

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-7878-GHK (CTx) Date November 29, 2007

Title *Greenberg v. SEC*

Presiding: The Honorable GEORGE H. KING, U. S. DISTRICT JUDGE

Beatrice Herrera

N/A

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None

None

Proceedings: (In Chambers) Order Re: Motion to Dismiss Plaintiff's FACA Claim

This matter is before the Court on Defendant Securities and Exchange Commission's ("SEC") Motion to Dismiss Plaintiff's FACA Claim ("Motion"). We have considered the papers filed in support of and opposition to this Motion, and deem this matter appropriate for resolution without oral argument. L.R. 7-15.

I. Motion to Dismiss Standard

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the court must accept the allegations of fact in the complaint as true and construe them in the light most favorable to the plaintiff. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). However, we need not accept as true conclusory allegations or legal characterizations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *Transphase Sys., Inc. v. S. Cal. Edison Co.*, 839 F. Supp. 711, 718 (C.D. Cal. 1993). Claims should be dismissed only when there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Further, if dismissal is warranted, leave to amend should be granted, even if the plaintiff does not request it, unless the court "determines that the pleading could not possibly be cured by the allegation of other facts." *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

II. Federal Advisory Committee Act ("FACA")

In our May 4, 2007 Order, we dismissed Plaintiff's FACA claim, with leave to amend. Plaintiff filed a First Amended Complaint ("FAC"), re-alleging that the Securities Industry Conference on Arbitration ("SICA") is an "advisory committee" pursuant to FACA, and that SICA has failed to comply with the requirements of FACA. Thus, Plaintiff seeks an injunction barring the SEC from consulting with SICA on rulemaking petitions, including a pending petition filed by Plaintiff.

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FACA defines “advisory committee” as: “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is— . . . *established* or *utilized* by one or more agencies[.]” 5 U.S.C. Appx. 2 § 3(2)(C) (emphasis added). As we explained in our May 4 Order, FACA covers committees that are literally “established” by federal agencies as well as those that are established *for* agencies. The latter class of committees falls under the term “utilized.” See *Aluminum Co. of Am. v. Nat. Marine Fisheries Serv.*, 92 F.3d 902, 905 (9th Cir. 1996). There are two subsets of “utilized” committees. See *Animal Legal Defense Fund, Inc. v. Shalala* (“ALDF”), 104 F.3d 424, 428, 431 (D.C. Cir. 1997). First, there are “group[s] organized by a nongovernmental entity but nonetheless so ‘closely tied’ to an agency as to be amenable to ‘strict management by agency officials.’” *Aluminum Co.*, 92 F.3d at 905 (quoting *Food Chem. News v. Young*, 900 F.2d 328, 332-33 (D.C. Cir. 1990)). Second, “utilized” advisory committees include groups that are established by “quasi-public” agencies. *ALDF*, 104 F.3d at 428, 431.

Plaintiff acknowledges that the “strict management” test is not applicable in this case. (Pl.’s Opp’n 15.) Plaintiff’s claim falls only under the second type of “utilized,” arguing that SICA was created by the the Self-Regulatory Organizations (“SROs”), the SROs are “quasi-public entities,” and therefore, SICA is an advisory committee under FACA. Thus, as with our May 4 Order, the determination of this Motion depends on whether the SROs are “quasi-public.”

“[Q]uasi-public does not have an independent meaning divorced from the Court’s reference” in *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440 (1989). *ALDF*, 104 F.3d at 429. The term “quasi-public” merely stood for a set of characteristics that the Court thought critical. What mattered to the Court in *Public Citizen* was (1) whether the SROs were formed by the government; (2) whether they are funded by the government; and (3) whether they were formed for the explicit purpose of furnishing advice to the Government. *Id.* Plaintiff argues that an entity is also “quasi-public” when it is “permeated by the federal government.” *Id.* at 429 (emphasis added). Although this statement is technically correct, Plaintiff completely divorces this phrase from its meaning in *ALDF* and *Public Citizen*. Plaintiff argues that the SROs are “permeated” by the federal government, but in a different way than was at issue in *ALDF*. He states that the specific characteristics discussed by the court in *ALDF* are not applicable in this case, but that what matters is that “*ALDF* held that entities ‘permeated by the Federal Government,’ also, enjoy ‘quasi-public’ status for purposes of FACA.” (Pl.’s Opp’n 9.) However, Plaintiff ignores that *ALDF* states that whether the SROs are “quasi-public” must be viewed in the specific context in which the term was used by the Supreme Court in *Public Citizen*. *ALDF*, 104 F.3d at 429.

Plaintiff attempts to provide his own definition of what it means to be “permeated by the federal government,” and thus, “quasi-public.” However, what mattered to the courts in *ALDF* and *Public Citizen* were the specific characteristics listed above, not the *conclusion* that entities permeated by the federal government are quasi-public. Plaintiff cannot simply ignore the reasoning and factual bases of the Court’s holding and provide his own interpretation of what “permeated” and “quasi-public” mean. Therefore, we reject Plaintiff’s interpretation and test the adequacy of Plaintiff’s allegations in the FAC in light of the three characteristics of “quasi-public” entities explicated in *ALDF* and *Public Citizen*.

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III. Plaintiff's Allegations

To the extent Plaintiff's argument is based on the same facts and allegations in his original Complaint, we reject these arguments for the same reasons noted in our May 4 Order. These arguments include: (1) members of Congress and participants in the securities industry have referred to the SROs as "quasi-public;" (2) the SEC exercises comprehensive oversight over the SROs; (3) the SEC receives advice and recommendations from SROs; and (4) to hold that SICA is not an advisory committee would be contrary to Congressional intent.

Even viewing the FAC's new allegations in the light most favorable to the Plaintiff, none of these allegations shows that the SROs were formed and funded by the government for the explicit purpose of furnishing advice to the government. Plaintiff alleges (1) that Congress created a system where the SROs self-regulate with SEC oversight; (2) the SROs must register with the federal government and that their registration can be revoked; (3) the SEC encourages the SROs to create committees to render advice and recommendations; (4) members of the SEC sometimes attend committee meetings or receive minutes of the meetings; (5) the SROs are obligated to enforce their members' compliance with securities laws and rules; and (6) the SROs' rule changes are subject to SEC approval. None of these allegations states any of the facts essential to a determination of whether the SROs are quasi-public bodies capable of establishing "utilized" advisory committees for an agency, as addressed in *ALDF*. Therefore, Plaintiff has failed to allege facts sufficient to show that the SROs are quasi-public and that SICA was created by quasi-public entities such that it is "utilized" by the federal government and subject to the strictures of FACA.

IV. Conclusion

Based on the foregoing, Defendant's Motion to Dismiss is hereby GRANTED. It is now clear that Plaintiff is unable to allege facts sufficient to state a FACA claim. As such, Plaintiff's FACA claim is DISMISSED with prejudice.

In light of this disposition, Plaintiff's claims under the Administrative Procedure Act ("APA") and the Freedom of Information Act ("FOIA") remain. The FOIA claim was stayed pending certain administrative action. Plaintiff is hereby ORDERED to file a report with the court on the status of the administrative action and the FOIA claim within twenty-one (21) days hereof.

IT IS SO ORDERED.

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