

1 HERBERT LESLIE GREENBERG (SBN 49472)
2 Email: LGreenberg@LGEsquire.com
3 Attorney at Law
4 10732 Farragut Drive
5 Culver City, CA 90230-4105
6 Telephone & Facsimile No.: (310) 838-8105

6 Plaintiff In Propria Persona

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HERBERT LESLIE GREENBERG,)	
Plaintiff,)	CASE NO. CV 06-7878-GHK(CTx)
v.)	FIRST AMENDED COMPLAINT
UNITED STATES SECURITIES)	FOR DECLARATORY AND
AND EXCHANGE COMMISSION,)	INJUNCTIVE RELIEF
Defendant.)	
_____)	

COMES NOW plaintiff HERBERT LESLIE GREENBERG and alleges as follows:

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PARTIES

3. Plaintiff is an individual, duly licensed by the State of California as an attorney at law, and resident of the County of Los Angeles, State of California. Plaintiff has served as an Associate General Counsel and Compliance Director of a securities firm, which was a member of the NEW YORK STOCK EXCHANGE, INC. ("NYSE"). From 1973, Plaintiff has engaged in the private practice of law as a sole practitioner where substantially all client representation has dealt with financial/investment disputes. Plaintiff has represented many individual investors and approximately twenty (20) securities firms before arbitration panels and/or in various state and/or federal courts. Plaintiff no longer represents securities firms. For approximately thirty (30) years, Plaintiff has served as a member of securities arbitrator panels sponsored by the NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. ("NASD"), before which disputes between public investors and securities firms are resolved by means of binding arbitration. During the past fifteen (15) years, Plaintiff has advocated changes to the securities arbitration dispute resolution process, *e.g.*, proponent of Petition No. 4-502, which would benefit Plaintiff as an investor having signed pre-dispute arbitration agreements with securities brokerage firms and as an arbitrator called upon to decide investor disputes in arbitration proceedings. Since approximately February 1, 2005, Plaintiff has been interested in all efforts that might result in a change to the securities arbitration process.

4. Defendant SEC is an agency of the United States Government within the meaning of 5 U.S.C. §552(f)(1).

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1 8. Plaintiff is informed and believes and thereupon alleges that defendant
2 SEC desired to establish for itself an advisory committee to advise it on matters
3 related to securities arbitration and prompted the creation of SICA by releasing
4 Securities Exchange Act Release No. 34-12974 (November 15, 1976), which states,
5 in part:

6 Designation of an Advisory Committee

7 After review of the public comments and following the public
8 forum, the Commission will designate an advisory committee to
9 develop specific recommendations for implementation of the investor
10 dispute resolution system. Among other things, the advisory
11 committee will be expected to submit to the Commission (a) a proposed
12 mediation-arbitration code, (b) operational guidelines for the small
13 claims adjusters, and (c) recommendations concerning the creation and
14 size of the administrative entity.

15 Recommendations for persons to serve on this advisory
16 committee should be sent to the attention of the Acting Director of the
17 Office of Consumer Affairs (of defendant SEC)... For the
18 Commission. George A. Fitzsimmons, Secretary
19

20 9. Plaintiff is informed and believes and thereupon alleges that the NYSE
21 and NASD, in response to Securities Exchange Act Release No. 34-12974
22 (November 15, 1976), suggested to defendant SEC that SROs create SICA as an
23 advisory committee for defendant SEC, in lieu of the advisory committee defendant
24 SEC previously considered establishing for itself. (*See, e.g.*, Securities Exchange
25 Act Release No. 34-13470 [April 26, 1977] ["The New York Stock Exchange, Inc.
26 and the National Association of Securities Dealers, Inc. proposed that a conference
27 be held or that a task force be created (SICA)... The Commission believes ... the
28 Commission should consider the ... recommendations of the conference before

1 taking further direct action. ... (T)he Commission wishes to await the results of the
2 proposed conference with the expectation that such results will reflect the goals and
3 attributes set forth in Securities Exchange Act Release No. 34-12974."].)

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5 10. Plaintiff is informed and believes and thereupon alleges that the 1972
6 legislative history of FACA reflects a "most liberal" application of FACA to groups
7 tied to the federal government in Senate Report (92nd Congress, 2nd Session) No. 92-
8 1098 at pps. 2, 8, by stating, in part:

9 During the 91st Congress, the Subcommittee on
10 Intergovernmental Relations held seven days of hearings.... The
11 hearings disclosed that the OMB, without statutory authority, had
12 established close liaison with an Advisory Council on Federal Reports
13 (ACFR) composed entirely of business officials from each of the major
14 industries, with whom OMB consulted before approving forms,
15 questionnaires, surveys, or investigatory requests to be circulated to
16 such industries. ...

