

1 HERBERT LESLIE GREENBERG (SBN 49472)
Attorney at Law
2 10732 Farragut Drive
Attorney at Law
3 10732 Farragut Drive
Culver City, CA 90230-4105
4 Telephone and Facsimile: (310) 838-8105
LGreenberg@LGEsquire.com
5

6 Plaintiff in Propria Persona

7 THOMAS J. KARR
KRISTIN S. MACKERT
Securities and Exchange Commission
8 100 F Street, N.E.
Washington, D.C. 20549-9612
9 Telephone: (202) 551-5172 (Ms. Mackert)
Facsimile: (202) 772-9263
10 mackertk@sec.gov

11 Local Counsel:
GREGORY C. GLYNN (SBN 39999)
12 Securities and Exchange Commission
5670 Wilshire Boulevard, 11th Floor
13 Los Angeles, CA 90036-3648
Telephone: (323) 965-3890
14 Facsimile: (323) 965-3908
glynng@sec.gov
15

16 Counsel for the Securities and Exchange Commission

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18 UNITED STATES DISTRICT COURT
19 CENTRAL DISTRICT OF CALIFORNIA
20

21	HERBERT LESLIE GREENBERG,)	
22)	CASE NO. CV 06-7878-GHK(CTx)
23	Plaintiff,)	
24)	JOINT DISCOVERY/CASE
25	v.)	MANAGEMENT PLAN
26)	[F.R.C.P. Rule 26(f)]
27	UNITED STATES SECURITIES)	
28	AND EXCHANGE COMMISSION,)	
)	
	Defendant.)	
)	JUDGE: Honorable George H. King

1 Pursuant to the Federal Rules of Civil Procedure, Rule 26(f), plaintiff
2 HERBERT LESLIE GREENBERG ("Plaintiff") and defendant SECURITIES AND
3 EXCHANGE COMMISSION ("SEC") present information as follows:
4

5 1. Date/Place of Conference: The conference was held telephonically on
6 December 7, 2007.
7

8 2. Plaintiff appeared in *propria persona*. THOMAS J. KARR and KRISTIN S.
9 MACKERT represented defendant SEC.
10

11 CASE SUMMARY

12

13 3. Theory of Liability:

14 Administrative Procedure Act ("APA"), 5 U.S.C § 701, *et seq.*

15 Plaintiff alleges that the Staff of defendant SEC ("SEC Staff"), in
16 contravention of its obligation to make timely recommendations to defendant SEC's
17 Commissioners concerning proposals contained in a Petition for Rulemaking
18 ("Petition") sponsored by a member of the public vis-à-vis by self-regulatory
19 organizations ("SROs") --- a Petition that is contrary to the interests of the securities
20 industry and/or SROs --- ("public Petition"), unreasonably delayed in making its
21 recommendations to defendant SEC's Commissioners. (17 C.F.R. § 201.192(a).)

22 Defendant SEC misstates Plaintiff's position. *See*, Item No. 5, below.
23 Plaintiff makes no claim that the SEC Commissioners "unreasonably delayed in
24 deciding whether to accept or reject Plaintiff's petition for rulemaking," but that SEC
25 Staff, which does not have the right to "accept or reject" the Petition, unreasonably
26 delayed in making recommendations (to the SEC Commissioners). Thus, SEC Staff
27 prevents the Petition from going before the SEC Commissioners for their
28 consideration.

1 Freedom of Information Act ("FOIA"), 5 U.S.C. § 522 *et seq.* Plaintiff
2 alleges that, pursuant to the FOIA, he requested records from defendant SEC,
3 defendant SEC is improperly asserting a deliberative process privilege exemption to
4 withhold "60-pages of documents" and that he has exhausted all administrative
5 remedies to obtain those records.

6
7 4. Relief Sought: Plaintiff seeks declaratory and injunctive relief and award of
8 costs, including Paralegal costs.

9
10 5. Theory of Defense: Defendant SEC's defenses to the claims are (1) that it has
11 not unreasonably delayed in deciding whether to accept or reject Plaintiff's petition
12 for rulemaking, and (2) that it properly asserted FOIA Exemption 5 in withholding
13 documents that are subject to the deliberative process privilege. The SEC also
14 submits that Plaintiff is not entitled to costs.

