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10
11 Counsel for the Securities and Exchange Commission

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 HERBERT LESLIE GREENBERG, :

15
16 Plaintiff, :

17 v. :

18
19 UNITED STATES SECURITIES
AND EXCHANGE COMMISSION, :

20 Defendant. :

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

**DEFENDANT UNITED STATES
SECURITIES AND EXCHANGE
COMMISSION'S NOTICE OF
MOTION AND MOTION TO
DISMISS**

Date: April 2, 2007
Time: 9:30 a.m.
Judge: George H. King

21
22 TO PLAINTIFF:

23 PLEASE TAKE NOTICE that on April 2, 2007, at 9:30 a.m., or as soon
24 thereafter as counsel may be heard, in Courtroom 650 of the above-captioned
25 Court, located in the Edward R. Roybal Center & Federal Building, 255 E. Temple
26 Street, Los Angeles, California, before the Honorable George H. King, defendant
27 United States Securities and Exchange Commission will move the Court for an
28 order dismissing the Second and Third Claims in plaintiff's Complaint for

1 Declaratory and Injunctive Relief, pursuant to Federal Rules of Civil Procedure
2 12(b)(1) and 12(b)(6) and Local Rule 7.

3 The grounds for this motion are:

4 1. Plaintiff's Second Claim under the Federal Advisory Committee Act
5 ("FACA") should be dismissed because the Securities Industry Conference on
6 Arbitration ("SICA") is not an "advisory committee" under FACA; and

7 2. Plaintiff's Third Claim under the Administrative Procedures Act
8 ("APA") should be dismissed because (a) any challenge related to the SEC's
9 handling of the petition for rulemaking that plaintiff filed is properly brought in a
10 United States Court of Appeals, not a district court, (b) plaintiff is not challenging
11 final agency action as required by the APA, and has an adequate legal remedy
12 once the SEC's consideration of his petition for rulemaking is complete, and (c)
13 plaintiff has not alleged any cognizable violations of the APA or of the SEC rule
14 governing petitions.

15 This motion is based on this Notice of Motion and Motion; the
16 accompanying Memorandum of Points and Authorities; the pleadings and other
17 papers on file with the Court in this action; and such additional materials or
18 argument of counsel as may be presented to the Court at or before the hearing on
19 this Motion.

20 This Motion is made following a conference of counsel pursuant to Local
21 Rule 7-3, which took place on February 12, 2007. The parties agreed that
22 consideration of plaintiff's First Claim, which raises issues pertaining to a
23 Freedom of Information Act ("FOIA") claim plaintiff filed with the SEC, should
24 be temporarily stayed pending the SEC's renewed search for documents in
25 response to that request, and ask that the Court stay activity pertaining to that
26 claim pending completion of that renewed search and resolution of any resultant
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1 administrative appeal. The parties were otherwise unable to resolve the issues set
2 forth in this motion.

3 Respectfully submitted,

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5 
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15 DATED: February 14, 2007

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12 UNITED STATES DISTRICT COURT
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14
15 HERBERT LESLIE GREENBERG,

16 Plaintiff,

17 v.

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19 UNITED STATES SECURITIES
20 AND EXCHANGE COMMISSION,

21 Defendant.

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

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**DEFENDANT UNITED STATES
SECURITIES AND EXCHANGE
COMMISSION'S
MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO
DISMISS**

Date: April 2, 2007
Time: 9:30 a.m.
Judge: Hon. George H. King

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1 **INTRODUCTION AND SUMMARY OF ARGUMENT**

2 The United States Securities and Exchange Commission (“SEC”)
3 respectfully submits that plaintiff’s Federal Advisory Committee Act (“FACA”)
4 and Administrative Procedure Act (“APA”) claims should be dismissed under
5 Federal Rules of Civil Procedure (“Rules”) 12(b)(1) and 12(b)(6). This Court
6 should also stay plaintiff’s claims under the Freedom of Information Act (“FOIA”)
7 until the SEC completes its renewed search on plaintiff’s FOIA request.

8 Plaintiff raises three claims against the SEC. First, he asserts the SEC has
9 operated the Securities Industry Conference on Arbitration (“SICA”) as a federal
10 advisory committee, without complying with the FACA. Second, he alleges that
11 the SEC violated the APA through its handling of a Petition for Rulemaking that
12 plaintiff filed with the SEC; that petition seeks modifications to the securities
13 industry’s self-regulatory organizations’ (“SROs”)¹ rules for arbitration of investor
14 complaints. Third, plaintiff claims that the SEC violated the FOIA by refusing to
15 produce documents in response to plaintiff’s FOIA request, failing to conduct an
16 adequate search for responsive documents and initially asserting that handwritten
17 notes that the SEC identified were exempt from disclosure under FOIA Exemption
18 5, 5 U.S.C. 552(b)(5).