17 ...

18 What kind of committees would this bring into coverage under
19 the legislation? The intention of the legislation is to interpret the words
20 "established" and "organized" in their most liberal sense, so that when
21 an officer brings together a group by formal or informal means, by
22 contract or other arrangement, and whether or not Federal money is
23 expended, to obtain advice and information such group is covered by
24 the provisions of this bill. Examples of such groups are the Advisory
25 Council on Federal Reports.... (Emphasis added.)

26
27 11. Plaintiff is informed and believes and thereupon alleges that in *Public*
28 *Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 460-3 (1989), dealing with an

1 advisory committee formed by a strictly private entity, one not created or permeated
2 by the Federal Government, the Court stated, in part:

3 [T]he examples the Senate Report offers - "the Advisory Council
4 on Federal Reports..." - are limited to groups organized by, or closely
5 tied to, the Federal Government, and thus enjoying quasi-public status.

6 ...

7 [F]ACA applies to advisory committees established by the
8 Federal Government in a generous sense of that term, encompassing
9 groups formed indirectly by quasi-public organizations ... "for" public
10 agencies as well as "by" such agencies themselves.

11 [T]he initial House and Senate bills' limited extension to
12 advisory groups "established," on a broad understanding of that word,
13 by the Federal Government, whether those groups were established by
14 the Executive Branch or by statute or whether they were the offspring
15 of some organization created or permeated by the Federal Government.
16 (Emphasis added.)

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18 12. Plaintiff is informed and believes and thereupon alleges that in *Animal*
19 *Legal Defense Fund, Inc. v. Shalala*, 104 F.3d 424-30, (D.C. Cir. 1997), dealing
20 with the "paradigmatic example" of an advisory committee, formed by a quasi-
21 public entity created (*vis-à-vis* permeated) by the Federal Government, setting forth
22 the characters of that example, the court stated, in part:

23 The National Academy of Sciences (NAS) ... was chartered by
24 Congress....

25 ...

26 [T]he definition given by the Court to an advisory committee
27 utilized by the federal government focuses not so much on *how* it is
28

1 used but whether or not the character of its creating institution can be
2 thought to have a quasi-public status.

3 ...

4 [Q]uasi-public does not have an independent meaning divorced
5 from the Court's reference in *Public Citizen*. The term merely stood for
6 a set of qualities that the Court thought critical. And the NAS is
7 imbued with those very characteristics:

8

9 In *Public Citizen*, the Court asked only whether particular
10 committees asserted to be "utilized" by the government as FACA
11 advisory committees were formed (established) by a non-governmental
12 organization that was "created or permeated by the Federal
13 Government." 491 U.S. at 463. (Underline emphasis only added.)

14
15 13. Plaintiff is informed and believes and thereupon alleges that, at all
16 times material hereto, SROs were and are quasi-public organizations as:

17 (A) SROs were and are permeated by and closely tied to defendant
18 SEC, *e.g.*:

19 (1) The SROs are entities that the federal government helped
20 bring into being as SROs when the entities applied to defendant SEC to register as
21 SROs and only became so registered upon their respective approvals by defendant
22 SEC, which defendant SEC may revoke;

23 (2) Defendant SEC sometimes solicits opinions, advice and/or
24 recommendations of and/or consults with SROs on various securities related
25 matters, *e.g.*, "In September 1972, the Commission appointed an Advisory
26 Committee on Broker-Dealer Reports and Registration ... to study methods of
27 simplifying and standardizing reports and eliminating duplicative recordkeeping
28 requirements. ... In February 1973, the Commission ... sought the advice of self-

1 regulatory authorities ... as to the best methods for implementation of the
2 Committee's proposals." (SEC 1973: 39th Annual Report Of The Securities And
3 Exchange Commission); securities arbitration procedures; proposals suggested in
4 non-SRO sponsored rulemaking proposals;

5 (3) Defendant SEC sometimes requests and/or encourages
6 SROs to establish advisory committees to render advice and/or recommendations to
7 defendant SEC, *e.g.*, SICA, where representatives of defendant SEC attended SICA
8 meetings and received minutes of the meetings and other reports from SICA; IPO
9 Advisory Committee;

