

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

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14 Plaintiff In Propria Persona

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HERBERT LESLIE GREENBERG,)
)
Plaintiff,)
)
v.)
)
UNITED STATES SECURITIES)
AND EXCHANGE COMMISSION,)
)
Defendant.)

CASE NO. CV 06-7878-GHK(CTx)
**NOTICE OF MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR LEAVE TO FILE
SECOND AMENDED
COMPLAINT**
DATE: August 18, 2008
TIME: 9:30 A.M.
JUDGE: Honorable George H. King

TO DEFENDANT SECURITIES AND EXCHANGE COMMISSION AND TO
ITS ATTORNEYS OF RECORD:

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Plaintiff hereby moves this Court for leave to file the attached Second Amended Complaint pursuant to Federal Rule of Civil Procedure, Rule 15. For the reasons set forth in the accompanying Memorandum, Plaintiff respectfully requests that this Court grant him leave to file the Second Amended Complaint because it will clarify the dispute between the parties and will not cause any prejudice.

The Motion shall be based upon this Notice, the attached Memorandum of Points and Authorities, a copy of the proposed Second Amended Complaint for Declaratory and Injunctive Relief, which is attached hereto, and such other and further matters that may be presented at the hearing thereof.

This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on May 23, 2008 and through associated correspondence.

DATED: June 5, 2008

HERBERT LESLIE GREENBERG
Plaintiff In Propria Persona

1 **MEMORANDUM IN SUPPORT OF MOTION**

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3 **I. Grounds for Granting Leave to Amend**

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5 According to Federal Rule of Civil Procedure 15, "a party may amend the
6 party's pleading once as a matter of course at any time before a responsive pleading
7 is served...[o]therwise a party may amend the party's pleading only by leave of
8 court or by written consent of the adverse party." Fed. R. Civ. P. 15(a). Where leave
9 of the court is sought, Rule 15 states, "[L]eave shall be freely given when justice so
10 requires." *Id.* In *Foman v. Davis*, the Supreme Court held that [i]n the absence of
11 any apparent or declared reason – such as undue delay, bad faith or dilatory motive
12 on the part of the movant, repeated failure to cure deficiencies by amendments
13 previously allowed, undue prejudice to the opposing party by virtue of allowance of
14 the amendment, futility of amendment, etc. – the leave sought should, as the rules
15 require, be "freely given." *Foman v. Davis*, 371 U.S. 178, 182 (1962). In *Advanced*
16 *Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc.*, the Court stated that "the court
17 must be very liberal in granting leave to amend a complaint," noting that "[t]his rule
18 reflects an underlying policy that disputes should be determined on their merits, and
19 not on the technicalities of pleading rules." *Advanced Cardiovascular Sys., Inc. v.*
20 *SciMed Life Sys., Inc.*, 989 F.Supp. 1237, 1241 (N.D. Cal. 1997).

21 As alleged in the initial complaint, Plaintiff filed a Petition for Rulemaking
22 (concerning matters related to securities arbitration)("Petition") with defendant
23 SECURITIES AND EXCHANGE COMMISSION ("SEC"), a federal agency.
24 Defendant SEC's General Rule 192 specifically requires the "appropriate division"
25 to make recommendations on the Petition to the Commissioners of defendant SEC.
26 Plaintiff contends that defendant SEC unreasonably delayed in making the required
27 recommendations in violation of Section 706(1) of the Administrative Procedure
28 Act ("APA"). Plaintiff has previously contended that defendant SEC engaged in

1 pattern and practice of unreasonable delay with respect to other similar petitions and
2 such conduct evidences agency bad faith. *See, e.g.,* Joint Discovery/Case
3 Management Plan at *pps.* 5-7.

4 Plaintiff seeks to amend the complaint to further develop and clarify the
5 nature of defendant SEC's lengthy pattern and practice of unreasonable delay in
6 acting upon all Petitions for Rulemaking (concerning matters related to securities
7 arbitration). Although the nature of defendant SEC's conduct requires access to
8 information largely in defendant SEC's possession and somewhat unavailable to the
9 Plaintiff until discovery, Plaintiff has ascertained much information in response to
10 several Freedom of Information Act ("FOIA") requests that he served upon
11 defendant SEC.