15
16 6. Jurisdictional Questions:

17 Plaintiff asserts jurisdiction pursuant to 28 U.S.C. §1331 (action arising under
18 the laws of the United States, 28 U.S.C. §1346(a)(2) (United States as defendant), 5
19 U.S.C. §701 (APA), 5 U.S.C. §552(a)(4)(B) (FOIA) and 28 U.S.C. §1361
20 (Mandamus).

21 Defendant SEC asserts that jurisdiction over Plaintiff's unreasonable delay
22 claim is properly in the courts of appeals, not the district court. The SEC agrees that
23 the court has jurisdiction over Plaintiff's FOIA claim.

24
25 7. Anticipated Additional Parties: None.

26
27 8. Class Action Issues: None.

28

1 Defendant SEC contends that the case is exempt from such exchange based
2 upon the provisions of F.R.C.P. Rule 26(a)(1)["an action for review of an
3 administrative record"], 5 U.S.C. 706 (on claims to "compel agency action
4 unlawfully withheld or unreasonably delayed," court "shall review the whole
5 record"), and the case law holding that APA unreasonable delay claims are to be
6 reviewed on the administrative record, supplemented by information (typically
7 declarations) provided by the agency to explain its handling of the matter for which
8 action has allegedly been delayed.

9 Without waiving this contention, the SEC agrees that by January 15, 2008 it
10 will provide its initial disclosure of documents, which would include those
11 documents produced in response to Plaintiffs' FOIA Requests Nos. 06-07533 and
12 07-06369, plus the documents found in the public record on Petition for Rulemaking
13 4-502, consecutively numbered (with the prefix "SEC") for ease of reference,
14 provided that Plaintiff by that date produces to the SEC any documents which he
15 deems relevant that were not produced by the SEC in response to his FOIA requests
16 or contained in the public record on Petition 4-502, also consecutively numbered for
17 ease of reference.

18
19 10. Subjects on Which Discovery Needed:

20 Plaintiff: On the APA Claim, Plaintiff needs discovery on the manner in
21 which SEC Staff acted in bad faith to unreasonably delay making recommendations
22 on the proposals in Plaintiff's public Petition to the Commissioners; the
23 establishment of an unauthorized procedure by which SEC Staff refers public
24 Petitions to the Securities Industry Conference on Arbitration ("SICA") in order to
25 cause unreasonable delay in making recommendations; SEC Staff's knowledge of
26 and nature of SICA as an advisory group controlled by members of the securities
27 industry; the relationships between SICA and defendant SEC, including but not
28 limited to the attendance by multiple members of the SEC Staff at all of SICA's non-

1 public meetings; defendant SEC's history of unreasonably delayed
2 recommendations (if any at all) with respect to public Petitions, including, but not
3 limited to Plaintiff's public Petition; the negative impact of the SEC Staff's
4 unreasonable delay in making recommendations concerning public Petitions upon
5 the minimal quality of justice dispensed in securities arbitrations conducted before
6 forums sponsored by SROs; and, authentication of documents provided by
7 defendant SEC pursuant to FOIA requests. Currently available documents, going
8 back to 1997, show that SEC Staff has essentially established what one could
9 consider "underground" regulations that were not vetted with the public and
10 essentially nullify SEC General Rule 192(a). The SEC Staff has, in practice,
11 rewritten Rule 192(a) to require that it first send all public Petitions to SROs for
12 recommendations, but does not set a return deadline. *Muwekma v. Babbitt*, 133
13 F.Supp.2d 30, 37 (D.D.C. 2000) ["(T)he defendants' refusal to provide the plaintiff
14 with a definite time frame for review of its petition ... defeats any assertion that the
15 process proceeds with reasonable dispatch."] If the SROs, the majority members of
16 SICA, fail to propose a rule change based upon the public Petitions, the SEC Staff
17 takes no action and feels that it is not bound by the provisions of Rule 192(a) to
18 make recommendations to the SEC Commissioners. *International* at 510 ["We
19 question whether the Secretary is free to make ... administrative changes with the
20 intent to defeat the mandate of the law by making the process so slow and/or
21 cumbersome as to ensure that no patents would issue."]. Additionally, there is an
22 issue of whether the SEC Staff's "administrative changes were within his powers
23 and supported by reasonable explanations." *Id.* at 510. Prior to referring the public
24 Petitions to SICA (SROs), SEC Staff knows that the proposals are anathema to the
25 SROs and will be rejected. SEC Staff has utilized this unauthorized procedure with
26 all public Petitions and has never issued recommendations to the SEC
27 Commissioners on those public Petitions. *Cutler* at 898 (D.D.C. 1987) ["(I)f an
28 agency's failure to proceed expeditiously will result in ... substantial nullification of