10 (4) In framing the Securities Exchange Act of 1934
11 ("Exchange Act") and its subsequent amendments, Congress envisaged a system of
12 "cooperative regulation" in which regulation of the securities market would be
13 "largely performed" by SROs, with defendant SEC "exercising appropriate
14 supervision in the public interest," and, thus, when acting pursuant to this mandate,
15 SROs effectively stand in the shoes of the defendant SEC and, thus, SROs enjoy
16 immunity from civil damages for conduct undertaken as part of their statutorily
17 delegated adjudicatory, regulatory, and prosecutorial authority to "prevent
18 fraudulent and manipulative . . . practices," "promote just and equitable principles of
19 trade," "remove impediments to and perfect" the free market, and/or "protect
20 investors and the public interest";

21 (5) SROs are obligated to enforce securities laws and SRO
22 rules with respect to their respective members and supervise the conduct of those
23 members;

24 (6) SROs propose rules and rule changes, which may only
25 become effective upon approval of defendant SEC;

26 (7) Defendant SEC may modify or abrogate rules of the
27 SROs;

28

1 (8) In listing and delisting companies for trading, SROs "stand
2 in the shoes of the SEC";

3 (9) The actions of SROs and their securities brokerage firm
4 members are subject to supervision and comprehensive oversight by defendant
5 SEC's exercise of its extensive regulatory authority;

6 (10) In exercising their self-regulatory authority, SROs sponsor
7 conferences to gather information and report to defendant SEC on matters related to
8 resolution of securities disputes;

9 (11) SROs sponsor arbitration forums before which disputes
10 between public investors and securities firms are resolved, where defendant SEC
11 exercises regulatory authority with respect to the rules governing arbitration
12 proceedings heard before those forums;

13 (B) The Congress of the United States has determined, and defendant
14 SEC has acknowledged, that SROs are quasi-public organizations:

15 (1) "As Congress has stated on a number of occasions, SROs
16 are 'quasi-public agencies, not private clubs, and . . . their goal is the prevention of
17 inequitable and unfair practices and the advancement of the public interest.'³¹ ... 31
18 Securities Industry Report of the Subcommittee on Securities, S. Doc. No. 13, 93d
19 Cong., 1st Sess. 156 (1973)." Exchange Act Release No. 34-43860 (January 19,
20 2001); 66 Fed. Reg. 8912, 8913 (February 5, 2001);

21 (2) Congress noted that SROs are "quasi-public organizations,
22 not private clubs." S. Rep. 94, 94th Cong., 1st Sess. (April 14, 1975) at 29. *Accord*,
23 121 Cong. Rec. 10728, 10756 (April 17, 1975);

24 (C) Defendant SEC has recognized and publicly admitted that SROs
25 are quasi-public organizations:

26 (1) "A National Securities Exchange is a quasi-public
27 institution." SEC Report of Special Study of Securities Market, H.R. Doc. No. 95,
28 88th Cong., 1st Sess., 804 (1963);

1 (2) SEC Commissioner ANNETTE L. NAZARETH has
2 stated, "These (SROs) are 'quasi-public entities' --- supervised by the SEC --- and
3 not just member clubs." (*Wall Street Journal*, December 15, 2006);

4 (3) ANNETTE L. NAZARETH, then Director, Division of
5 Market Regulation of defendant SEC stated, "[I]t is incumbent on us to ask why
6 these quasi-public institutions (SROs, including the NYSE) are not subject to
7 transparency and reporting requirements substantially similar to those applicable to
8 public companies." (Remarks Before SECURITIES INDUSTRY ASSOCIATION
9 Research Conference, October 16, 2003);

10 (D) Defendant SEC has adoptively admitted that SROs are quasi-
11 public organization as defendant SEC has known of and not criticized, not
12 reprimanded and/or not corrected statements by SROs or the securities industry that
13 hold SROs out to the public as a quasi-public organizations, *e.g.*:

14 (1) In a public letter of comment to defendant SEC, the SIA,
15 "which brings together the shared interests of nearly 600 securities firms," stated,
16 "[S]ROs are 'quasi-public agencies' that 'exercise certain quasi-governmental powers
17 over members through their ability to impose disciplinary sanctions, deny
18 membership, and requirement members cease doing business entirely.' Indeed,
19 SROs are legally bound to enforce their rules against their members, subject to
20 Commission sanctions for failure to do so";