19 As relief, plaintiff asks this Court to declare that the SEC has violated FACA
20 through its relationship with SICA, and to enjoin the SEC from engaging in any
21 activities with SICA or considering any comments from SICA on his petition for
22 rulemaking. He also demands that the Court order the SEC to provide all records
23 requested under FOIA and make available all records of SICA.

24 Plaintiff’s FACA and APA claims must be dismissed for failure to state a
25 claim and for lack of jurisdiction. SICA is not an “advisory committee” within the
26

27
28 ¹ The term "self-regulatory organization" means any national securities exchange, registered securities association, or registered clearing agency established pursuant to 15 U.S.C. 78o-4. *See* 15 U.S.C. 78c(a)(26).

1 meaning of FACA. Under FACA, an advisory committee must be “established” or
2 “utilized” by the agency. Here, plaintiff concedes that SICA, which is a private
3 organization, was not established by the SEC. Further, plaintiff makes no
4 allegation – nor could he – that SICA is subject to the strict management and
5 control of the SEC, as binding judicial precedent requires for an agency to be found
6 to have “utilized” an entity for FACA purposes. Consequently, SICA does not
7 constitute a federal advisory committee subject to FACA’s restrictions on its
8 operations.

9 This Court also lacks jurisdiction under the APA for plaintiff’s claim
10 concerning the petition for rulemaking he filed with the SEC. Under Section 25 of
11 the Securities Exchange Act of 1934, 15 U.S.C. 78y, jurisdiction to review the
12 SEC’s ultimate action on plaintiff’s petition for rulemaking rests exclusively in the
13 United States courts of appeals. It is well-established that where, as here, a
14 judicial-review statute vests review of agency action in a court of appeals, a party
15 may not obtain relief – interlocutory or otherwise – in a district court. Even if
16 jurisdiction existed in this Court for review of SEC action on rulemaking petitions
17 such as plaintiff’s, no final agency action has occurred here. Moreover, on the
18 merits of his APA claims, plaintiff does not allege that the SEC violated any of its
19 regulations governing petitions for rulemaking or any other statutory duty.

20 As to plaintiff’s FOIA claims, the parties have agreed that any consideration
21 of the claims relating to his FOIA request – for documents relating to the SEC’s
22 interactions with SICA – should be stayed. Before plaintiff filed this action, the
23 SEC’s Office of the General Counsel – which decides appeals from initial decisions
24 of the SEC’s FOIA Office, *see* 17 C.F.R. 200.80(d)(6) – remanded plaintiff’s FOIA
25 request to the FOIA Office for a renewed search for responsive documents. *See*
26 Compl. ¶33. The parties agree that plaintiff’s FOIA claims should be temporarily
27 stayed while the FOIA Office completes that search and plaintiff exhausts his
28

1 administrative remedies.²

2 **FACTUAL BACKGROUND**

3 As plaintiff's FACA and APA claims stem largely from his concerns
4 regarding the activities of SICA, we briefly describe the origin and functions of
5 that entity. We also address plaintiff's complaint as it concerns his petition for
6 rulemaking filed with the SEC (Petition 4-502) regarding securities arbitration
7 rules, as that portion of his complaint also pertains to his APA claim.

8 **A. Securities Industry Conference on Arbitration.**

9 In the mid-1970s, several SROs and other persons proposed that a task force
10 be established to consider developing a uniform, efficient, economic and
11 appropriate mechanism for resolving investor complaints against brokerage firms.
12 Subsequently, the SROs established SICA in early April 1977. SICA prepared and
13 adopted a uniform code of arbitration covering all disputes between customers and
14 broker/dealers. Thereafter, SROs, including the New York Stock Exchange
15 ("NYSE") and the National Association of Securities Dealers, Inc. ("NASD"),
16 separately filed with the SEC their own proposals to implement arbitration rules

18 ²Specifically, the parties agreed that all issues pertaining to plaintiff's FOIA
19 request should be temporarily stayed, under the following conditions: (1) by
20 March 13, 2007, the SEC's FOIA Office will provide its initial decision on remand
21 (including producing responsive agency records that are not exempt from
22 production) following its renewed search for any documents responsive to
23 plaintiff's FOIA request; (2) plaintiff may appeal any aspect of that decision to the
24 SEC's Office of the General Counsel ("OGC") pursuant to 17 C.F.R. 200.80(d)(6),
25 and may transmit that appeal by email; (3) the SEC's OGC will provide plaintiff
26 with its final decision on any appeal within 20 business days of the date plaintiff's
27 appeal is received, *see* 17 C.F.R. 200.80(d)(6)(v); and (4) once the SEC's OGC
28 issues a final decision, or if the SEC fails to meet the agreed-upon deadline for
plaintiff's receipt of the initial decision on remand or for the final decision on
appeal, the temporary stay is extinguished and plaintiff may amend his complaint
to raise any remaining issues.

