THOMAS J. KARR
KRISTIN S. MACKERT
SARAH E. HANCUR, *pro hac vice motion pending*
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9612
Telephone: (202) 551-5172 (Ms. Mackert)
Facsimile: (202) 772-9263
E-mail: mackertk@sec.gov

Local Counsel:
GREGORY C. GLYNN, Cal Bar #039999
Securities and Exchange Commission
5670 Wilshire Boulevard, 11th Floor
Los Angeles, CA 90036-3648
Telephone: (323) 965-3890
Facsimile: (323) 965-3908
E-mail: glynng@sec.gov

Counsel for the Securities and Exchange Commission

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HERBERT LESLIE GREENBERG, Plaintiff, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant.	Civil Action No. CV 06-7878-GHK (CTx) **DEFENDANT UNITED STATES SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT** Date: August 18, 2008 Time: 9:30 a.m. Judge: Hon. George H. King

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES **Page**

FEDERAL STATUTES

RULES AND REGULATIONS

MISCELLANEOUS

I. INTRODUCTION

Defendant United States Securities and Exchange Commission hereby opposes plaintiff Herbert Leslie Greenberg's Motion (pursuant to Federal Rule of Civil Procedure ("Rule") 15) for Leave to file a Second Amended Complaint for Declaratory and Injunctive Relief. For the reasons set forth below, the SEC respectfully submits that the Court not grant plaintiff's motion for leave.

II. BACKGROUND

A. Plaintiff's Fully Resolved First Amended Complaint.

Plaintiff's current complaint, the First Amended Complaint, raised three claims: (1) that the SEC's interactions with the Securities Industry Conference on Arbitration allegedly violated the Federal Advisory Committee Act, (2) that the SEC had allegedly violated the Freedom of Information Act in its handling of a FOIA request from plaintiff, and (3) that the SEC had allegedly unreasonably delayed in acting on his Petition for Rulemaking 4-502, in violation of Section 706(1) of the Administrative Procedure Act. *See* First Am. Compl. ¶¶48-50 (FACA claim), ¶¶43-47 (FOIA claim), ¶¶51-52 (APA unreasonable delay claim).

These claims have been resolved. First, the Court dismissed plaintiff's FACA claim with prejudice. *See* Nov. 29, 2007 Order. Second, after the parties settled plaintiff's FOIA claim, *see* Joint Status Report (Feb. 26, 2008), the Court dismissed this claim. *See* March 7, 2008 Order. Third, his APA unreasonable delay claim was extinguished when the SEC on March 27, 2008 issued a letter-order denying Petition 4-502. *See* March 27, 2008 letter from Nancy Morris (Secretary of the SEC) to plaintiff at 2 (attached as Exh. A to Joint Status Report (March 28, 2008). Thus, all of plaintiff's claims have been resolved.

B. The Proposed Second Amended Complaint.

Nonetheless, plaintiff seeks to interpose a Second Amended Complaint. Notably, plaintiff does not challenge the merits of the SEC's denial of his petition. Rather his proposed complaint alleges that the SEC "has acted in violation of 5 U.S.C. 706 and [SEC] General Rule 192 by its unreasonable delay in acting upon Petition No. 4-502." 2d Am. Compl. ¶100. He fleshes out this language by alleging that the SEC's Division of Trading and Markets ("DTM"[1]) has not made the recommendation to the Commission regarding his petition mandated by Rule 192,[2] *see id.* ¶63; Motion for Leave to Amend at 6, even though, as he notes, the SEC (through counsel in this litigation) has informed him that such a recommendation was made.[3] Plaintiff even, incredibly, suggests that "the SEC did

---

[1] In his papers, plaintiff refers to DTM by its former name, the Division of Market Regulation or "DMR."

[2] Rule 192 provides in part that the Secretary "shall . . . refer [the petition] to the appropriate division or office for consideration and recommendation," and that "[s]uch recommendations shall be transmitted with the petition to the Commission for such action as the Commission deems appropriate." 17 C.F.R. 201.192(a).

[3] *See also* Decl. of Acting Secretary Florence E. Harmon ¶2 (stating that DTM made a written recommendation to the Commission on March 18, 2008) (attached at Exh. A). Plaintiff is thus without any Rule 11 basis for stating that he "is informed and believes" that no recommendation was made. 2d Am. Compl. ¶63. His suggestion the SEC, in response to another of his FOIA requests, "stat[ed], in substance, that defendant SEC has no document evidencing that recommendations were transmitted," *id.* at ¶61, is simply wrong. Rather, the letter clearly states that the SEC was "withholding non[-]public documents such as . . . an action memorandum." May 5, 2008 letter from Frank Henderson to plaintiff at 1 (attached as Exh. B.).