21 (2) In a public letter of comment to defendant SEC, the
22 BOSTON STOCK EXCHANGE stated, "SROs ... act as a quasi-public entity
23 responsible for oversight of the market and its participants";

24 (3) In an interview with CNBC television and quoted on the
25 NYSE's website, NYSE Chairman Marshall N. Carter stated, "The range of options
26 (as the way the NYSE may operate in the future) are all the way from a quasi-public
27 utility, the way we are now, all the way to a full-blown public offering global
28 company...." (CNBC Interview with NYSE Chairman, Marshall N. Carter and

1 NYSE CEO, John A. Thain, April 8, 2005);

2 (4) In an article published in the *Wall Street Journal*, "Big
3 Board (NYSE) Chairman William H. Donaldson says big investors have a duty to
4 protect his exchange, which he calls 'a quasi public utility' that has served the
5 country well." (*Wall Street Journal*, May 13, 1992). WILLIAM H. DONALDSON,
6 subsequent to that statement, served a Chairman of defendant SEC.

7
8 14. Plaintiff is informed and believes and thereupon alleges that SICA was
9 created by SROs to provide advice as to the securities arbitration process to
10 defendant SEC and various reports accurately describe the purpose and/or formation
11 of SICA as follows:

12 (A) "In response to Commission initiatives on arbitration, the SROs
13 formed the Securities Industry Conference on Arbitration (SICA) in 1977. The
14 purpose of SICA was to develop uniform rules governing SRO arbitrations between
15 broker-dealers and customers." (Defendant SEC's "Oversight of Self-Regulatory
16 Organization Arbitration" [Audit 289, August 24, 1999].);

17 (B) "SICA was formed by the securities industry in 1977 at SEC's
18 invitation to review then existing securities arbitration procedure...." ("Securities
19 Arbitration: How Investors Fare" [GAO/GGD-92-74, May 1992].);

20 (C) "The securities industry established SICA in 1977 after a request
21 by the SEC to the industry to conduct a review of existing arbitration procedures for
22 small claims." ("Securities Arbitration Reform: Report of the Arbitration Policy
23 Task Force to the Board of Governors of NASD" [January 1996].);

24 (D) "SICA was established in early April 1977. Subsequently, the
25 Commission invited proposals from SICA for improved methods for resolving
26 investors' small claims. The proposal for a small claims procedure put forth by
27 SICA was subsequently approved and adopted by the SROs and the SEC." (Twelfth
28 Report [2003] of SICA.)

1 15. Plaintiff is informed and believes and thereupon alleges that "Public
2 Members" of SICA have made statements that accurately describe the nature,
3 purpose, formation and/or operation of SICA as follows:

4 (A) "SICA is an advisory committee to the SEC (Securities and
5 Exchange Commission), whose representatives are in attendance at all SICA
6 meetings." (Emphasis added.) (Website of THEODORE G. EPPENSTEIN, "Public
7 Member" of SICA 1998 -);

8 (B) "'This is a serious issue,' says Constantine Katsoris, a law
9 professor at Fordham University and one of three of the original public members of
10 the Securities Industry Conference on Arbitration (SICA). SICA was conceived
11 'with the SEC's blessing ... to create a uniform set of rules for all exchanges so that
12 we could have a national securities market,' says Katsoris." (Registered
13 Representative Magazine, "California Securities Arbitrations at a Standstill,"
14 September 1, 2002)

15
16 16. Plaintiff is informed and believes and thereupon alleges that defendant
17 SEC:

18 (A) "[V]iews SICA as a sounding board" and requires SROs, in their
19 respective rulemaking requests filed with defendant SEC, to discuss SICA's action
20 or inaction on the issues presented in the rulemaking requests. (Minutes of SICA
21 Meeting – October 20, 2004);

22 (B) "[N]oted that SICA has served as a good sounding board for
23 ideas and to work out problems" and concurs that "SICA should continued to focus
24 its future efforts on generating ideas for discussion." (Memorandum from
25 Governance Task Force to SICA - March 21, 2007)

26
27 17. Plaintiff is informed and believes and thereupon alleges that defendant
28 SEC seeks the views, recommendations or comments of SICA and its SRO

1 members with respect to Petitions for Rulemaking, which are not initiated by SROs
2 and seek changes to the securities arbitration process, and defendant SEC's own
3 recommendations for changes to the securities arbitration process. ("The Level
4 Playing Field," 17 Fordham Urban Law Journal 419, 429-430 [1990].)