1 based on SICA's uniform code. The SEC ultimately approved those proposals in
2 accordance with the procedures set forth in Section 19 of the Securities Exchange
3 Act of 1934 ("Exchange Act"), 15 U.S.C. 78s, and Rule 19b-4 thereunder, 17
4 C.F.R. 240.19b-4. *See, e.g., In the Matter of New York Stock Exchange, Inc.*, SEC
5 Release No. 34-16390, 1979 WL 173293, *1 & n.5 (Nov. 30, 1979) (approving
6 NYSE adoption of arbitration code based on SICA model rules, and noting eight
7 other SROs that had adopted SICA's arbitration procedures for small claims).

8 SICA's members are representatives from SROs, the Securities Industry
9 Association and, currently, three members of the public. In addition, members of
10 the staffs of the SEC, the Commodity Futures Trading Commission, the American
11 Arbitration Association and the North American Securities Administrators
12 Association and the former public members of SICA are invited to attend the
13 meetings of SICA. Candidates with extensive experience in alternative dispute
14 resolution have been selected to serve as public members of SICA following
15 interviews by the current and former public members, subject to the concurrence of
16 the SRO participants of SICA.³

17 SROs may look to SICA's model rules of arbitration in deciding how they
18 might propose revising their own arbitration rules. Any changes to an SRO's
19 arbitration rules must be approved by the SEC, however, following public notice
20
21

22 ³ This information on SICA was obtained from SICA's Twelfth Report, cited by
23 plaintiff, *see* Compl. ¶ 8(D), and is provided for background purposes only. *See*
24 [www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_00](http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009529.pdf)
25 [9529.pdf](http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009529.pdf). Further, citation to documents expressly referenced in the complaint
26 does not convert this motion from a Rule 12(b) motion to dismiss into a Rule 56
27 motion for summary judgment. *See Jackson v. Southern California Gas Co.*, 881
28 F.2d 638 (9th Cir. 1988); *Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337,
1340 n.3 (11th Cir. 2005); *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987
F.2d 429, 431 (7th Cir. 1993).

1 and comment. *See* 15 U.S.C. 78s(b).⁴

2 **B. Plaintiff's Petition for Rulemaking 4-502.**

3 On May 13, 2005, plaintiff filed Petition for Rulemaking 4-502 with the
4 SEC. That petition, filed under SEC Rule of Practice 192 ("Rule 192")⁵, asked that
5 certain changes be made to the SROs' arbitration processes. Compl. ¶13. After
6 publishing Petition 4-502 on its website and requesting public comment, *id.* ¶14, on
7 August 19, 2005, the SEC sent a copy of Petition 4-502 and the public comments
8 to SICA. *Id.* ¶15. On August 30, 2005, plaintiff wrote to the SEC to respond to the
9 SEC's distribution of his petition and the public comments to SICA. *Id.* ¶16.

10 Plaintiff claims that the SEC's sending these documents to SICA is an improper

11
12 ⁴ *See, e.g.,* Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order
13 Approving Proposed Rule Change and Amendments No. 1 and 2 Thereto
14 Regarding NYSE Rule 619 To Clarify That Failure To Appear or Produce
15 Documents in Arbitration May Be Deemed Conduct Inconsistent With Just and
Equitable Principles of Trade, 71 Fed. Reg. 48961-01 (Aug. 22, 2006).

16 ⁵ With regard to petitions for rulemaking, Rule 192 provides:

17
18 Any person desiring the issuance, amendment or repeal of a rule of
19 general application may file a petition therefor with the Secretary.
20 Such petition shall include a statement setting forth the text or the
21 substance of any proposed rule or amendment desired or specifying
22 the rule the repeal of which is desired, and stating the nature of his or
23 her interest and his or her reasons for seeking the issuance,
24 amendment or repeal of the rule. The Secretary shall acknowledge, in
25 writing, receipt of the petition and refer it to the appropriate division
26 or office for consideration and recommendation. Such
27 recommendations shall be transmitted with the petition to the
Commission for such action as the Commission deems appropriate.
The Secretary shall notify the petitioner of the action taken by the
Commission.

28 17 C.F.R. 201.192(a).

1 ploy to fail to act upon Petition 4-502 or to assure that Petition 4-502 receives
2 negative comments from SICA before being presented to the SEC's
3 Commissioners. *Id.* ¶¶44-45. While the SEC staff has sent plaintiff a copy of
4 SICA's letter addressing his petition, the SEC has not yet taken final action
5 regarding Petition 4-502. As explained in more detail below, any appeal of the
6 SEC's final action on a proposed rulemaking like the one at issue here must be
7 taken in a court of appeals. *See* 15 U.S.C. 78y.