The "action memorandum" *is* DTM's recommendation. *See, e.g., In re Stuart-James. Co.*, 50 SEC 468, 1991 WL 291802, at *8 (SEC Jan. 23, 1991) (noting that "an Action Memorandum from the Staff" to the Commissioners contains the staff's

not deny Petition 4-502," 2d Am. Compl. ¶62, even though the parties clearly informed the Court on March 28, 2008 that the Commission had so acted, *see* Joint Status Report (March 28, 2008) at 1, and the March 27, 2008 letter-order to him concerning Petition 4-502 clearly states that "the Commission hereby denies the Petition." *Id.*; Exh. A ¶3.[4] For relief, he seeks a declaration that the SEC unreasonably delayed in making recommendations on Petition 4-502, and that the Court order DTM to make recommendations to the Commission on Petition 4-502 within 90 days. 2d Am. Compl. at 25.

Beyond his claim seeking to compel a DTM recommendation and a Commission decision when both have already occurred, plaintiff also seeks in his complaint to compel recommendations by DTM on petitions filed with the

---

"recommendations"). Withholding this memorandum under FOIA Exemption 5 was entirely proper, as recommendations concerning rulemaking are "precisely the type of candid discussion that the deliberative process privilege is designed to shield." *Abraham Fruchter & Twersky v. U.S. SEC*, 2006 WL 785285, at *3 (S.D.N.Y. Mar. 29, 2006). As for plaintiff's allegation that there was no Commission meeting on Petition 4-502, 2d Am. Compl. ¶61, this proves nothing. The Commission acts on certain matters by *seriatim* consideration, without a meeting. *See* 17 C.F.R. 200.42. Plaintiff thus lacks any factual basis for his conspiracy theory that neither DTM nor the Commission have taken the requisite action on Petition 4-502.

[4] To the extent plaintiff suggests that because the March 27, 2008 letter was signed by the Secretary, rather than the Commissioners themselves, it is not the decision of the Commission, he misapprehends the manner in which Commission decisions are issued. Rule 192(a) explicitly provides that "[t]he Secretary shall notify the petitioner of the action taken by the Commission." Indeed, as a matter of course, Commission orders are signed by the Secretary. *See*, *e.g.*, *Proposed Rule Changes of Self-Regulatory Organizations*, 73 Fed. Reg. 16179, 16190 (Mar. 27, 2008) (final rule approving rule changes by SROs, signed "[b]y the Commission" by "Florence E. Harmon, Deputy Secretary"); *In re Matter of Moneesh K. Bakshi*, 2007 WL 4563664, at *2 (SEC Dec. 28, 2007) (Commission order suspending attorney, signed "[b]y the Commission" by "Nancy M. Morris, Secretary").

Commission by persons other than himself which relate, in some manner, to securities arbitration. Specifically, he seeks to incorporate in his complaint (1) Petition 4-403, filed by the Public Investors Arbitration Bar Association in 1997, (2) Petition 4-501, filed by Daniel Solin on May 6, 2005, (3) Petition 4-506, filed by Avery Goodman on July 15, 2005 (which plaintiff concedes the Commission has acted on, having denied it on March 27, 2008, 2d Am. Compl. ¶75), and (4) Petition 4-541, filed by Solin on June 18, 2007. *See id*. ¶¶17-41, 67-87. On this claim, he seeks a declaration that the SEC "has engaged in a pattern and practice" of unreasonable delay in deciding petitions, and that the Court enter a permanent injunction requiring DTM to make recommendations within 12 months of filing on all petitions for rulemaking that "concern matters relating to securities arbitration." *Id*. at 25-26.[5]

III. ARGUMENT

Plaintiff's motion for leave to file a second amended complaint should be denied as futile. "[F]utility is fully sufficient to justify the denial of a motion to amend." *Hatch v. Dep't for Children, Youth and their Families*, 274 F.3d 12, 19 (1st Cir. 2001); *see also Foman v. Davis*, 371 U.S. 178, 182; 83 S. Ct. 227; 9 L. Ed. 2d 222 (1962) ("futility of amendment" is reason to deny leave to amend). A district court in its discretion may deny leave to amend "where the amended complaint would be subject to dismissal." *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991). Thus, leave to amend should be denied as futile where there would be no subject matter jurisdiction, *see Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998), the claims would be moot, *see Bd. of*

[5] In his proposed complaint, plaintiff occasionally refers to recommendations made by the "SEC" to the Commission. Presumably plaintiff intends to refer to recommendations made by DTM, rather than suggesting that the Commission made recommendations to itself.

