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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14
15 HERBERT LESLIE GREENBERG, :

16 Plaintiff, :

17 v. :

18
19 UNITED STATES SECURITIES
20 AND EXCHANGE COMMISSION, :

21 Defendant. :

Civil Action No.
CV 06-7878-GHK (CTx)

**DEFENDANT UNITED STATES
SECURITIES AND EXCHANGE
COMMISSION'S REPLY
IN SUPPORT OF MOTION
TO DISMISS PLAINTIFF'S
FACA CLAIM**

Date: November 19, 2007
Time: 9:30 a.m.
Judge: Hon. George H. King

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1 Plaintiff continues to argue that the Securities Industry Conference on
2 Arbitration (“SICA”) is a creation of the self-regulatory organizations (“SROs”),
3 that SROs are “quasi-public entities” and thus, that SICA is an advisory committee
4 subject to the provisions of the Federal Advisory Committee Act (“FACA”). The
5 most telling thing about plaintiff’s argument, however, is what it ignores. In its
6 May 4, 2007 Order, this Court held that, to establish that the SROs are “quasi-
7 public” entities for FACA purposes, plaintiff needed to demonstrate that:

- 8 (1) * * * the SROs were formed by the government;
- 9 (2) * * * [the SROs] are funded by the government; and
- 10 (3) * * * [the SROs] were formed for the explicit purpose of furnishing
11 advice to the Government.

12 May 4, 2007 Order at 4-5, citing *Animal Legal Defense Fund v. Shalala*, 104 F.3d
13 424, 429 (D.C. Cir. 1997) (“[w]hat matter[s]” in determining if an entity is quasi-
14 public for FACA purposes is “who formed and funded it, and whether it was
15 formed ‘for the explicit purpose of furnishing advice to the Government’”).

16 Neither plaintiff’s amended complaint nor his Opposition to the SEC’s
17 current motion to dismiss (“Opposition”) demonstrates – or even addresses at all –
18 any of these factors. Indeed, his Opposition abjectly fails to refer either to this
19 holding in the May 4 Order or the corresponding holding in *ALDF*.

20 Beyond this, as in his amended complaint, plaintiff’s Opposition merely
21 rehashes facts and arguments previously rejected by this Court.¹ Thus, plaintiff’s
22 amended FACA claim should be dismissed with prejudice pursuant to Federal Rule

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25 ¹ In response to the SEC’s demonstration that plaintiff’s allegations in his
26 amended complaint merely repeat his prior allegations, plaintiff’s only response is
27 that he has found a few more instances where an official referred to an SRO as
28 “quasi-public” without reference to FACA. *See Opp.* at 5 n.1. As discussed
below, p. 7, those references cannot salvage his amended complaint.

1 of Civil Procedure 12(b)(6).²

2 I. **The SROs Are Not Quasi-Public for Purposes of FACA.**

3 Plaintiff argues that the SEC utilizes SICA through SROs that are “quasi-
4 public” arms of the SEC for purposes of FACA. But just as with his amended
5 complaint, plaintiff’s Opposition fails to state any of the facts this Court cited as
6 essential to find that the SROs were created or funded by the SEC, or formed for
7 the express purpose of furnishing advice to the SEC.

8 A. **Plaintiff Does Not Meet the Criteria Set Forth by *ALDF* and this**
9 **Court.**

10 1. **The SROs are not formed or funded by the SEC.**

11 As the SEC has shown, the amended complaint lacks any allegations that
12 would show that the SROs are formed or funded by the SEC. *See* SEC Br. at 7-8.
13 Nothing in plaintiff’s Opposition can cure these deficiencies. While he concedes
14 that the SROs are privately created and privately funded, he suggests in his factual
15 recitation – but omits from his argument – that the SEC somehow “formed” the
16 SROs by approving their registrations as SROs. *Opp.* at 4. This attempt to distort
17 the meaning of the word “form” is meritless. Government approval of a private
18 entity’s – such as an SRO’s – registration is a far cry from the actual formation of