8 ARGUMENT

9 As plaintiff fails to allege cognizable claims under the FACA or APA, each
10 of those claims should be dismissed.

11 **I. As SICA Is Not an "Advisory Committee" under FACA, Plaintiff Fails** 12 **to State a FACA Claim.**

13 Plaintiff cannot prevail on his FACA claim for the simple reason that SICA
14 is not an "advisory committee" within the meaning of the Act. Section 3 of FACA
15 defines an "advisory committee" as

16 [a]ny committee, board, commission, council, conference, panel, task
17 force, or other similar group, or any subcommittee or other subgroup
18 thereof . . . which is –

19 (A) established by statute or reorganization plan, or

20 (B) established or utilized by the President, or

21 (C) established or utilized by one or more agencies[.]

22 5 U.S.C. App. 3. As discussed below, plaintiff's allegations fail to demonstrate
23 that the SEC "established" or "utilized" SICA so as to make it subject to the
24 requirements of FACA.⁶ Thus, his FACA claim must be dismissed. *See*

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27 ⁶ Specifically, FACA requires that an advisory committee must file a charter and
28 keep detailed minutes of its meetings. *Id.* §§ 9(c), 10(c). The committee's
meetings must be chaired or attended by a federal employee who is authorized to

1 *Manshardt v. Federal Judicial Qualifications Comm*, 408 F.3d 1154, 1157 (9th Cir.
2 2005) (affirming granting of motion to dismiss FACA complaint).

3 **A. The SEC Did Not “Establish” SICA.**

4 The SEC did not establish SICA, as would be required for FACA to apply.⁷
5 To the contrary, as plaintiff repeatedly states, “the SROs formed” SICA. Compl.
6 ¶8(A); *see also id.* ¶8(B) (“SICA was formed by the securities industry in 1977”),
7 ¶8(C) (“the securities industry established SICA in 1977”). Plaintiff maintains
8 SICA was formed at the “prompting/behest and with the guidance” of the SEC, *id.*
9 ¶7, selectively quoting from an SEC release stating that “the Commission will
10 designate an advisory committee to develop specific recommendations for
11 implementation of the investor dispute resolution system.” *See id.* ¶6 (citing
12 Securities Exchange Act Release No. 34-12974, 1976 WL 162796, *2 (Nov. 15,
13 1976)). However, in a subsequent release, the SEC stressed that the SROs would
14 instead take the lead in fashioning such a system:

15 Although the Commission does have extensive authority over the
16 self-regulatory organizations, their rules and procedures, it is of the
17 view that it would not be useful at this time to interpose itself in this
18 area since the industry has manifested its intention to take affirmative

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20 adjourn the meetings when he or she deems it in the public interest to do so. *Id.* §
21 10(e). An advisory committee must provide advance notice of its meetings and
22 open the meetings to the public. *Id.* § 10(a). It must make its minutes, records and
23 reports available to the public, unless the records are excluded under the FOIA.
24 *Id.* § 10(d). An advisory committee must be “fairly balanced in terms of the points
25 of view represented and the functions” it performs, and its existence is limited to
26 two years unless specifically exempted by the agency to whom it reports. *Id.*
27 §§ 5(b)(2), (c), 14(a)(1).

28 ⁷ See FACA Section 3(C). Plaintiff does not allege that SICA was “established”
by statute or the President, so Sections 3(A) and (B) of FACA clearly do not
apply.

1 action.

2 *Implementation of an Investor Dispute Resolution System*, Exchange Act Release
3 No. 34-13470, 1977 WL 175430,*4 (Apr. 26, 1977) (“Release 34-13470”)
4 (footnote omitted). And, as plaintiff admits, the SEC subsequently noted that it
5 was “[t]he New York Stock Exchange, Inc. and the National Association of
6 Securities Dealers, Inc. [who] proposed that a conference be held or that a task
7 force be created.” Compl. ¶7 (citing Release 34-13470 at *3). Thus, on the face of
8 the complaint, it is evident that the SROs – not the SEC – established SICA.

9 Moreover, merely because the SEC may have suggested to the SROs that
10 they establish an entity to address investor arbitration issues does not show that the
11 SEC “established” SICA for FACA purposes. In *Byrd v. EPA*, 174 F.3d 239, 245
12 (D.C. Cir. 1999), plaintiff contended that the EPA “effectively created” the panel at
13 issue by “conceiving of the need for” it. The court rejected the contention that the
14 EPA had established that panel, writing that FACA “describes a panel that ‘is
15 established,’ 5 U.S.C. App II, § 3(2), not one that could have been established by a
16 government agency.” *Id.* at 247; *see also Food Chem. News v. Young*, 900 F.2d
17 328, 333 (D.C. Cir. 1990). Thus, even if the SEC encouraged the SROs to form
18 SICA, this does not mean the SEC “established” SICA under FACA. Also,
19 plaintiff does not allege in his complaint – nor could he – that the SEC selects any
20 of the members of SICA, which likewise weighs against a finding that the SEC
21 “established” SICA for FACA purposes. *See Food Chemical News*, 900 F.2d at
22 333.

