpartisan, although in recent times
13 that proposition has been in dispute. See Association of American Physicians and
14 Surgeons, Inc. v. Clinton, 997 F.2d 898, 906 n.4 (D.C. Cir. 1993)." ALDR at 428.

15 ⁶ The argument was rejected in California Forestry Association v. United States
16 Forrest Service, 102 F.3d 609 (D.C. Cir. 1996). The Court stated, in pertinent part:

17 [W]e conclude that SNEP is subject to the requirements of
18 FACA.... CFA also seeks an order enjoining the Forest Service from
19 relying on the SNEP report. ... [T]he Forest Service contends that even
20 though the SNEP study was not produced in compliance with FACA,
21 CFA will not be aggrieved by the Forest Service's use of the study in
22 any rulemaking because the rulemaking will be subject to full notice
23 and comment and ultimately to judicial review. In response CFA
24 contends that it has already been denied an adequate opportunity to
25 review the scientific evaluations used to produce the report, the
underlying evaluations are not now effectively reviewable and the
integrity of the report has therefore been irreparably compromised. We
cannot assess these competing claims at this stage and therefore remand
to the district court to fashion an appropriate remedy in the first
instance.

26 Id. at 613-4. Further, unless a rule or regulation is proposed, advice or
27 recommendations received from trade dominated advisory committees would not be
28 presented for public comment. The investing public might never learn of SICA's
anti-consumer recommendations to defendant SEC. Amended Compl. ¶¶ 23-27.

1 In Maxcess, Inc. v. Lucent Techs., Inc., 433 F.3d 1337, 1340 n.3 (11th Cir.
2 2005), the Court admitted a document as it was "central to a plaintiff's claim." The
3 Court stated:

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

7 Id. at 1340 n.3. Here, unspecified "documents (allegedly) expressly referenced in
8 plaintiff's Amended Complaint" are not "integral" to support the allegations. Motion
9 at 4, fn 3. See Wietschner v. Monterey Pasta Co., 294 F. Supp. 2d 1102, 1109
10 (N.D. Cal. 2003). Similarly, the Amended Complaint does not refer to SEC Release
11 No. 34-16390 nor its purported content. Motion at 3:21-25.

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

15 16 **IV. CONCLUSION**

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18 ACFR, a group of business officials, not chartered by the Federal
19 Government, is the often-cited quintessential example of a "quasi-public" entity for
20 purposes of FACA. Facts pleaded in the Amended Complaint demonstrate that
21 SROs are much more "closely tied to" and "permeated by" the Federal Government
22 than ACFR. To hold that SROs are not "quasi-public" entities for purposes of
23 FACA, would, contrary to Congressional intent, exempt advisory committees
24 formed by groups similar to ACFR from application of FACA.

25 Opening an advisory committee to the disinfectant of sunlight, especially one
26 dominated by the securities industry, which provides secret advice and
27 recommendations to defendant SEC on matters of securities arbitration of customer
28 disputes, would serve the public good. It would comport well with Congress's

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admonition to "interpret ... words ... in their most liberal sense," and, as the Court acknowledged, "on a broad understanding," to cause FACA to be applicable.

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

DATED: October 17, 2007 _____
HERBERT LESLIE GREENBERG

1 /___/ HAND DELIVERY: I caused to be hand delivered each such envelope to the
2 office of the addressee.

3 /___/ ELECTRONIC MAIL: By transmitting the document by electronic mail to
4 the electronic mail address as stated above.

5 /___/ (Federal) I declare that I am employed in the office of a member of the bar of
6 this Court, at whose direction the service was made.

7
8 Pursuant to California Rules of Court, Rule 201, and the Local Rules of the
9 United States District Court, I certify that all originals and service copies (including
10 exhibits) of the papers referred to herein were produced and reproduced on paper
11 purchased as recycled, as defined by section 42202 of the Public Resources Code.

12 Executed on October 17, 2007 at Culver City, California.

13 I declare under penalty of perjury under the laws of the State of California
14 that the foregoing is true and correct.

15 _____
16 PAULETTE D. GREENBERG

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