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20 ²Plaintiff’s contention in his Opposition that the SEC improperly seeks to
21 introduce evidence in a motion to dismiss, *Opp.* at 17-19, is misguided. The SEC
22 cited documents quoted in the amended complaint. *See* SEC Br. at 3-4. It is
23 axiomatic that “a document is not ‘outside’ the complaint if the complaint
24 specifically refers to the document.” *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th
25 Cir. 1994); *see Cooper v. Pickett*, 122 F.3d 1186, 1192 (9th Cir.) (“a court ruling
26 on a motion to dismiss may consider the full texts of documents which the
27 complaint quotes only in part”), *superseded on other grounds*, 137 F.3d 616 (9th
28 Cir. 1997). Moreover, the background facts to which plaintiff objects only relate
to the point that the SEC did not “establish” SICA, which plaintiff concedes, *see*
Opp. at 10 (“SROs formed SICA”), and plaintiff does not challenge the accuracy
of these facts. *Id.* at 17-19.

1 an entity which was at issue in *ALDF*. See May 4 Order at 4 n.5 (noting that, in
2 *ALDF*, the National Academy of Sciences was held to be quasi-public for purposes
3 of FACA because it “was created by Congress to answer the government’s requests
4 for information, and was compensated by the government for performing these
5 tasks”).

6 Plaintiff next attempts to dismiss the telling lack of federal funding of the
7 SROs by arguing that “[f]ederal funding is not a requisite in determining whether
8 an entity is ‘quasi-public.’” Opp. at 14-15, citing *Public Citizen v. Dep’t of Justice*,
9 491 U.S. 440 (1989). This argument is completely off point. The reference in
10 *Public Citizen* concerned government funding of *advisory committees* themselves,
11 not quasi-public entities. As *ALDF* and the May 4 Order made clear, whether the
12 SROs are “quasi-public,” so that their committees (like SICA) are therefore subject
13 to FACA, largely turns on the public funding of the *SROs*. See May 4 Order at 3-4,
14 citing *ALDF*, 104 F.3d at 429. Again, it is crucial – and undisputed – that the SEC
15 provides no funding to the SROs or to SICA.

16 **2. The SROs were not formed for the explicit purpose of**
17 **furnishing advice to the SEC.**

18 The SEC has also shown that plaintiff’s amended complaint contains no
19 allegation that the SEC formed the SROs for the explicit purpose of furnishing
20 advice to the SEC. See SEC Br. at 7-8. Nothing in plaintiff’s Opposition salvages
21 this fatal flaw in his FACA claim.

22 Plaintiff attempts to gloss over this deficiency by stating that the SEC seeks
23 advice or consults with the SROs, has encouraged them to establish committees
24 like SICA, and that “SROs sponsor conferences to gather information and report
25 that information to [the] SEC.” Opp. at 11. None of these allegations, even if true,
26 says anything about whether the SROs were *established for the explicit purpose of*

1 *furnishing advice to the SEC*, which – as this Court held – is the relevant inquiry.
2 May 4 Order at 4 (citing *ALDF*). Instead, as the SEC has noted previously, it is
3 clear that the SROs are independent entities that were created for business purposes
4 (notably, some of them have issued publicly traded stock), not for the purpose of
5 advising the SEC. *See* SEC Brief at 7-8, n.11. Thus, plaintiff utterly fails to show
6 that the SROs were created expressly to advise the SEC.

7 **B. Plaintiff's Other Quasi-Public Arguments Also Fail.**

8 Having failed to identify any facts in his amended complaint that support any
9 of the three prongs of the “quasi-public” test, as set forth by *ALDF* and this Court,
10 or even to mention those factors at all, plaintiff suggests other reasons why the
11 SROs should be deemed quasi-public for FACA purposes. Each is immaterial and
12 unpersuasive.

13 **1. The SEC's Oversight of Private SROs Does Not Convert**
14 **Them into Quasi-Public Entities for FACA Purposes.**

15 Plaintiff attempts to reargue his assertion that the SROs are quasi-public
16 because of the SEC's oversight responsibilities. *See* Opp. at 12-14 (stating, *inter*
17 *alia*, that the SROs “are required to register with defendant SEC, * * * promulgate
18 rules governing the conduct of their members, and * * * enforce compliance by [the
19 SRO] members with those rules and with the federal securities laws,” and that “the
20 SEC has comprehensive oversight of the SROs”). These allegations are palpably
21 insufficient to show that the SROs are quasi-public under FACA.