Comm'rs v. Bull H/N Info. Sys. Inc., 1994 WL 622198, at *3 (3d Cir. Nov. 8, 1994) ("amendment . . . would be futile since the proposed cause of action had become moot"), or the plaintiff would lack standing. *See Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817, 824 (9th Cir. 2002).

Here, the proposed complaint is clearly futile, as none of its claims could withstand a motion to dismiss pursuant to Rule 12(b)(1) and (b)(6). Specifically, as discussed in further detail below, the Second Amended Complaint – if filed – would be subject to dismissal for three reasons. First, the Court would lack jurisdiction over either of his claims. Both would be brought under Section 706(1) of the APA, but Section 706(1) only applies to final agency action, not intermediate recommendations by agency staff. Second, his claims seeking to compel either DTM's recommendation on Petition 4-502 or a decision by the Commission on that petition are moot, since both events have already occurred. Third, he lacks standing to file a third-party action on petitions submitted by other persons or associations.

A. <u>The Court Would Lack Jurisdiction Over Plaintiff's Claims.</u>

Because there is no subject matter jurisdiction for either (1) plaintiff's claims seeking to compel interim agency recommendations, or (2) plaintiff's second claim seeking to redress an alleged "pattern or practice" of agency delay with regard to petitions for rulemaking that relate to securities arbitration, these claims would be subject to dismissal pursuant to Rule 12(b)(1), rendering plaintiff's proposed complaint futile.

1. There Is No Subject Matter Jurisdiction to Compel Interim Agency Recommendations Under Section 706(1) of the APA.

Plaintiff's proposed claims, which allege DTM – both on Petition 4-502 in particular, and petitions concerning securities arbitration in general – has violated the APA "through its unreasonable delay in *making recommendations* to the Commission," *see* 2d Am. Compl. at 25 (emphasis added), would be subject to dismissal as not challenging final agency action. Plaintiff premises his claims on 5 U.S.C. 706(1), which permits the Court to "compel agency action unlawfully withheld or unreasonably delayed." An agency action, however, is "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. 551(13), not an interim recommendation. *See, e.g., Friends of Yosemite v. Frizzell*, 420 F. Supp. 390, 394 (N.D. Cal. 1976) ("the Assistant Secretary's recommendations" did not constitute "an agency action within the meaning of 5 U.S.C. 551(13)").

Moreover, for a court to have jurisdiction over a suit to compel an agency action pursuant to Section 706(1), it must have prospective jurisdiction over a suit challenging that action once it has been taken. *Cf. Public Utility Comm'r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985). But there would be no district court jurisdiction over a suit to challenge the propriety of an interim agency recommendation, because that recommendation would not be final agency action. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 798; 112 S. Ct. 2767; 120 L. Ed. 2d 636 (1992) (no jurisdiction for suit challenging internal agency report that carried "no direct consequences" and served "more like a tentative recommendation than a final and binding determination"); *Dalton v. Specter,* 511 U.S. 462, 469-71; 114 S. Ct. 1719; 128 L. Ed. 2d 497 (1994) (recommendation to President on base closures was not "final agency action" subject to judicial review because it was a recommendation that was in no way binding on the President, who

had absolute discretion to accept or reject it).[6]

The heart of plaintiff's claims is that the DTM has allegedly unreasonably delayed in making recommendations to the Commission on petitions for rulemaking. But, simply put, a recommendation is not a "rule, order, license, sanction, relief, or the equivalent or denial thereof," and thus, is *not* agency action. Moreover, it is clear that under Rule 192(a) the recommendation has no binding effect upon the Commission. Rather, Rule 192(a) expressly states that once DTM makes its recommendations, "such recommendations shall be transmitted with the petition to the Commission for such action *as the Commission deems appropriate*." (Emphasis added). Because the Commission has discretion to accept or reject DTM's recommendations, and no statutory deadline to act once DTM makes its recommendations, any order compelling DTM to make an interim recommendation would not afford plaintiff any concrete relief.

For these reasons, there is no jurisdiction for plaintiff's claims of undue delay in DTM making recommendations to the Commission.

---

[6] *See also Ecology Center, Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999) (Forest Service's monitoring and reporting are only steps leading to an agency decision, rather than the final action itself); *Am. Paper Inst. v. U.S. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) (demand from regional office of EPA would not constitute "final agency action" unless and until Administrator of EPA adopted region's position); *Cheyenne-Arapaho Gaming Comm'n v. Nat'l Indian Gaming Comm'n*, 214 F. Supp. 2d 1155, 1168 (N.D. Okla. 2002) (opinion of agency's general counsel, even though it "probably provide[d] a highly educated guess as to the decisions an agency will make," did not constitute final agency action).