23 **B. The SEC Does Not Exercise Such Strict Control over SICA as to**
24 **“Utilize” It for FACA Purposes.**

25 Similarly, plaintiff does not allege that the SEC exercises such strict control
26 over SICA’s operations and actions that the SEC can be deemed to “utilize” SICA,
27 as that term is applied under FACA. Plaintiff alleges that “SICA has been utilized
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1 by [the Commission] for approximately thirty (30) years to obtain . . . advice and
2 recommendations [on matters related to rules governing arbitrations before forums
3 sponsored by SROs].” Compl. ¶7. However, plaintiff’s “utilization” theory is
4 foreclosed by *Public Citizen v. United States Department of Justice*, 491 U.S. 440,
5 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989).

6 In *Public Citizen*, plaintiff sought to enjoin the Department of Justice from
7 consulting with the American Bar Association Standing Committee on the Federal
8 Judiciary (“ABA Committee”) about potential nominees for federal judgeships.
9 491 U.S. at 447. Public Citizen argued the ABA Committee was an “advisory
10 committee” under FACA because the Department of Justice had “utilized” it to
11 evaluate potential nominees.

12 The Court disagreed, holding instead that Congress had not intended to
13 subject groups like the ABA Committee to the requirements of FACA. The Court
14 recognized that “the Executive makes use of the ABA Committee, and thus
15 ‘utilizes’ it in one common sense of the term.” *Id.* at 452. But the Court rejected
16 this “dictionary reading” of the Act because it “would catch far more groups and
17 consulting arrangements than Congress could have conceivably intended.” *Id.* at
18 453 n.8, 464. Congress did not mean to include “every formal and informal
19 consultation between the President or an Executive agency and a group rendering
20 advice.” *Id.* at 453.

21 Faced with a “literal reading” that would “compel an odd result,” the Court
22 turned to FACA’s legislative history in order to determine the “proper scope” of
23 the Act. *Id.* at 454 & n.9. The Court noted that FACA’s purpose “was to enhance
24 the public accountability of advisory committees . . . and to reduce wasteful
25 expenditures on them.” *Id.* at 459. This purpose, the Court reasoned, “could be
26 accomplished” without expanding the Act “to include privately organized
27 committees that receive no federal funds,” and were “not amenable to the strict
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1 management [of] agency officials.” Consequently, the Court concluded that ABA
2 Committee was not “utilized by a department or agency in the same manner as a
3 Government-formed advisory committee,” *id.* at 457-58, even though the
4 Department of Justice had “affirmatively solicited” its views. *Manshardt*, 408 F.3d
5 at 1157 (discussing *Public Citizen*).

6 Following *Public Citizen*, the Ninth Circuit has stressed that a committee is
7 not “utilized” for purposes of FACA unless it is “so closely tied to [the Agency] as
8 to be amenable to strict management.” *Aluminum Co. of Am. (“Alcoa”) v.*
9 *National Marine Fisheries Serv.*, 92 F.3d 902, 905 (9th Cir. 1996) (quoting *Food*
10 *Chemical News*, 900 F.2d at 332-33). The Ninth Circuit also looks closely at
11 whether the group in question receives public funds. *E.g., Alcoa*, 92 F.3d at 906.
12 Thus, in *Alcoa*, the court held that a group formed to compile data about an
13 endangered species was not “utilized” by the government, even though the
14 National Marine Fisheries Service relied upon the group’s data, because the
15 Committee was not under the control of the government and did not receive public
16 funding.

17 Other circuits have reached the same conclusion as the Ninth Circuit: *Public*
18 *Citizen* imposes a “stringent standard, denoting something along the lines of actual
19 management or control[.]” *Washington Legal Found. v. United States Sentencing*
20 *Comm’n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994). It is not enough that an agency’s
21 employees serve on the committee or exercise “significant influence” over the
22 committee’s deliberations. *See id.* at 1450 (group established to assist Sentencing
23 Commission was not “utilized” by DOJ, even though DOJ employees were
24 members of the group and likely to exert “significant influence” on the group’s
25 deliberations and recommendations). Nor is it enough if an agency retains
26 extensive power over a committee’s composition, so long as that power is not
27 exercised. *See Byrd*, 174 F.3d at 247-48 (peer review panel convened by contractor
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1 to assess EPA's update of benzene report was not "utilized" by EPA, even though
2 EPA provided list of potential panel members, had final authority over the panel's
3 composition and reserved the power to make comments to the panel's report).

4 In this case, plaintiff does not – and cannot – allege facts sufficient to show
5 that the SEC "utilized" SICA. Plaintiff does not allege that SICA receives any
6 public funding. Nor does he allege that SICA is subject to the SEC's strict
7 management and control. On the contrary, plaintiff alleges as part of his FACA
8 claim that the SEC "has *not* . . . [e]xercised control and supervision over
9 procedures and accomplishments of SICA." Compl. ¶12(F)(1) (emphasis added).
10 And while plaintiff notes that SEC staff are invited to and attend SICA meetings,
11 *id.* ¶30(A),(B), he does not – and cannot – allege that SEC staff schedules, sets the
12 agenda for, or runs these meetings. Plaintiff's own allegations thus refute any
13 claim that the SEC utilizes SICA as an "advisory committee" within the meaning of
14 FACA.