5
6 18. Plaintiff is informed and believes and thereupon alleges that:

7 (A) SICA has held meetings for approximately thirty (30) years;

8 (B) SICA's meetings have not been open to the public;

9 (C) Timely notice of each meeting of SICA has not been published
10 in the Federal Register;

11 (D) All interested persons have not been allowed to attend, appear
12 before, or file statements with SICA;

13 (E) Records, reports, transcripts, minutes, appendixes, working
14 papers, drafts, studies, agenda, or other documents, which were made available to or
15 prepared for or by SICA, have not been made available for public inspection and
16 copying;

17 (F) Defendant SEC has not:

18 (1) Exercised control and supervision over procedures and
19 accomplishments of SICA;

20 (2) Assembled and maintained the reports, records, and other
21 papers of SICA during its existence; and

22 (3) Carried out, on behalf of that agency, the provisions of
23 FOIA, with respect to such reports, records, and other papers of SICA;

24 (4) Caused a charter of SICA to be properly filed.

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1 **Defendant SEC Referred Plaintiff's Petition for Rulemaking to SICA for**
2 **Advice and Recommendations, Allowing SICA to Avoid the Public Comment**
3 **Procedure And Assuring Indefinite Delay or Negative Comment If The Petition**
4 **Is Presented to SEC Commissioners**

5
6 19. On or about May 13, 2005, Plaintiff filed Petition No. 4-502 with
7 defendant SEC. On June 22, 2005, Plaintiff filed Supplemental Information to
8 Petition No. 4-502 with defendant SEC. Petition No. 4-502 describes deficiencies in
9 the process of resolving disputes between public investors and securities firms by
10 means of arbitration before forums sponsored by SROs and advocates associated
11 changes, which are contrary to the procedures promulgated by SICA and/or its
12 member SROs, *e.g.*:

13 (A) Specifically permit arbitration panel members, should they elect
14 to do so, to conduct legal research, or, in the alternative, forbid SRO sponsored
15 arbitration forums from restricting arbitrators from conducting legal research;

16 (B) Abolish the requirement that a securities industry arbitrator be
17 assigned to each three person panel hearing customer disputes or, in the alternative,
18 require that information presented to a panel of arbitrators by a securities industry
19 arbitrator be revealed to the parties during open hearing;

20 (C) Require SROs to conduct continuing evaluations of ability of
21 every arbitrator on their panels to perform his/her duties, including, but not limited
22 to mandatory peer evaluations;

23 (D) Require SROs to train arbitrators in applicable law;

24 (E) Require SROs to reveal in pre-dispute arbitration agreements
25 whether their arbitrators are required to follow the law in their decision-making
26 process, the training of their arbitrators in the law, and their process, if any, to
27 evaluate their arbitrators on a continuing basis.

28

1 20. On or about May 13, 2005, defendant SEC published Petition No. 4-
2 502 on its website and requested public comment. Defendant SEC received several
3 supportive comment letters that it promptly published on its website. SICA did not
4 avail itself of that process to comment upon Petition No. 4-502.

5
6 21. On or prior to August 19, 2005, defendant SEC referred Petition No. 4-
7 502 and the associated public comments to SICA to obtain SICA's advice and
8 recommendations.

9
10 22. On or about August 30, 2005, upon first learning of the referral of
11 Petition No. 4-502 to SICA, in a letter sent to defendant SEC via electronic
12 communication, which Plaintiff is informed and believes and thereupon alleges that
13 defendant SEC received, but to which it has not responded, Plaintiff objected to that
14 referral to SICA by stating, in part:

15 Referring the Petition to the Securities Industry Conference on
16 Arbitration ("SICA"), a group composed of representatives of various
17 SROs, the Securities Industry Association ("SIA") and "public"
18 members, does not provide confidence that the severe problems
19 described in the Petition would be effectively addressed. One of the
20 SROs is the subject of the complaints set forth in the Petition. In a
21 letter to the SEC dated August 2, 2005, the SIA described itself as
22 follows: "The Securities Industry Association brings together the
23 shared interests of nearly 600 securities firms to accomplish common
24 goals." Essentially, the Petition would not receive a fair hearing before
25 the SICA as it sets forth complaints against most of the SICA's
26 members' vested interests.