1 a right conferred by statute, 'the courts must act to make certain that what can be
2 done is done.'"]. "[T]he Secretary's motivations were, at least, relevant."
3 *International* at 510. Other instances of bad faith constitute admissible evidence.
4 *See, e.g.*, FRE, Rule 404(b) ["Evidence of other ... wrongs, or acts ... may, however,
5 be admissible for other purposes, such as proof of motive, opportunity, intent,
6 preparation, plan, knowledge, identity, or absence of mistake or accident..."].

7 On the FOIA Claim, Plaintiff intends to limit discovery to verification of
8 allegations upon which defendant SEC may rely to substantiate its claim of
9 deliberative process privilege exemption.

10 Defendant: On Plaintiff's APA claim, as discussed above, the SEC does not
11 believe that Plaintiff is entitled to discovery beyond that which will be contained in
12 the administrative record that the SEC will produce to Plaintiff. The SEC submits
13 that Plaintiff's allegations regarding the SEC's actions in the past with regard to
14 other petitions are not relevant to whether it has unreasonably delayed with regard to
15 Petition 4-502, and are not probative of alleged bad faith regarding Petition 4-502.
16 To the extent Plaintiff is alleging that the SEC's communications with SICA
17 concerning his petition constitute bad faith, as the Court has held, *see* July 16, 2007
18 Order at 2-3, such communications are contemplated by regulation and entirely
19 proper. The remainder of Plaintiff's allegations likewise fail to make the strong
20 showing of bad faith necessary to permit going beyond the administrative record in
21 an unreasonable delay claim.

22 As to Plaintiff's FOIA claim, the SEC likewise submits that discovery is not
23 ordinarily allowed in such litigation, particularly where, as here, there is no
24 allegation of an inadequate search. The SEC submits that, as is common practice in
25 FOIA cases, it should submit its *Vaughn* index when it submits its motion for
26 summary judgment.

1 11. Electronic Information Disclosures: Not applicable as neither party
2 contemplates such discovery.

3

4 12. Stipulations Regarding Claims of Privilege/Protection of Trial Preparation
5 Materials: None.

6

7 13. Completion of Discovery:

8 Plaintiff: Assuming that discovery disputes do not arise between the
9 parties or witnesses, Plaintiff anticipates completing discovery by September 1,
10 2008. *See* Plaintiff's Response to No. 25, below.

11 Defendant: *See* SEC Response to No. 25, below.

12

13

14 14. Interrogatories:

15 Plaintiff: Two sets of Interrogatories directed to defendant SEC. The First
16 Set to be served within thirty (30) days after exchange of documents and list of
17 witnesses with defendant SEC. The Second Set to be served within thirty (30) days
18 after completion of deposition discovery. *See* Plaintiff's Response to No. 10, above.

19 Defendant: *See* SEC Response to No. 10, above.

20

21 15. Requests for Admissions:

22 Plaintiff: Two sets of Requests for Admissions directed to defendant SEC.
23 The First Set to accompany the First Set of Interrogatories. The Second Set to
24 accompany the Second Set of Interrogatories. *See* Plaintiff's Response to No. 10,
25 above.