2. This Court Does Not Have Subject Matter Jurisdiction to Hear Plaintiff's "Pattern and Practice" Claim.

Likewise, there is no subject matter jurisdiction for plaintiff's proposed second claim. That claim would allege that the "SEC has engaged in a pattern and practice of . . . unreasonabl[e] delay in making recommendations to the Commission upon Petitions for Rulemaking," 2d Am. Compl. at 25, and seeks "a permanent injunction ordering defendant SEC to make recommendations, within one year after respective filings," with regard to any petition that pertains in any matter to securities arbitration. *Id.* at 26.

However, the Supreme Court in *Lujan v. National Wildlife Federation ("Lujan v. NWF")*, rejected the existence of federal court jurisdiction over such claims regarding how an agency conducts its business on a system-wide level. 497 U.S. 871; 110 S. Ct. 3177; 111 L. Ed. 2d 695 (1990). There the Supreme Court held that a plaintiff "cannot seek *wholesale* improvement of [a] program by court decree, rather than in the offices of the [agency] or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm." *Lujan*, 497 U.S. at 891 (emphasis in original). Further, "[e]xcept where Congress explicitly provides for [the Court's] correction of the administrative process at a higher level of generality, [it] intervene[s] in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect. . . . Until confided [in the Court], however, more sweeping actions are for the other branches." *Id.* at 894.

This holding in *Lujan v. NWF* was applied to a situation similar to the one before this Court in *Institute for Wildlife Protection v. Norton*, 337 F. Supp. 2d 1223 (W.D. Wash. 2004). There, plaintiffs alleged that defendants had a "long standing practice, procedure, policy and/or course of conduct to delay acting on, or

failure to act on, petitions to list species under the [Endangered Species Act ("ESA")], filed by the Institute and by other citizens." *Id.* at 1226. There, as here, plaintiff also requested that the Court enter an order addressing "'all petitions submitted by any person.'" *Id.* at 1228.

The *Institute for Wildlife Protection* plaintiffs argued that jurisdiction over their claim arose under Section 706(1) of the APA because defendants had "repeatedly failed to make timely decisions on citizen petitions." *Id*. They asserted that *Lujan v. NWF* did not apply to their claim because it supposedly applied only to abstract, programmatic challenges, whereas their claim involved specific violations of the ESA and APA. *Id.* They cited to four discrete petitions filed by plaintiffs where the agency had failed to review their petitions in accordance with the deadlines set forth in the ESA, and argued that this evidenced a pattern of agency inaction.

The court found that it lacked subject matter jurisdiction because under the ESA "failures to act in a timely manner on citizen petitions" were not final actions. As such, the court refused to "look beyond [plaintiffs'] own petitions" by ordering defendants to make "wholesale improvements" to its citizen petition review process." *Id.* at 1229; *see also High Sierra Hikers Ass'n v. Blackwell*, 381 F.3d 886 (9th Cir. 2004) (programmatic challenges were permissible because they involved actions that the agency had already taken, not inaction by the agency); *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221 (D. Mont. 2004), *aff'd* 469 F.3d 801 (9th Cir. 2006) (alleged failure of government to adequately manage mines on federal land that were polluting adjacent Indian tribal land did not constitute a "discrete" agency action).

For this reason, too, the Court does not have jurisdiction to hear plaintiff's proposed "pattern and practice" claims and should therefore deny his motion for leave to amend.

B. Plaintiff's First Proposed Claim Is Moot.

Even if this Court had jurisdiction, plaintiff's first claim would be subject to dismissal pursuant to Rule 12(b)(6) because it is moot. A claim is moot if it has lost its character as a present, live controversy, which is what has happened in the case at bar. *Neighbors of Cuddy Mountain v. Alexander,* 303 F.3d 1059, 1065 (9th Cir. 2002); *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997) (citations omitted). Here, because the Commission has already denied Petition 4-502 (after DTM had made its recommendation on that petition), plaintiff's first claim is moot.

1. The Division of Trading and Markets Has Already Made a Recommendation to the Commission, Which Has Taken Final Action.

Because the SEC expressly denied Petition 4-502 on March 27, 2008, *see* Exh. A to Joint Status Report (March 28, 2008), plaintiff's first claim is moot. While plaintiff suggests that whether the Commission decided his petition is in dispute, Motion at 6, his grounds for asserting there is a dispute are frivolous. He apparently does not realize that the March 27, 2008 letter-order signed by Nancy M. Morris *is* the decision "[b]y the Commission" in which "the Commission hereby DENIES the Petition." *Id.; see also* Harmon Decl. ¶3. His contention that the Commission did not approve the denial of his petition because, in response to his FOIA request, the SEC's FOIA Office did not identify a meeting where the Commission voted on his petition, likewise completely misses the point that the Commission decided his petition by written *seriatim* process. *See* 17 C.F.R. 200.42; *see also* Exh. B at 1 (noting that FOIA Office had withheld a "seriatim"

document in response to a FOIA request concerning Petition 4-502).[7] As plaintiff has the document in which Commission decided his petition, he cannot legitimately deny that the decision occurred.