27
28 23. Plaintiff is informed and believes and thereupon alleges that, at SICA's

1 meeting on October 11, 2005:

2 (A) SICA appointed a subcommittee ("Subcommittee") to present "a
3 proposed plan of action" with respect to Petition No. 4-502;

4 (B) SICA designated four (4) representatives of the securities
5 industry, one (1) "Public Member" and two (2) representatives of the securities
6 industry as alternates to be members of the Subcommittee; and,

7 (C) None of the seven (7) representatives of defendant SEC in
8 attendance registered any criticism as to the constitution of the Subcommittee.
9 (Minutes of SICA Meeting – October 11, 2005)

10
11 24. Plaintiff is informed and believes and thereupon alleges that, at SICA's
12 meeting on January 12, 2006:

13 (A) The Subcommittee reported that, in response to a request by
14 defendant SEC to "evaluate" Petition Nos. 4-502, the Subcommittee had "evaluated
15 the issues and had recommendations";

16 (B) The Subcommittee recommended that SICA submit the
17 proposals to other subcommittees and further discuss them at SICA's meeting
18 scheduled on March 21, 2006;

19 (C) The Subcommittee evaluated the proposals as "unnecessary,"
20 "inappropriate," "run counter to SROs goals," and/or "strict application of the law
21 would be harmful to investors"; and,

22 (D) None of the six (6) representatives of defendant SEC in
23 attendance registered any criticism. (Emphasis added.) (Minutes of SICA Meeting –
24 January 12, 2006)

25
26 25. Plaintiff is informed and believes and thereupon alleges that, at SICA's
27 meeting on March 21, 2006, SICA "tabled" discussion of Petition No. 4-502 due to
28 "time constraints," and none of the four (4) representatives of defendant SEC in

1 attendance registered any criticism. (Minutes of SICA Meeting – March 21, 2006)

2
3 26. On or about July 24, 2006, after Plaintiff made several inquires of
4 defendant SEC as to the status of Petition No. 4-502, defendant SEC informed
5 Plaintiff via letter, which states, in pertinent part:

6 [W]e have asked the Securities Industry Conference on
7 Arbitration ("SICA") to consider your petition and to provide us with
8 its views. ... SICA ... has appointed a subcommittee to give them
9 (issues raised in Petition No. 4-502) more thorough consideration. We
10 have not yet received a formal response or final recommendation from
11 SICA.

12
13 27. Plaintiff is informed and believes and thereupon alleges, with respect to
14 Petition No. 4-502, that:

15 (A) When defendant SEC sought the advice and recommendations of
16 SICA or shortly thereafter, defendant SEC had the reasonable expectation that the
17 advice or recommendations would be counter to the proposal;

18 (B) Defendant SEC has not received a "formal response or final
19 recommendation" from SICA;

20 (C) Defendant SEC has no reasonable expectation that it will receive
21 a "formal response or final recommendation" from SICA; and,

22 (D) Unless and until defendant SEC receives a "formal response or
23 final recommendation" from SICA, defendant SEC will not transmit Petition No. 4-
24 502 to the Commissioners of defendant SEC pursuant to SEC General Rule 192.

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1 (A) Admission to and an opportunity to present his positions related
2 to Petition No. 4-502 to members of SICA at its then forthcoming meeting in
3 October 2006; and,

4 (B) SICA to provide Plaintiff with a copy of various documents
5 issued by SICA, *i.e.*:

6 (1) SICA's First, Second, Third, Fourth, Fifth, Sixth, Seventh,
7 Eighth, Ninth, and Tenth Reports;

8 (2) Exhibits A ("Guidelines"), B ("printed evaluation form")
9 and C ("Memorandum") of the Final Report Securities Industry Conference on
10 Arbitration Pilot Program for Non-SRO-Sponsored Arbitration Alternatives; and,

11 (3) A writing that sets forth SICA's criteria to determine
12 whether a person qualifies as a "Public Member."

13
14 31. SICA declined to permit Plaintiff to attend its meeting (scheduled for
15 October 2006) and has failed and, thus, refused to provide documents described in
16 Paragraph 30(B), above, or any of them, to Plaintiff.

17
18 32. Plaintiff provided defendant SEC with a copy of each of Plaintiff's
19 communications with SICA as the respective communications occurred. Defendant
20 SEC has not communicated with Plaintiff as to any of those communications or the
21 content thereof.