12 In the Second Amended Complaint, Plaintiff provides additional factual
13 details concerning the defendant SEC's methods of operation. These changes in the
14 proposed Second Amended Complaint do not alter the underlying claims Plaintiff
15 set forth in the prior Complaints, nor do they include facts that are not already
16 known to defendant SEC. Granting this request would be consistent with the
17 "underlying policy that disputes should be determined on their merits, and not on the
18 technicalities of pleading rules." *Advanced Cardiovascular Sys.*, 989 F.Supp. at
19 1241.

20 Given the aforementioned circumstances, it cannot be said that Plaintiff's
21 request reflects any "dilatatory motive" on Plaintiff's part, nor would allowing
22 Plaintiff's Motion For Leave To File A Second Amended Complaint impose any
23 undue prejudice upon defendant SEC. *Foman*, 371 U.S. at 182. Similarly, there has
24 been no undue delay by Plaintiff in amending the complaint.

25 Granting Plaintiff's Motion For Leave To File A Second Amended Complaint
26 would leave the case management schedule unchanged, and would provide the
27 defendant SEC and the Court with important and useful information.

1 Given the fact that Plaintiff's request to file a Second Amended Complaint
2 would neither prejudice defendant SEC, nor delay or change any existing pleading
3 or case management schedule, Plaintiff's Motion For Leave To File A Second
4 Amended Complaint should be granted.

5
6 **II. Initial Response to Defendant SEC's Anticipated Opposition**

7
8 During the conference of counsel and in associated correspondence,
9 defendant SEC indicated that it intends to raise certain issues to oppose the within
10 motion, *e.g.*:

11 (A) whether "Section 706(1) of the Administrative Procedure Act only
12 permits courts to compel 'agency action ... unreasonably delayed.' It does not apply
13 to intermediate recommendations of agency staff...." and, thus, the Court lacks
14 subject matter jurisdiction;

15 (B) whether Plaintiff's claim is "moot" as defendant SEC has denied
16 Plaintiff's Petition;

17 (C) whether allegations of a recurring pattern and course of conduct
18 supports a separate Claim for injunctive and declaratory relief.

19
20 In anticipation of those issues and reserving the right to further respond,
21 Plaintiff states:

22
23 (A) Defendant SEC has previously moved the Court for an order to dismiss
24 this claim on the ground "plaintiff has not alleged any cognizable violations of the
25 APA or of the SEC rule governing petitions." Motion to Dismiss dated February 14,
26 2007 at p. 2. This Court denied that portion of its motion. Minute Order dated July
27 16, 2007.

1 Plaintiff's Claim deals with specific acts required by defendant SEC's General
2 Rule 192a ("Any person desiring the issuance, amendment or repeal of a rule of
3 general application may file a petition therefor with the Secretary. ... The Secretary
4 shall ... refer it to the appropriate division ... for consideration and
5 recommendation. Such recommendations shall be transmitted with the petition to
6 the Commission for such action as the Commission deems appropriate." (Emphasis
7 added.) 17 CFR 200.192a). "[A]gency action' includes the whole or part of an
8 agency rule ... or the equivalent ... or failure to act(.)" 5 U.S.C. 551(13).

9 (B) Defendant SEC claims, as a factual matter, that defendant SEC acted
10 upon the Petition by denying it and, impliedly, that the "appropriate division"
11 provided related recommendations to the Commissioners, pursuant to the
12 requirements of SEC General Rule 192. The allegations of the proposed Second
13 Amended Complaint, supported by the results of FOIA requests, refute that
14 contention, *e.g.*, ¶63 ("Plaintiff is informed and believes and thereupon alleges that
15 DMR has not made any recommendation to the Commissioners with respect to
16 Petition No. 4-502."); ¶62 ("Plaintiff is informed and believes and thereupon alleges
17 that defendant SEC did not deny Petition No. 4-502...."). A factual dispute is not a
18 ground for opposing leave to file an amended complaint. *Foman v. Davis*, 371 U.S.
19 178, 182 (1962).

20 (C) In the proposed Second Claim, Plaintiff asserts that defendant SEC is
21 engaged in a recurring pattern and practice of conduct in violation of APA § 706(1).
22 Courts have repeatedly held that a recurring pattern and practice trumps an argument
23 that a matter is moot even if the government ceases its unlawful activities. *United*
24 *States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)
25 ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of
26 power to hear and determine the case, *i.e.*, does not make the case moot. A
27 controversy may remain to be settled in such circumstances, *e.g.*, a dispute over the
28 legality of the challenged practices. The defendant is free to return to his old ways.