22 Indeed, they are nothing new. In its May 4 Order, the Court noted – as
23 plaintiff had already asserted – that the SROs “are heavily regulated bodies that are
24 required by statute to undertake various actions ‘in the public interest.’” May 4
25 Order at 3. The Court in May thus squarely rejected plaintiff's argument that SEC
26 oversight of SROs makes them quasi-public. *See also id.* at 4 (noting plaintiff's
27 allegations that the

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1 SROs are “amenable/subject to strict management by the SEC through [its]
2 exercise of regulatory authority, closely tied to the policies of [the] SEC and
3 obligated to enforce securities laws,” and finding those allegations insufficient to
4 establish that the SROs are “quasi public”). Order at 4. Plaintiff’s repetition of this
5 argument cannot alter this result.³

6 Next, plaintiff repeatedly argues that the SEC “permeates” the SROs, and
7 that this renders them quasi-public. *See* Opp. at 5-10. But this rote incantation of
8 the term “permeate” is unpersuasive because it is out of context. In context, as
9 *ALDF* and this Court made clear, a federal agency does not “permeate” an entity
10 (the term used in *Public Citizen*), so as to render it “quasi-public” for FACA
11 purposes, unless the agency formed and funded it. Again, it bears stressing that the
12 National Academy of Sciences – the only quasi-public entity held to be permeated
13 by the federal government for FACA purposes – was chartered by Congress,
14 funded by the government and has a duty to “whenever called upon by any
15 department of the Government, investigate, examine, experiment, and report upon
16 any subject of science or art.” *ALDF*, 104 F.3d at 425.

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³ The SEC noted that if this Court were to accept plaintiff’s argument – that comprehensive federal oversight made an entity quasi-public under FACA – innumerable purely private entities would suddenly qualify as quasi-public. SEC Brief at 8 n.12. Plaintiff’s response to this contention, Opp. at 13 n.3, is meritless. But what is most telling is his apparent incredulity that “defendant SEC argues that is inapplicable to all advisory committees of all regulated entities, unless the regulated entity was ‘formed’ by the federal government.” *Id.* This is partially correct: The SEC does indeed argue that the entity must be *formed by, funded by, and formed with the explicit purpose of furnishing advice to* the federal government. But what plaintiff apparently fails to realize is that the SEC makes this argument because this is the test set forth in *ALDF* and by this Court.

1 **2. Plaintiff's Citation to References to the SROs as "Quasi-**
2 **Public" Outside the FACA Context is Neither New nor**
3 **Meritorious.**

4 Plaintiff once again argues that the SROs are quasi-public because members
5 of Congress, along with certain SEC and SRO officials, at times have used the term
6 "quasi-public." *See* Opp. at 11-12; *see also id.* at 6 (citing the "common use in the
7 law of corporations" of the term "'quasi-public' corporations"). But these
8 allegations are in substance identical to the ones that the Court previously found
9 insufficient to deem an entity quasi-public under FACA. Indeed, the Court
10 previously wrote, in finding that plaintiff had not stated a valid FACA claim, that
11 such statements would not determine the outcome of this case because
12 being "quasi-public" as a matter of common parlance in corporate law
13 does not necessarily render an entity "quasi-public" for the purposes
14 of FACA.

15 May 4 Order at 3. Just as before, these out-of-context allegations fail to
16 demonstrate that the SROs are quasi-public under FACA.

17 **II. SEC Does Not "Utilize" SICA.**

18 Since plaintiff has failed to establish that the SROs are "quasi-public"
19 entities for purposes of FACA in either his amended complaint or his Opposition to
20 the Motion to Dismiss, he is left only with the half-hearted argument that the SEC
21 directly "utilizes" SICA as that term is applied under FACA.⁴ Plainly, however,
22 the SEC does not utilize SICA in this manner. The Supreme Court has held that an
23 agency "utilizes" an entity under FACA only where that entity is funded by or
24 otherwise "amenable to the strict management [of] agency officials." *Public*

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27 ⁴ While plaintiff in a heading argues that "SICA is utilized by defendant
28 SEC," Opp. at 3, he elsewhere appears to have abandoned this argument, focusing
only on the argument that SICA was allegedly created by "quasi-public" SROs.