22
23 33. On or about August 8, 2006, by letter sent to defendant SEC via
24 electronic communication, which Plaintiff is informed and believes and thereupon
25 alleges that defendant SEC received, but to which defendant SEC has not responded,
26 Plaintiff informed defendant SEC that SICA had recently "declined to offer any
27 assurance that it will ever make any recommendation (concerning Petition No. 4-
28 502) to the SEC" and, Plaintiff, in effect, stated that:

1 (A) Defendant SEC's reliance upon SICA for advice or
2 recommendations concerning Petition No. 4-502 violates provisions of FACA; and,

3 (B) Pursuant to SEC General Rule 192, defendant SEC should
4 promptly proceed to act upon Petition No. 4-502.

5
6 34. On or about August 16, 2006, by letter sent to SICA via electronic
7 communication, a copy of which Plaintiff is informed and believes and thereupon
8 alleges defendant SEC received, but to which defendant SEC has not responded,
9 Plaintiff, in effect, stated to SICA that its relationship with defendant SEC violates
10 provisions of FACA.

11
12 **Plaintiff's FOIA Request, Defendant SEC's "Final Response" and Plaintiff's**
13 **Appeal**

14
15 35. On August 5, 2006, by letter sent to defendant SEC via electronic
16 communication, Plaintiff requested under FOIA ("Request"), in pertinent part:

17 ALL writings, e.g., letters, emails, audits, reports, notes of oral
18 communications and/or interviews, notices, that evidence that the
19 Securities and Exchange Commission, including its staff, (collectively
20 "SEC") and the Securities Industry Conference on Arbitration ("SICA")
21 have communicated with one another, from January 1, 1996 to the date
22 hereof, with respect to any recommendation, advice and/or opinion
23 concerning securities arbitration and/or associated proceedings,
24 including, but not limited to: (a) SEC solicitation of any
25 recommendation, advice and/or opinion concerning securities
26 arbitration and/or associated proceedings from SICA; (b) SICA
27 providing any recommendation, advice and/or opinion concerning
28 securities arbitration and/or associated proceedings to the SEC; (c)

1 identity of SEC personnel attending meetings of SICA or any
2 subcommittee of SICA; (d) notice to SEC from SICA of anticipated
3 meeting of SICA or any subcommittee of SICA; (e) minutes of
4 meetings of SICA or any subcommittee of SICA; (f) identity of all
5 persons who attended meetings of SICA or any subcommittee of SICA;
6 (g) notes of content of meetings of SICA or any subcommittee of
7 SICA; (h) payment by other than SEC of expense of SEC personnel
8 with respect to attending meetings of SICA or any subcommittee of
9 SICA; (i) Exhibits A ("Guidelines"), B ("printed evaluation form") and
10 C ("Memorandum") of the Final Report Securities Industry Conference
11 on Arbitration Pilot Program for Non-SRO-Sponsored Arbitration
12 Alternatives.

13
14 36. Plaintiff is informed and believes and thereupon alleges that defendant
15 SEC has possession and control of all records described in the Request due to
16 interactions between defendant SEC and SICA.

17
18 37. From August 5, 2005, defendant SEC has issued various "final
19 responses," Plaintiff has appealed each and defendant SEC has produced numerous
20 documents in response to the Request.

21
22 38. On October 30, 2006, defendant SEC issued a final response wherein
23 defendant SEC granted the request for waiver of fees in the Request;

24
25 39. On March 12, 2007, defendant SEC asserted a purported "deliberative
26 process privilege" exemption when refusing to produce "approximately sixty pages
27 of documents."
28

1 agenda, or other documents, which were made available to or prepared for or by
2 SICA. (Violation of FACA §10(a));

3 (E) Failing to:

4 (1) Exercise control and supervision over the procedures and
5 accomplishments of SICA;

6 (2) Assemble and maintain the reports, records, and other
7 papers of SICA during its existence; and,

8 (3) Carry out, on behalf of defendant SEC, the provisions of
9 FOIA, with respect to such reports, records, and other papers of SICA. (Violation of
10 FACA §8(b));

11 (4) Cause an advisory committee charter to be filed with
12 respect to SICA;

13 (F) Allowing SICA to continue operations for more than two (2)
14 years. (Violation of FACA §14(a)(1)).