26 Defendant: *See* SEC Response to No. 10, above.

27 16. Oral Depositions:

28

1 Plaintiff: Eight (8) oral depositions, *i.e.*, depositions of CATHERINE
2 McGUIRE, LOURDES GONZALES, PAULA JENSEN, ROBERT LOVE,
3 CONSTANTINE KATSORSIS, THEODORE EPPENSTEIN, THOMAS
4 STIPANOWICH and JUDITH HALE NORRIS. The list is subject to change as
5 Plaintiff's current knowledge as to identities of the authors of various handwritten
6 SEC Staff documents may be inaccurate and information currently desired from
7 some of the named prospective deponents may be obtained through other discovery
8 means. *See* Plaintiff's Response to No. 10, above.

9 Defendant: *See* SEC Response to No. 10, above.
10

11 17. Dates of Disclosure of Experts and Experts' Written Reports and
12 Supplementations:

13 Plaintiff: Within sixty (60) days after the Court resolves disputes described
14 herein.

15 Defendant: The SEC does not believe expert testimony is required or
16 relevant to this proceeding. In the event that neither party obtains summary
17 judgment and this matter is set for trial, the SEC submits that any expert reports
18 should be submitted no less than 60 days before trial.
19

20 18. Challenges to Expert Testimony:

21 Date Due: If applicable, 30 days before trial.
22

23 19. Separate Views on Discovery Plan:

24 Plaintiff: The views of Plaintiff and defendant SEC differ as defendant
25 SEC contends that, in effect, no discovery or exchange of documents is proper
26 within the entire legal action, whereas Plaintiff contends that discovery is proper and
27 necessary.
28

1 Defendant: Plaintiff misstates the SEC's position. For that position, *see* SEC
2 Response to No. 10, above; *see also* SEC's Response to Plaintiff's Status Report
3 (dated Dec. 14, 2007), Exh. 2.
4

5 20. Discovery Beyond Initial Disclosures Undertaken to Date:

6 Plaintiff: Plaintiff has directed FOIA requests to defendant SEC, and it has
7 produced some documents. Plaintiff has recently filed an administrative FOIA
8 appeal due to defendant SEC's failure to make an adequate search and on other
9 grounds.

10 Defendant: The SEC has produced thousands of pages of documents to
11 Plaintiff in response to his FOIA requests; in addition, materials concerning Petition
12 4-502 are publicly available on the SEC's website.
13

14 21. Completion of Discovery:

15 Plaintiff: By September 1, 2008, assuming few or no discovery disputes.
16 *See* Plaintiff Response to No. 25, below.

17 Defendant: The SEC submits that under the summary judgment schedule it
18 proposes, *see* SEC Response to No. 25, below, any discovery can be completed
19 before September 1, 2008.
20

21 OTHER ITEMS
22

23 22. Joinder of Additional Parties: None contemplated.
24

25 23. Third-Party Actions: None contemplated.
26

27 24. Amendment of Pleadings:

28 Plaintiff: None.

1 Defendant: None.

2
3 25. Dispositive Motions:

4 Plaintiff: Plaintiff proposes that the parties proceed with normal discovery
5 prior to the filing any dispositive motion. To do otherwise would not be proper and
6 would waste the parties' and Court's time. Whether "the SEC decides whether to
7 grant or deny Plaintiff's petition" is not relevant to the issue of "unreasonable delay"
8 that is before this Court. The issue herein deals with the unreasonable delay of the
9 SEC Staff in not making recommendations to the SEC's Commissioners. (The SEC
10 Staff has no authority to "grant or deny Plaintiff's petition.") Even if the SEC Staff
11 does render recommendations to the SEC Commissioners, the declarative relief
12 issue would remain to be decided.

13 Defendant: The SEC proposes the following summary judgment schedule.

14 A. The SEC files its motion for summary judgment and supporting papers
15 within 45 days of the Court's entry of a scheduling order. Included in those papers
16 will be:

- 17 1. A certified copy of the administrative record on Petition 4-502;
- 18 2. Any declaration(s) the SEC chooses to submit explaining its
19 handling of Petition 4-502;
- 20 3. A *Vaughn* index for the approximately 60 pages of documents
21 withheld by the SEC in response to FOIA Request No. 06-0753; and
- 22 4. Any declaration(s) needed to explain the basis for the SEC's
23 assertion of the deliberative process privilege.