Equally lacking in credibility is plaintiff's suggestion that his claim is not moot because DTM did not make a recommendation. In a telephone call with plaintiff and a May 10, 2008 letter to him, counsel for the SEC told plaintiff that such a recommendation had indeed been made. The May 5, 2008 letter from the FOIA Office (which notes an "action memorandum" (*i.e.*, the DTM recommendation) was withheld) confirmed this, and the SEC has provided a declaration unequivocally stating that such a recommendation was made. Harmon Decl. ¶2. Thus, plaintiff lacks any reasonable (or Rule 11) basis for claiming no recommendation was made. It would be a pointless endeavor to entertain an amended complaint to require the SEC to further prove the existence of a DTM recommendation that obviously was made, based simply on plaintiff's baseless denial of that reality.

Simply put, as both the DTM recommendation and the Commission decision on Petition 4-502 have been made, plaintiff's first claim is moot.[8]

---

[7]Of course, the SEC was not required to explain this process in responding to a FOIA request, as the FOIA "provides a means for access to existing documents and is not a way to interrogate an agency." *Patton v. United States R.R. Retirement Bd.*, No. ST-C-91-04-MU, slip op. at 3 (W.D.N.C. Apr. 26, 1991), *aff'd mem.*, 940 F.3d 652 (4th Cir. 1991).

[8] To the extent plaintiff seeks after-the-fact declaratory relief that DTM *had* unreasonably delayed in making a recommendation, no jurisdiction for such a claim exists. Section 706(1) only authorizes a court to actually "compel agency action," and the Declaratory Judgment Act, 28 U.S.C. 2201, is not an independent grant of jurisdiction. *Id.; see also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 670; 70 S. Ct. 876; 94 L. Ed. 1194 (1950). Moreover, any such declaratory relief provided by the Court would be nothing more than an advisory

2. Plaintiff's First Claim Is Not "Capable of Repetition Yet Evading Review."

Plaintiff cannot argue that this action is subject to an exception to the mootness doctrine because it is "capable of repetition, yet evading review." *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515; 31 S. Ct. 279; 55 L. Ed. 310 (1911); *Am. Rivers*, 126 F.3d at 1123-24. The repetition must be as to the plaintiff himself, *see Murphy v. Hunt*, 455 U.S. 478, 482; 102 S. Ct. 1181; 71 L. Ed. 2d 353 (1982) (requiring "a reasonable expectation that the same complaining party would be subjected to the same action again"), and plaintiff does not either allege that he has submitted any additional petitions, or that he intends to do so. And, even if he had filed or intended to file any additional petitions, any "unreasonable delay" (which under Section 706(1) jurisprudence typically involves the passage of multiple years, *see* July 16, 2007 Order at 3) in resolving them would be susceptible to review under Section 706(1), and thus be highly unlikely to evade review. For both of these reasons, plaintiff cannot escape mootness as a reason why his first claim would be subject to dismissal.

C. Plaintiff Cannot Sue Over the Petitions of Others.

Assuming *arguendo* that jurisdiction existed over plaintiff's "pattern and practice" claim, *but see* pages 8-9 above, it would still have to be dismissed because plaintiff lacks standing to sue over petitions filed by third parties. Plaintiff's second claim alleges that the "SEC has engaged in a pattern and practice of conduct through unreasonably [sic] delay in making recommendations to the Commission upon Petitions for Rulemaking" and seeks "a permanent injunction

---

opinion. *Wis.'s Envtl. Decade, Inc. v. State Bar of Wis.*, 747 F.2d 407, 413 (7th Cir. 1984) ("the requested declaratory judgment would be an impermissible advisory opinion").

ordering defendant SEC to make recommendations, within one year after respective filings, to the Commission upon Petitions for Rulemaking . . . pursuant to the requirements of defendant SEC's General Rule 192." 2d Am. Compl. at 25-26. But since those are not plaintiff's petitions, he fails to state a claim upon which relief may be granted and cannot sue over them.