15
16 **THIRD CLAIM**

17 **(Violation of the Administrative Procedure Act**

18 **Re: Unreasonable Delay and SEC Rule 192)**

19
20 51. Plaintiff repeats and re-alleges the allegations set forth in Paragraphs 1
21 through 42, inclusive, Paragraphs 44 through 47, inclusive, and Paragraphs 49
22 through 50, inclusive, as if they were set forth herein in full.

23
24 52. Defendant SEC has acted in violation of 5 U.S.C. §706 and General
25 Rule 192 by its unreasonable delay in acting upon Petition No. 4-502 by utilizing
26 reference to SICA to fail to act upon Petition No. 4-502 or to assure that Petition No.
27 4-502 receives negative comments from SICA before being presented to the
28 Commissioners.

1 **REQUESTED RELIEF**

2
3 WHEREFORE, Plaintiff prays judgment and relief that the Court:

4
5 **ON THE FIRST CLAIM**

6
7 (1) Declare that defendant SEC has violated FOIA by failing to disclose
8 the records requested by Plaintiff;

9 (2) Enter a permanent injunction ordering defendant SEC to provide to
10 Plaintiff, within ten working days, a full and complete copy of all records that were
11 requested by Plaintiff and are currently being withheld;

12 (3) Grant Plaintiff a fee and/or cost waiver under FOIA; and,

13
14 **ON THE SECOND CLAIM**

15
16 (1) Declare that defendant SEC has violated FACA in its relationship with
17 SICA;

18 (2) Enter a permanent injunction ordering defendant SEC to make
19 documents and records of SICA available to Plaintiff to the full extent permitted by
20 FACA;

21 (3) Enter a permanent injunction prohibiting defendant SEC from
22 participating in, convening, conducting or holding any meeting or engaging in any
23 other non-public activities with SICA;

24 (4) In the alternative:

25 (A) Enter a permanent injunction ordering defendant SEC to exercise
26 control and supervision over procedures and accomplishments of SICA; including,
27 but not limited to:

28 (i) Causing SICA's meetings to be open to the public;

1 (ii) Providing timely notice of each meeting of SICA to be
2 published in the Federal Register;

3 (iii) Causing SICA to allow all interested persons to attend,
4 appear before, or file statements with SICA;

5 (iv) Causing SICA to make available for public inspection and
6 copying all records, reports, transcripts, minutes, appendixes, working papers,
7 drafts, studies, agenda, or other documents, which were made available to or
8 prepared for or by SICA;

9 (v) Assembling and maintaining the reports, records, and
10 other papers of SICA during its existence, and carrying out the provisions of FOIA,
11 with respect to such reports, records, and other papers of SICA;

12 (vi) Causing SICA to be chartered as an advisory committee;
13 or,

14 (B) Enter a permanent injunction prohibiting defendant SEC from
15 relying upon or employing any advice or recommendation received from SICA
16 unless and until the relationship between defendant SEC and SICA complies with
17 the requirements of FACA;

18
19 **ON THE THIRD CLAIM**

20
21 (1) Declare that defendant SEC has violated APA and defendant SEC's
22 General Rule 192 in its unreasonable delay in acting upon Petition No. 4-502;

23 (2) Enter a permanent injunction ordering defendant SEC to act upon
24 Petition No. 4-502 pursuant to the requirements of defendant SEC's General Rule
25 192; and,

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ON ALL CLAIMS

- (1) Award Plaintiff his costs, including Paralegal fees, and reasonable attorneys fees incurred in this action; and,
- (2) Grant such other and further relief as the Court may deem just and proper.

DATED: August 22, 2007

HERBERT LESLIE GREENBERG
Plaintiff In Propria Persona

1 /___/ ELECTRONIC MAIL: By transmitting the document by electronic mail to
2 the electronic mail address as stated above.

3 /___/ (Federal) I declare that I am employed in the office of a member of the bar of
4 this Court, at whose direction the service was made.

5 Pursuant to California Rules of Court, Rule 201, and the Local Rules of the
6 United States District Court, I certify that all originals and service copies (including
7 exhibits) of the papers referred to herein were produced and reproduced on paper
8 purchased as recycled, as defined by section 42202 of the Public Resources Code.

9 Executed on August 22, 2007 at Culver City, California.

10 I declare under penalty of perjury under the laws of the State of California
11 that the foregoing is true and correct.

12
13 _____
14 PAULETTE D. GREENBERG

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