1 This, together with a public interest in having the legality of the practices settled,
2 militates against a mootness conclusion. For to say that the case has become moot
3 means that the defendant is entitled to a dismissal as a matter of right. The courts
4 have rightly refused to grant defendants such a powerful weapon against public law
5 enforcement.") (citations omitted); *Payne Enters., Inc. v. United States*, 837 F2d
6 486, 491 (D.C. Cir. 1988) ("So long as an agency's refusal to supply information
7 evidences a policy or practice of delayed disclosure or some other failure to abide by
8 the terms of the FOIA, and not merely isolated misstates by agency officials, a
9 party's challenge to the policy or practice cannot be mooted by the release of the
10 specific documents that prompted the suit."); *Gilmore v. U.S. Department of Energy*,
11 33 F.Supp.2d 1184, 1188 (N.D. Cal.1998) ("[T]he Court has jurisdiction to hear a
12 claim alleging a pattern and practice of unreasonable delay in responding to FOIA
13 requests, even where the plaintiff's FOIA request has already been resolved.").

14 The proposed Second Amended Complaint, dealing with all Petition filings
15 during the past ten (10) years, alleges that each instance was part of a continuing
16 recurring pattern and course of conduct, *i.e.*, unreasonable delay, by defendant SEC
17 to make recommendations to the Commissioners --- in contravention of SEC
18 General Rule 192a.

19
20 **III. Conclusion**

21
22 For the foregoing reasons, the motion should be granted.

23
24 DATED: June 5, 2008

25 _____
26 HERBERT LESLIE GREENBERG
27 Plaintiff, In Propria Persona
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EXHIBIT A

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

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Plaintiff In Propria Persona

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

COMES NOW plaintiff HERBERT LESLIE GREENBERG and alleges as follows:

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INTRODUCTION

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1. This is an action brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.* Plaintiff HERBERT LESLIE GREENBERG a/k/a LES GREENBERG ("Plaintiff") alleges that defendant UNITED STATES SECURITIES AND EXCHANGE COMMISSION ("SEC") violated the APA through a pattern and practice of unreasonable delay in acting upon Petitions for Rulemaking (concerning matters related to securities arbitration), including, but not limited to, Plaintiff's Petition for Rulemaking (SEC File No. 4-502)("Petition No. 4-502").

JURISDICTION AND VENUE

2. This court has jurisdiction over this action pursuant to 28 U.S.C. §1331 (action arising under the laws of the United States), 28 U.S.C. §1346(a)(2) (United States as defendant), 5 U.S.C. §701 (APA), 28 U.S.C. §1361 (mandamus). Venue lies in this district pursuant to 28 U.S.C. § 1391(e).

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 brokerage firms before arbitration panels

1 and/or in various state and/or federal courts. Plaintiff no longer represents securities
2 brokerage firms. For approximately thirty (30) years, Plaintiff has served as a
3 member of securities arbitrator panels sponsored by the NATIONAL
4 ASSOCIATION OF SECURITIES DEALERS, INC. ("NASD"), and its successor
5 FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. ("FINRA"),
6 before which disputes between public investors and securities firms are resolved by
7 means of binding arbitration. During the past fifteen (15) years, Plaintiff has
8 advocated changes to the securities arbitration dispute resolution process, *e.g.*,
9 proponent of Petition No. 4-502, which would benefit Plaintiff as an investor having
10 signed pre-dispute arbitration agreements with securities brokerage firms and as an
11 arbitrator called upon to decide investor disputes in arbitration proceedings. Since
12 approximately February 1, 2005, Plaintiff has been interested in all efforts that
13 might result in a change to the securities arbitration process and has commented
14 extensively on such matters upon the website of defendant SEC and elsewhere.

15
16 4. Defendant SEC is an agency of the United States Government within
17 the meaning of 5 U.S.C. §552(f)(1).