15 Nor can plaintiff demonstrate that any SRO utilization of SICA can be
16 imputed to the SEC because, as he asserts, the SROs are purportedly "quasi-public"
17 entities. Compl. ¶4. To be a "quasi-public" entity, whose creation of an advisory
18 committee "for" a government agency constitutes that agency's establishment of
19 that committee for FACA purposes, *Public Citizen*, 491 U.S. at 462, that entity
20 must be "created or permeated by the federal government." *Id.* at 463; *see also*
21 *Animal Legal Def. Fund, Inc. v. Shalala*, 104 F.3d 424, 428 (D.C. Cir. 1997)
22 (noting the "quasi-public" test in *Public Citizen* was meant to address committees
23 that were the "offspring of [an] organization created or permeated by the federal
24 government"). In addition, courts deciding whether an organization is "quasi-
25 public" for FACA purposes look to whether that organization is "in receipt of
26 public funds." *Public Citizen*, 491 U.S. at 460; *Shalala*, 104 F.3d at 428.

27 This is decidedly not the case with the SROs. As courts have found, the
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1 SROs are not creations of the government. Rather, “SROs are *private*
2 organizations that operate subject to a scheme of government regulation.” *Lang v.*
3 *French*, 974 F. Supp. 567, 569 (E.D. La. 1997). Thus, “[i]t is beyond cavil that the
4 NASD is not a government agency; it is a private, not-for-profit corporation. It was
5 not created by statute. None of its directors . . . are government officials or
6 appointees. It receives no government funding . . . , [and] its actions cannot be
7 imputed to the government.” *United States v. Shvarts*, 90 F.Supp.2d 219, 222
8 (E.D.N.Y. 2000), *abrogated on other grounds by United States v. Coppa*, 267 F.3d
9 132 (2d Cir. 2001). Similarly, “the New York Stock Exchange – a self-regulatory
10 private organization like the NASD – is not a state actor.”⁸ *Desiderio v. NASD*,
11 191 F.3d 198, 206 (2d Cir. 1999); *see also Schultz v. SEC*, 614 F.2d 561, 569 (7th
12 Cir. 1980) (“the [Chicago Board Options] Exchange is a Delaware non-stock
13 corporation and not an authority of the Government.”). As plaintiff does not – and
14 cannot – allege that the SEC created or permeates the SROs, or that they receive
15 public funds, their establishment of SICA cannot be attributed to the SEC nor can
16 the SROs’ utilization of SICA be imputed to the SEC .

17 **II. Plaintiff’s APA Claim Must Be Dismissed.**

18 Plaintiff’s APA claim, insofar as it challenges the SEC’s handling of his
19 petition for rulemaking, suffers from three flaws: it is brought in the wrong court,
20 it is premature, and it lacks merit.⁹

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24 ⁸ Indeed, the New York Stock Exchange is part of NYSE Group, a publicly traded
25 company formed in 2006. *See, e.g.*, “NYSE’s Big Day: From Private Club to
26 Public Company,” *New York Times*, Page C2 (March 8, 2006).

27 ⁹ Plaintiff’s APA claim also alleges that the SEC violated the APA by violating
28 FACA. *Id.* ¶45(A). But, as shown at pages 6-12, above, since SICA is not a
federal advisory committee, FACA does not apply.

1 **A. Exclusive Jurisdiction over Commission Exchange Act**
2 **Rulemaking Lies in the Courts of Appeals.**

3 Any challenge to the SEC's ultimate action on plaintiff's petition must be
4 taken in a court of appeals. As any rulemaking that the SEC conducts based on
5 plaintiff's petition would occur under Section 19(c) of the Exchange Act,¹⁰ under
6 Section 25(b)(1) of that act, any challenge to that rulemaking would have to be
7 taken in a court of appeals. *See* 15 U.S.C. 78y(b)(1) (any person aggrieved by an
8 SEC rule promulgated under Section 19 "may obtain review in [a] United States
9 Court of Appeals"). Also, any SEC order under SEC Rule 192 deciding plaintiff's
10 petition would be reviewable only in a court of appeals under Section 25(a)(1) of
11 the Exchange Act. *See* 15 U.S.C. 78y(a)(1). *See FCC v. ITT World*
12 *Communications*, 466 U.S. 463, 468, 104 S.Ct. 1936, 80 L.Ed.2d 480 (1984)
13 (district court lacked jurisdiction over challenge to agency's denial of rulemaking
14 petition, where statute said that jurisdiction over such orders was in courts of
15 appeals); *cf. Timpinaro v. SEC*, 2 F.3d 453, 455 (D.C. Cir. 1993) (on petition for
16 review to court of appeals, noting that SEC had issued an "order den[ying] a
17 petition for rulemaking").