1. Plaintiff's Second Claim Must Be Dismissed Because He Lacks Standing.

Plaintiff does not meet the standing requirements to state his second claim. To establish standing plaintiff must satisfy all Constitutional and prudential requirements. To this end, the Supreme Court has developed two related strands of standing: "Article III standing, which enforces the Constitution's case or controversy requirement; and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11; 124 S. Ct. 2301; 159 L. Ed. 2d 98 (2004) (citation omitted). The Supreme Court has "always insisted on strict compliance with this jurisdictional standing requirement." *Raines v. Byrd*, 521 U.S. 811, 819-20; 117 S. Ct. 2312; 138 L. Ed. 2d 849 (1997). Plaintiff's complaint does not meet the requirements of either type of standing.

To show Article III standing, a plaintiff must demonstrate "that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision." *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 1156-1157 (D. Kan. 2006). An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560; 112 S. Ct. 2130; 119 L. Ed. 2d 351 (1992). An injury is particularized when it "affect[s] the plaintiff in a personal and individual way."

Lujan, 504 U.S. at 561 n.1. In addition, "[w]hen the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." *Id.* at 561. Indeed, the "injury in fact" test "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35; 92 S. Ct. 1361; 31 L. Ed. 2d 636 (1972). Moreover, where plaintiffs have "invoked Article III jurisdiction to challenge the conduct of the executive branch of government, the necessity of a case or controversy is of particular import." *Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir. 1998).

Here, plaintiff cannot establish "injury in fact" for his second claim. For plaintiff to have standing in this regard, his injury must affect him in "a personal and individual way." Plaintiff alleges no such personal injury – rather, he asserts injuries to third-party petitioners who filed those other petitions or, perhaps, to members of the general public. Nor does he make any allegations that he, personally, "face[s] an imminent threat of future injury," *Gratz v. Bollinger*, 539 U.S. 244, 285; 123 S. Ct. 2411; 156 L. Ed. 2d 257 (2003), if there is unreasonable delay in SEC action on the other petitions.[9] And because plaintiff does not allege,

---

[9] *See also Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d at 1158 ("[B]ecause Raytheon has not demonstrated any credible threat that the EPA will issue against it another section 106 order, Raytheon has not demonstrated an injury in fact. 'Under such circumstances, we have no assurance that the asserted injury is 'imminent'– that it is 'certainly impending.' Raytheon therefore lacks Article III standing to assert its 'pattern and practice' challenge.") (citations omitted); *United States v. Capital Tax Corp.*, 2007 WL 488084, at *6 (N.D. Ill. Feb, 8, 2007) (holding that because Capital Tax failed to demonstrate an imminent threat of future harm, the court "found a lack of standing to pursue a CERCLA pattern or practice challenge where the plaintiff failed to show that it was likely to receive

and cannot prove, any personal stake in any of the other petitions, he also lacks the requisite redressability required for Article III standing.

Moreover, even if plaintiff were to satisfy the requirements for Article III standing, he would also have to meet the requirements of prudential standing, a set of "principles that, like constitutional standing, places 'limits on the class of persons who may invoke the courts' decisional and remedial powers.'" *Bd. of County Comm's of Sweetwater Co. v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002). Prudential standing has three components: it "encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" *Newdow*, 542 U.S. at 12 (internal citations omitted). Plaintiff cannot show that he meets the requirements for prudential standing, for two reasons.

First, plaintiff's second claim only raises the legal rights of others. But in *Lujan v. Defenders of Wildlife*, the Supreme Court stressed that a party does not have standing to assert a violation on behalf of third parties. *See* 504 U.S. at 561-63. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is "substantially more difficult" to establish. *Id.* at 562-63.

Second, as the *Lujan v. Defenders of Wildlife* court recognized, "a programmatic" agency challenge has "obvious difficulties" because, in part, '"suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations . . . [are], even when premised on allegations of several instances of violations of law, . . . rarely if ever appropriate for federal-court adjudication.'" *Id.* at 568 (citation

---

another order from the EPA").

omitted). Here, plaintiff asks the Court to set a fixed timetable for staff recommendations on all petitions for rulemaking ever filed with the SEC that relate in any matter to securities arbitration. Considerations of prudential standing strongly counsel against the Court's adjudicating such "generalized grievances." Because of this, plaintiff "lacks prudential standing for [his] 'pattern and practice' claim." *Raytheon Aircraft Co.*, 435 F. Supp. 2d at 1159.[10] Thus, his second claim would be subject to dismissal for lack of standing.

