UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 06-7878-GHK (CTx)	Date	September 2, 2008
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 Plaintiff:	Attorneys Present for Defendant:
None	None

Proceedings: (In Chambers) Order Re: Motion for Leave to File Second Amended Complaint

This matter is before the court on Plaintiff's motion for leave to file a Second Amended Complaint ("SAC"). The SAC adds additional factual details concerning Defendant Securities and Exchange Commission's ("SEC") or ("Commission") methods of operation as related to Plaintiff's Administrative Procedure Act ("APA") "unreasonable delay" claim, and requests declaratory and injunctive relief ordering the SEC to rule on his petition for rulemaking. The SAC also adds a "patterns and practices" claim. That claim requests an injunction directing the SEC Division of Trading and Markets ("DTM") to make recommendations to the Commission within one year on any petition for rulemaking concerning arbitration disputes. Having considered all of the papers filed in support of and in opposition to this motion, we determine the issues presented are suitable for resolution without oral argument. L.R. 7-15.

I. Standard of Review

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). However, the grant or denial of leave to amend rests in the sound discretion of the trial court. *Swanson v. United States Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996). A plaintiff should be afforded leave to amend if the underlying factual circumstances may be a proper subject of relief, but "futility of amendment" is a reason to deny such an amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Therefore, despite the policy favoring amendment under Rule 15, leave to amend may be denied if the proposed amendment is futile or would be subject to dismissal. *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).

II. Plaintiff's APA Claim For Unreasonable Delay

5 U.S.C. § 706(1) confers jurisdiction on this court to "compel agency action . . . unreasonably delayed." Agency action, "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. . . ." 5 U.S.C. § 551. In our July 16, 2007 Order, we

allowed Plaintiff to continue his APA unreasonable delay claim because the SEC had not decided his petition for rulemaking for over two years. (Order, Jul. 16, 2007 at p. 3.) We then strongly urged the SEC to decide Plaintiff's rulemaking petition, staying discovery for 60 days pending a decision by the SEC. (Order, Jan. 28, 2008.) Since this litigation began, the "agency action" subjected to the possible unreasonable delay of over two years was the SEC's final decision on Plaintiff's rulemaking petition 4-502. (First Amended Complaint ("FAC") at ¶52.)

Because the SEC has made a decision as to Plaintiff's rulemaking petition, there remains no "agency action" that is unreasonably delayed. SEC Rule 192(a) states that once the Commission has made a decision on a petition, "[t]he Secretary shall notify the petitioner of the action taken by the Commission." 17 C.F.R. § 201.192. Plaintiff argues that a letter to him from the Secretary of the Commission, on behalf of the Commission, is insufficient evidence that the Commission made a decision as to his petition. We reject this argument. Under Rule 192(a), Plaintiff is not entitled to the Minute Record of the Commission; he is only entitled to notification of the action taken by the Commission on his petition. Rule 192(a). Plaintiff admits that he received such notification, as well as a letter from the DTM explaining the Commission action. (Joint Status Report, Ex. A.) Moreover, Plaintiff provides no evidence that the Commission never made a decision on his petition for rulemaking. Plaintiff is entitled to nothing more by way of notification than the letter from the Commission Secretary, and the notification by the Commission is the "agency action" at issue.

Contrary to Plaintiff's assertion, an internal recommendation from the SEC staff to the Commission concerning how to rule on a petition is not "agency action." Under SEC Rule 192(a), "[t]he Secretary shall refer [the petition] to the appropriate division or office for consideration and recommendation. Such recommendations shall be transmitted with the petition to the Commission for such action as the Commission deems appropriate." Rule 192(a). A plain reading of the statute makes clear that only the SEC's unreasonable delay in making a final decision on a petition could be subject to an APA claim. Rule 192(a) does not make the recommendations of SEC staff binding. In fact, the Commission can take any action on a petition that it feels is appropriate. Since the Commission is not bound by any recommendation, the internal decision-making process inside the SEC cannot be "agency action" as defined by 5 U.S.C. § 706(1). *See Friends of Yosemite v. Frizzelli*, 420 F. Supp. 390, 394 (N.D. Cal. 1976) (holding that a memorandum sent from the Assistant Secretary of the Interior to the National Park Service was not "agency action" because the memorandum was only interim agency action and not binding on the Service). Here, Plaintiff inappropriately requests that we view an interim agency recommendation as "agency action" under the APA. Since Plaintiff was only entitled to a decision on his petition for rulemaking, Plaintiff's APA claim for unreasonable delay is now moot and allowing Plaintiff to file a SAC would prove futile. *See Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522, 532-33 (9th Cir. 2008).

III. Plaintiff's Patterns and Practices Claim

In Plaintiff's proposed SAC Plaintiff asserts that the SEC is engaged in a recurring pattern and practice of conduct through unreasonable delay in making recommendations to the Commission upon

petitions for rulemaking in violation of SEC's General Rule 192 and the APA. The general rule that a party must assert its own legal rights and interests is not absolute, and "there may be circumstances where it is necessary to grant a third party standing to assert the rights of another." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). However, a litigant may assert the legal rights or interests of third parties only when "(1) the litigant has suffered an injury in fact, giving him a concrete interest in the outcome of disputed issue; (2) the litigant has a close relationship to the third party; and (3) the third party's ability to protect his own interests is hindered." *AlohaCare v. Hawaii, Dept. of Human Services*, __ F.3d __ 2008 WL 2605208 at *17 (9th Cir. 2008).

Now that Plaintiff's petition for rulemaking has been denied, there is no longer any unreasonable delay in deciding Plaintiff's petition. Thus, Plaintiff has no injury in fact necessary for standing. 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 (1972). Therefore, Plaintiff does not have standing to now bring a patterns and practices claim.

Plaintiff then argues that he has a "particularized injury" in the SEC DTM's alleged failure in making a recommendation concerning his petition to the Commission. However, there is no injury to Plaintiff because the staff recommendation holds no particular weight with the Commission and, under Rule 192(a), the Commission can take whatever action it "deems appropriate." Because Plaintiff cannot show "a cognizable injury to make the threshold showing of a case or controversy" he has no standing to address any third party claims, or a pattern and practices claim based on his own injuries. *See Fleck and Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1104 (9th Cir. 2006).[1]

IV. Conclusion

Therefore, Plaintiff's motion to file a SAC is DENIED with prejudice. Given that the SEC has notified Plaintiff as to the Commission's decision regarding Plaintiff's petition for rulemaking, Plaintiff is hereby ORDERED to show cause within twelve (12) days as to why his FAC should not be dismissed as moot.

IT IS SO ORDERED.

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[1] Plaintiff's injury is also not redressible. To bring a patterns and practices claim, Plaintiff must show that a favorable decision by the court is likely to redress his injuries. *Graham v. Fed. Emergency Manag. Agency*, 149 F.3d 997, 1003 (9th Cir. 1998) (citing *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994)). Even if we were to issue a declaratory judgment requiring the SEC to make such a recommendation to the Commission, the Commission is under no obligation to follow that recommendation, because it has the discretion to make any decision it deems "appropriate." Rule 192(a).

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