18 Because any appeal of the SEC's ultimate action with regard to plaintiff's
19 petition for rulemaking lies in the courts of appeals, there is no district-court
20 jurisdiction for any interlocutory challenge to the SEC's handling of his petition.
21 *See Public Utility Comm'r of Oregon v. Bonneville Power Admin.*, 767 F.2d 622,
22 626 (9th Cir. 1985) ("where a statute commits review of final agency action to the
23 court of appeals, any suit seeking relief that might affect the court's future
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25
26 ¹⁰ Section 19(c) provides that, by rulemaking, the SEC "may abrogate, add to, and
27 delete . . . the rules of a self-regulatory organization." 15 U.S.C. 78s(c). As the
28 SEC previously approved the SROs' adoption of their arbitration procedures, any
SEC rulemaking to change those rules would be conducted under Section 19(c).

1 jurisdiction is subject to its exclusive review”); *Telecommunication Res. & Action*
2 *Ctr. v. FCC*, 750 F.2d 70, 74-75 (D.C. Cir. 1984) (same).

3 **B. Plaintiff’s APA Claim Is Premature, He Has An Adequate Legal**
4 **Remedy, and It Fails on the Merits.**

5 Even if plaintiff were in the right court, his APA claim concerning his
6 petition is premature. As noted above, that claim alleges that the SEC acted
7 arbitrarily and capriciously, and not in accordance with law, by “utilizing reference
8 to SICA” to “fail to act upon Petition No. 4-502” or to assure that his Petition
9 “receives negative comments” before finally being acted upon. Compl. ¶45(B). He
10 seeks “a permanent injunction” prohibiting the SEC “from relying upon or
11 employing any advice or recommendation received from SICA” and “a writ of
12 mandamus ordering defendant SEC to act upon Petition 4-502 pursuant to the
13 requirements of defendant SEC’s General Rule 192.” *Id.* at 20.

14 Plaintiff cannot maintain this APA claim, however, since (1) there has not
15 yet been final agency action regarding Petition 4-502, (2) he has an adequate
16 remedy, albeit in a different forum, should he seek to challenge whatever action the
17 SEC ultimately takes with regard to that petition, (3) he alleges no cognizable
18 violation of SEC Rule 192, and (4) his claim cannot meet the criteria for mandamus
19 relief under 28 U.S.C. 1361.

20 **1. There Has Been No Final Agency Action.**

21 Unquestionably, there has been no “final agency action” as required before
22 an APA challenge can be made to agency action. 5 U.S.C. 704. Final agency
23 action is action (1) that “mark[s] the consummation of the agency’s decision-
24 making process,” and (2) “by which rights and obligations have been determined,
25 or from which legal consequences flow.” *Bennett v. Spear*, 520 U.S. 154, 178, 117
26 S. Ct. 1154, 137 L. Ed. 2d 281 (1997); *Nippon Miniature Bearing Corp. v. Weise*,
27 230 F.3d 1131, 1137 (9th Cir. 2000). Plaintiff admits that the SEC has not finally
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1 acted on his petition. *See* Compl. ¶¶20-21. While plaintiff asks the Court to
2 impose conditions on the manner with which the SEC addresses his petition for
3 rulemaking, *see* Compl. at 19-20, the APA does not grant jurisdiction for
4 interlocutory review of ongoing agency decisionmaking. *See Clark v. Busey*, 959
5 F.2d 808, 811 (9th Cir. 1991).

6 **2. Plaintiff Has an Adequate Remedy at Law.**

7 Plaintiff's APA claim must also fail because his allegations – even if they
8 stated a meritorious claim – may adequately be addressed once the SEC completes
9 its consideration of Petition 4-502. Jurisdiction under the APA does not lie where
10 the plaintiff has an adequate alternative remedy. *See* 5 U.S.C. 704 (permitting
11 judicial review only where “there is no other adequate remedy in a court”); *Nippon*
12 *Miniature*, 230 F.3d at 1138 (no jurisdiction under APA where plaintiff's ability to
13 assert defenses in any subsequent enforcement action “provided an adequate
14 remedy”); *Shell Oil Co. v. Train*, 585 F.2d 408, 414 (9th Cir. 1978) (no jurisdiction
15 where plaintiff could present claims in court “after the [agency] has taken formal
16 action”).

17 Here, as noted above, once the SEC has completed its consideration of
18 Petition 4-502 and responded to plaintiff pursuant to SEC Rule 192, plaintiff (if he
19 chooses) can petition for review of the SEC's rulemaking. *See* 15 U.S.C.
20 78y(a)(1), (b)(1); *Clark*, 959 F.2d at 811 (no jurisdiction for review of ongoing
21 agency proceeding where “on review of the final disposition of a rulemaking
22 petition, intermediate agency actions in processing the petition are also subject to
23 review”). The availability of this post-rulemaking remedy deprives plaintiff of the
24 ability to maintain his complaint.