2. Plaintiff Cannot Obtain a Court Order Inserting a One-Year Recommendation Deadline into SEC Rule 192(a).

Even if plaintiff had standing to bring his second claim, the claim would still be dismissed pursuant to Rule 12(b)(6). Well-settled precedent forecloses plaintiff's request that the Court order the SEC to make specific procedural changes to its petition process. The Supreme Court has held that "[a]bsent constitutional constraints or extremely compelling circumstances[,] administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 541-43; 98 S. Ct. 1197; 55 L. Ed. 2d 460 (1978), *quoting FCC v. Schreiber*, 381 U.S. 279, 290; 85 S. Ct. 1459; 14 L. Ed. 2d 383 (1965) (reversing a decision that "struck down [a] rule because of the perceived inadequacies of the procedures employed in the rulemaking proceedings"). As the Supreme Court wrote, a court should "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which

---

[10] Moreover, in the APA context, to sue over an agency action a plaintiff must be "aggrieved" by that action. 5 U.S.C. 702. Plaintiff does not (and cannot credibly) allege that he is personally aggrieved by the SEC's alleged inaction on petitions that are not his own.

procedures are 'best'. . . ." *Vermont Yankee*, 435 U.S. at 549.

Ignoring this doctrine, plaintiff improperly asks the Court to permanently require the SEC staff to make recommendations to the Commission "within one year" after a petition is filed. 2d Am. Compl. at 26. While the staff endeavors to make recommendations to the Commission as expediently as possible, SEC Rule 192 does not contain specific time deadlines for good reason. A blanket rule establishing such deadlines would not allow the Commission to take into account the complexity of certain petitions, the varying volume of petitions pending at a given time, or the myriad of competing agency interests. It is for reasons such as these that an agency is to be allowed to "exercise its administrative discretion in deciding how, in light of internal organizational considerations, it may best proceed . . . ." *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333; 96 S. Ct. 579; 46 L. Ed. 2d 533 (1976). The Court should therefore not "engraft[its] own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee*, 435 U.S. at 525.

3. The "Pattern and Practices" Cases Cited by Plaintiff Are Distinguishable from this Case.

Plaintiff cites three cases in support of his "pattern and practice" claim. Motion at 6-7. But none of these cases address either Article III or prudential standing, or the Supreme Court's *Lujan v. NWF* decision limiting "pattern and practice" claims. Moreover, as discussed below, each is inapposite.

The first case, *United States v. W.T. Grant Co.*, 345 U.S. 629, 632; 73 S. Ct. 894; 97 L. Ed. 1303 (1953), was not a challenge to agency rulemaking, but a government antitrust claim against private individuals. Defendants, who had been charged with creating "inter-locking corporate directories" that violated the Clayton Act, terminated the directories after the government sued them. In declining to hold the case moot, the Supreme Court stressed that defendants should

not be able to use their easily-reversible termination maneuver as a "weapon against *public law enforcement*." *Id.* at 632 (emphasis added).[11] Moreover, in *W.T. Grant*, the plaintiff United States was suing on behalf of the public, *see, e.g.*, *FTC v. Larkin*, 841 F. Supp. 899, 906 (D. Minn. 1993), so that – unlike here – the inability of a private individual to sue on behalf of another private individual was not at issue.

Payne Enterprises, Inc. v. United States, 837 F.2d 486 (D.C. Cir. 1988), is also inapposite. In *Payne*, the court ruled that the case was not moot even though documents improperly withheld under FOIA were subsequently released. Payne alleged that he routinely requested information from the Air Force for use in his business selling information and advice to prospective government contractors. The Air Force's FOIA office repeatedly denied his FOIA requests, requiring him to take administrative appeals to the Secretary of the Air Force. On each appeal, the Secretary released the information he requested, twice admonishing the FOIA Office for baselessly denying Payne's requests. There, even though Payne had no pending FOIA request, the court entertained his suit because there was a "reasonable expectation that the [impermissible initial denial of Payne's FOIA requests would] be repeated." *Id.* at 492 (citations omitted). Thus, unlike here, Payne demonstrated a likelihood that identical violations would affect *him* in the future. In contrast, here, plaintiff has filed one petition with the SEC and does not allege that he plans to file any more. Further, Payne's business depended on timely responses to his frequent FOIA requests; plaintiff here does not allege that his job depends on his regular filing of petitions for rulemaking or timely responses thereto. As such, the likelihood of recurrence in *Payne* is tellingly absent here.

---

[11] Nonetheless, the Supreme Court affirmed the trial court's dismissal of the claim for injunctive relief. The Court cited favorably the trial court's observation that "its dismissals 'would not be a bar to a new suit in case possible violations arise in the future.'" *Id.* at 635-36.

Equally distinguishable is *Gilmore v. U.S. Department of Energy*, 33 F. Supp. 2d 1184 (N.D. Cal. 1998). Gilmore sought "a declaratory judgment that the DOE's failure to comply with FOIA time limits [was] unlawful and . . . an order enjoining the DOE from failing to process FOIA requests within the statutory period." *Id.* at 1186. The court found a pattern and practice of delay in responding to FOIA requests *filed by plaintiff*. Moreover, unlike the APA, the statute at issue here, FOIA expressly granted jurisdiction to the district court to enjoin DOE from improperly withholding agency records. 5 U.S.C. 552(a)(4)(B). There is no similar express grant of subject matter jurisdiction under the APA. In addition, Gilmore had standing (and there was no question of mootness) because one of his FOIA requests was still pending, so that the threat of ongoing injury to Gilmore could be redressed by injunction.