1 *Citizen*, 491 U.S. at 457-58; *see also Alcoa v. National Marine Fisheries Serv.*, 92
2 F.3d 902, 905 (9th Cir. 1996) (entity is utilized under FACA only where it is “so
3 closely tied to [the Agency] as to be amenable to strict management”). Even if an
4 agency affirmatively solicits the views of the entity or relies upon its
5 recommendations, that is not enough for the agency to be deemed to “utilize” the
6 entity for FACA purposes. *Id.*

7 Any allegation that the SEC has “utilized” SICA directly must fail. Plaintiff
8 does not allege that the SEC strictly manages SICA. Indeed, this Court, in initially
9 dismissing plaintiff’s FACA claim in its entirety, implicitly held that plaintiff had
10 failed to show that the SEC has “utilized” SICA. Plaintiff has added no new facts
11 to this argument, and the SEC has shown that the “facts” he now cites are
12 insufficient to find that the SEC has “utilized” SICA for the purposes of FACA.
13 *See SEC Br. at 9-10.*⁵

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23 ⁵ Apparently believing that it shows that the SEC “utilizes” SICA, plaintiff
24 cites as supposed proof that the SEC “relies upon” SICA the fact that the SEC has
25 asserted the deliberative-process privilege to withhold certain documents he has
26 sought under the Freedom of Information Act. *See Opp. at 9 n.2.* This argument
27 fundamentally misapprehends the SEC’s assertion of the deliberative-process
28 privilege. The SEC is not trying to protect SICA’s deliberations; rather the SEC is
seeking to protect its own internal pre-decisional deliberations concerning possible
responses to activities or proposals of SICA.

1 **CONCLUSION**

2 For the foregoing reasons and the reasons stated in the SEC's Memorandum
3 of Points and Authorities in Support of Motion to Dismiss, this Court should grant
4 the SEC's motion to dismiss plaintiff's FACA claim with prejudice.

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6 Respectfully submitted,

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13 Counsel for the Securities and
14 Exchange Commission

15 DATED: November 7, 2007

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2 **PROOF OF SERVICE**

3 I am over the age of 18 years and not a party to this action. My business address is:

4 U.S. SECURITIES AND EXCHANGE COMMISSION, 100 F Street, N.E.,
5 Washington, D.C. 20549-9612

6 Telephone No. (202) 551-5163; Facsimile No. (202) 772-9263.

7 On November 7, 2007, I served true copies of documents entitled
8 **DEFENDANT UNITED STATES SECURITIES AND EXCHANGE
9 COMMISSION'S REPLY IN SUPPORT OF MOTION TO DISMISS
10 PLAINTIFF'S FACA CLAIM** upon the parties to this action addressed as stated
11 on the attached service list:

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

18 **PERSONAL DEPOSIT IN MAIL:** By placing in sealed
19 envelope(s), which I personally deposited with the U.S. Postal Service
20 at Washington, D.C., with first class postage thereon fully prepaid.

21 **EXPRESS U.S. MAIL:** Each such envelope was deposited in a
22 facility regularly maintained at the U.S. Postal Service for receipt of
23 Express Mail at Washington, D.C., with Express Mail postage paid.

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

26 **FEDERAL EXPRESS BY AGREEMENT OF ALL PARTIES:** by
27 placing in sealed envelope(s) designated by Federal Express with delivery
28 fees paid or provided for, which I deposited in a facility regularly maintained
by Federal Express or delivered to a Federal Express courier, at Washington,
D.C.

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.

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

3 Date: November 7, 2007


Kristin S. Mackert

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6 **HERBERT LESLIE GREENBERG v. SEC**
7 **United States District Court - Central District of California**
8 **Case No. CV 06-7878 GHK (CTx)**

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