25 **3. Plaintiff Identifies No Violations of SEC Rule 192.**

26 Even if the Court could reach the merits of plaintiff's APA claim, his
27 allegations are insufficient to state a claim that the SEC violated Rule 192. As
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1 noted above, plaintiff faults the SEC for sending SICA his petition, and urges the
2 Court to enjoin the SEC from considering any comments SICA may have. Compl.
3 at 19-20. But plaintiff does not point to anything in SEC Rule 192 – the SEC
4 regulation governing petitions for rulemaking – the Exchange Act, or the APA that
5 prohibits the SEC staff from sending the petition to a third party such as SICA for
6 its consideration, or from reviewing any response from SICA in the course of
7 reviewing plaintiff’s petition for rulemaking.

8 **4. Plaintiff Cannot Invoke 28 U.S.C. 1361’s Mandamus**
9 **Provisions.**

10 Nor can plaintiff seek relief on his APA claim concerning his petition for
11 rulemaking under 28 U.S.C. 1361, as his claim fails to meet any of the
12 requirements for seeking such extraordinary relief. As the Ninth Circuit has held:

13 “Mandamus is an extraordinary remedy and is available to compel a
14 federal official to perform a duty only if: (1) the individual’s claim is
15 clear and certain; (2) the official’s duty is nondiscretionary,
16 ministerial, and so plainly prescribed as to be free from doubt; and (3)
17 no other adequate remedy is available.” *Patel v. Reno*, 134 F.3d 929,
18 931 (9th Cir.1998); *see also* [*Heckler v. Ringer*, 466 U.S. 602, 616,
19 104 S.Ct. 2013 (1984)] (“The common-law writ of mandamus, as
20 codified in 28 U.S.C. § 1361, is intended to provide a remedy for a
21 plaintiff only if he has exhausted all other avenues of relief[.]”)

22 *Kildare v. Saenz*, 325 F.3d 1078, 1083 (9th Cir. 2003).

23 Plaintiff’s claim meets none of these criteria. First, his claim that the SEC
24 cannot consider anything that SICA might have to say regarding his proposed
25 rulemaking is far from clear and certain. *See* pages 15-16, above. He also fails to
26 identify any ministerial duty that SEC officials have not performed. Finally, as
27 noted above, he has an adequate remedy at law once the SEC acts on his
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1 rulemaking petition. For all of these reasons, he cannot proceed under Section
2 1361, either.

3 **CONCLUSION**

4 For the foregoing reasons, the Court should grant the SEC's motion to
5 dismiss plaintiff's FACA and APA claims and temporarily stay consideration of his
6 FOIA claims.

7 Respectfully submitted,

8
9 *Gregory C. Glynn*

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17 DATED: February 14, 2007

1
2 **PROOF OF SERVICE**

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

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

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

8 On February 14, 2007, I served true copies of documents entitled (1)
9 **DEFENDANT UNITED STATES SECURITIES AND EXCHANGE**
10 **COMMISSION'S NOTICE OF MOTION AND MOTION TO DISMISS, (2)**
11 **DEFENDANT UNITED STATES SECURITIES AND EXCHANGE**
12 **COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN**
13 **SUPPORT OF MOTION TO DISMISS, and (3) a PROPOSED ORDER** upon
14 the parties to this action addressed as stated on the attached service list:

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

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

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

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

FEDERAL EXPRESS BY AGREEMENT OF ALL PARTIES: by
placing in sealed envelope(s) designated by Federal Express with delivery
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: February 14, 2007


Thomas J. Karr

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5
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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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)

PROPOSED ORDER

22 This matter having come before the Court on the motion of the United
23 States Securities and Exchange Commission (“SEC”) to dismiss plaintiff’s Federal
24 Advisory Committee Act (“FACA”) and Administrative Procedure Act (“APA”)
25 claims and to temporarily stay consideration of plaintiff’s Freedom of Information
26 Act (“FOIA”) claims until the SEC completes its renewed search on plaintiff’s
27 FOIA request and plaintiff exhausts his administrative remedies, the Court finds
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1 that it lacks jurisdiction over plaintiff's APA claim and that plaintiff fails to state a
2 claim under FACA or the APA. Accordingly, it is hereby

3 ORDERED that the SEC's motion to dismiss the FACA and APA claims is
4 GRANTED, and plaintiff's complaint as to those claims is DISMISSED WITH
5 PREJUDICE. The SEC's motion to temporarily stay proceedings as to plaintiff's
6 FOIA claims is also GRANTED.

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UNITED STATES DISTRICT JUDGE

Date: _____