IV. CONCLUSION

Plaintiff's proposed Second Amended Complaint would improperly seek (1) to compel interim agency recommendations that are not reviewable agency action, (2) to compel the SEC to take actions that it has already taken, and (3) to seek redress for petitions filed by third parties in which he has no direct stake. For the reasons detailed above, his Second Amended Complaint would be subject to dismissal under Rule 12(b)(1) and (b)(6). Therefore, the SEC respectfully requests that plaintiff's motion for leave to file the Second Amended Complaint be denied.

Respectfully submitted,

/s/ Thomas J. Karr

Thomas J. Karr
Kristin S. Mackert
Sarah E. Hancur, *pro hac vice motion pending*
Office of the General Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9612
Telephone: (202) 551-5172 (Ms. Mackert)
Facsimile: (202) 772-9263
E-mail: mackertk@sec.gov

Gregory C. Glynn, Cal. Bar #039999
Securities and Exchange Commission
5670 Wilshire Boulevard, 11th Floor
Los Angeles CA 90036-3648
Telephone: (323) 965-3890
Facsimile: (323) 965-3908
E-mail: glynng@sec.gov

Counsel for the Securities and Exchange Commission

EXHIBIT "A"

THOMAS J. KARR
KRISTIN S. MACKERT
SARAH E. HANCUR, *pro hac vice motion pending*
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9612
Telephone: (202) 551-5172 (Ms. Mackert)
Facsimile: (202) 772-9263
E-mail: mackertk@sec.gov
Counsel for the Securities and Exchange Commission

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HERBERT LESLIE GREENBERG, :	Civil Action No. CV 06-7878-GHK (CTx)
Plaintiff, :	**DECLARATION OF FLORENCE E. HARMON**
v.	
UNITED STATES SECURITIES AND EXCHANGE COMMISSION, :	
Defendant. :	

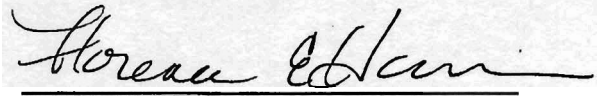
I, Florence E. Harmon, hereby state that:

1. I am the Acting Secretary in the Office of the Secretary at the Securities and Exchange Commission.

2. On March 18, 2008, the Division of Trading and Markets made a written recommendation to the Commission on Petition for Rulemaking No. 4-502.

3. On March 27, 2008, the Commission denied Petition for Rulemaking No. 4-502 in a letter-order signed by the Secretary of the Commission.

I declare upon penalty of perjury that the foregoing is true and correct. Executed this 30th day of June, 2008 in Washington, D.C.



FLORENCE E. HARMON
Acting Secretary

EXHIBIT "B"

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549

Office of Freedom of Information
& Privacy Act Operations

BY MAIL AND FACSIMILE: (310) 838-8105

Mail Stop 5100 May 5, 2008

Mr. Les Greenberg, Esquire
Attorney at Law
10732 Farragut Drive
Culver City, CA 90230

RE: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 08-05421-FOIA

Dear Mr. Greenberg:

This letter partially responds to your request, dated March 28, 2008, and received in this Office on March 31, 2008, for documents relating to Petition for Rulemaking 4-502.

After consulting with other Commission staff, we are releasing the enclosed documents that may be responsive to your request.

We are withholding nonpublic documents such as a seriatim, an action memorandum, background information, two draft letters, e-mails, and an inter-agency document, consisting of eighteen pages. Since these documents form an integral part of the predecisional process, they are protected from disclosure under the deliberative process privilege embodied in 5 U.S.C. § 552(b)(5), 17 CFR § 200.80(b)(5).

You have the right to appeal our decision to our General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(d)(5) and (6). Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

Send your appeal to the FOIA/Privacy Act Office of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 5100, Washington, D.C. 20549, or deliver it to Room 1120 at that address. Also, send a copy to the SEC Office of the General Counsel, Mail Stop 9612, or deliver it to Room 1120 at the Station Place address.

We are still consulting with other Commission staff regarding additional information that may be responsive to your request. We will advise you of our findings as soon as possible.

In the interim, if you have any question, please call me.

Sincerely,
FOIA/Privacy Act Officer

Frank A. Henderson

by: Frank A. Henderson
FOIA/Privacy Act Branch Chief

enclosures by mail