24 B. Following the SEC's filing of its summary judgment papers, Plaintiff will
25 have 30 days to serve Rule 56(f) discovery requests upon the SEC.

26 C. Within 45 days after any discovery disputes have been resolved and all
27 discovery has been completed, or (if Plaintiff elects to take no Rule 56(f) discovery)
28 within 45 days of the SEC filing its summary judgment papers, Plaintiff will file his

1 cross- motion for summary judgment/opposition to the SEC's motion, with all
2 supporting papers.

3 D. Within 30 days of Plaintiff's filing of his summary judgment/opposition
4 papers, SEC will serve any reply brief/opposition to cross-motion.

5 E. Within 30 days of the SEC's filing of any reply, Plaintiff will file his reply
6 in support of his cross-motion for summary judgment.

7 In addition, when the SEC decides whether to grant or deny Plaintiff's petition, the
8 SEC plans to move to dismiss Plaintiff's "unreasonable delay" claim as moot.

9
10 26. Settlement Possibilities: Unlikely.

11
12 27. Joint Statement Re: Mediation: Not contemplated.

13
14 28. Trial Estimate:

15 Plaintiff: Three (3) days. Defendant SEC contends that APA "claims ...
16 are typically resolved by summary judgment." The contention is subject to proof.
17 Each APA claim should be decided on its own particular facts. However, such
18 motions are only brought after full discovery has been completed. *Muwekma* at 34
19 ["Summary judgment is appropriate when the 'pleadings, depositions, answers to
20 interrogatories, and admissions on file, together with affidavits, if any, show that
21 there is no issue as to any material fact and that the moving party is entitled to
22 summary judgment as a matter of law.'" (Emphasis added.)].

23 Defendant: The SEC does not believe that a trial will be necessary, as claims
24 like those advanced by Plaintiff are typically resolved by summary judgment
25 motions.

26
27 29. Jury Demand: None made.

28

1 30. Trial Before Magistrate Judge: Declined.

2
3 31. Preliminary Pretrial Conference: The parties request a preliminary pretrial
4 conference with the Court before entry of the scheduling order.

5
6 32. Other Matters:

7 Plaintiff: Prior to a preliminary pretrial conference with the court before
8 entry of the scheduling order, Plaintiff requests to submit to the court a
9 Memorandum of Points and Authorities dealing with the issue of whether the APA
10 Claim in the within action, for purposes of F.R.C.P. 26(a)(E)(i) is "an action for
11 review of administrative record."

12 Plaintiff contemplates bringing a motion to cause defendant SEC to produce a
13 *Vaughn* Index. The parties met and conferred on December 7, 2007.

14
15 Defendant: The SEC submits that any discovery issues should be resolved
16 under the dispositive motion scheduling plan proposed by the SEC, *see* SEC
17 Response to No. 25, above. In the event that the Court chooses not to adopt that
18 schedule presently, the SEC agrees to a plan whereby, prior to a preliminary pretrial
19 conference and entry of a scheduling order, Plaintiff is entitled to brief the issue of
20 whether he is entitled to discovery on his APA unreasonable delay claim or FOIA
21 claim and the SEC is given two weeks to file a brief responding to Plaintiff's brief.

22 On Plaintiff's plan to bring a motion for a *Vaughn* index, the SEC believes
23 that providing that index as part of its summary judgment papers accords with
24 common practice on FOIA claims and is sufficient for Plaintiff's needs. Nonetheless,
25 the SEC is prepared to provide its *Vaughn* index by February 15, 2008, which
26 should obviate the need for any motion to compel its production.

1 DATED: December __, 2007

2 Counsel for Plaintiff
3

4 _____
5 HERBERT LESLIE GREENBERG

6
7 DATED: December __, 2007

8 Counsel for Defendant
9 SECURITIES AND EXCHANGE COMMISSION
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12 THOMAS J. KARR

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14 KRISTIN S. MACKERT

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