18 19 **LEGAL FRAMEWORK**

20
21 5. Defendant SEC's General Rule 192 states, in pertinent part, "Any
22 person desiring the issuance, amendment or repeal of a rule of general application
23 may file a petition therefor with the Secretary. ... The Secretary shall ... refer it to
24 the appropriate division ... for consideration and recommendation. Such
25 recommendations shall be transmitted with the petition to the Commission for such
26 action as the Commission deems appropriate." (Emphasis added.). 17 CFR
27 200.192a. "*Commission* means the United States Securities and Exchange
28 Commission, or a panel of Commissioners constituting a quorum of the

1 Commission...." 17 CFR 200.101. The Commission has not delegated authority to
2 take "such action." 17 CFR 200.30-3. "There is hereby established a Securities and
3 Exchange Commission (hereinafter referred to as the 'Commission') to be composed
4 of five commissioners to be appointed by the President by and with the advice and
5 consent of the Senate." 15 U.S.C. §78d(a).

6
7 6. APA Rule 706 states, "The reviewing court shall - (1) compel agency
8 action unlawfully withheld or unreasonably delayed." The relevant agency action
9 herein is that the "appropriate division" consider Petitions for Rulemaking
10 (concerning matters related to securities arbitration), make associated
11 recommendations and transmit those recommendations to the Commission.
12 "[A]gency action' includes the whole or a part of an agency rule ... or the equivalent
13 or denial thereof, or failure to act(.)" 5 U.S.C. 551(13).

14 15 **STATEMENT OF FACTS**

16 17 **Defendant SEC Seeks Recommendations** 18 **On Petitions for Rulemaking from SICA and SROs**

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20 7. Plaintiff is informed and believes and thereupon alleges that, at all
21 times material hereto, the NASD and NYSE and their successor FINRA, were
22 SELF-REGULATORY ORGANIZATIONS ("SROs").

23
24 8. Plaintiff is informed and believes and thereupon alleges that, at all
25 times material hereto, the SECURITIES INDUSTRY CONFERENCE ON
26 ARBITRATION ("SICA") has been and is a structured group dominated by the
27 securities industry and is composed of persons who are not full-time federal
28 employees and who are:

1 (A) Representatives of SROs, *e.g.*, the NASD, the NYSE, each of
2 which has members that are securities firms;

3 (B) Representatives of the SECURITIES INDUSTRY
4 ASSOCIATION, which brings together the shared interests of approximately 600
5 securities firms to accomplish common goals; and,

6 (C) Three "Public Members," whose initial nomination for that
7 position is subject to consultation with SRO participants of SICA and who serve
8 subject to the consent of the SRO participants of SICA.

9
10 9. Plaintiff is informed and believes and thereupon alleges that SICA was
11 formed by the NYSE and NASD, at the prompting/behest and with the guidance of
12 defendant SEC, for the specific purpose of obtaining advice and recommendations
13 on matters related to rules governing arbitration before forums sponsored by SROs,
14 and, for approximately thirty (30) years, defendant SEC has employed SICA to
15 obtain such advice and recommendations.

16
17 10. Plaintiff is informed and believes and thereupon alleges that defendant
18 SEC seeks the views, recommendations or comments of SICA and its SRO
19 members with respect to Petitions for Rulemaking, which are not initiated by SROs
20 and which seek changes to rules or the promulgation of rules concerning matters
21 related to securities arbitration.

22
23 11. Plaintiff is informed and believes and thereupon alleges that:

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

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

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

28

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

3 (E) Records, reports, transcripts, minutes, appendixes, working
4 papers, drafts, studies, agenda, or other documents, which were made available to or
5 prepared for or by SICA, have not been made available for public inspection and
6 copying.

7
8 **Defendant SEC's Pattern and Practice of Unreasonable Delay**
9 **In Making Recommendations to the Commission**
10 **Upon Petitions for Rulemaking**
11

12 12. Plaintiff is informed and believes and thereupon alleges that, at all
13 times material hereto, the Division of Market Regulation or its successor
14 (collectively "DMR") has been and is the "appropriate division" of defendant SEC
15 dealing with Petitions for Rulemaking (concerning matters related securities
16 arbitration) ("Petitions").

17
18 13. Plaintiff is informed and believes and thereupon alleges that, since prior
19 to March 23, 1998, defendant SEC (DMR) considered requests for comment from
20 SICA on Petitions as substantially equivalent to seeking such comments from the
21 SROs that were then members of SICA.

22
23 14. Plaintiff is informed and believes and thereupon alleges that, since
24 March 23, 1998, defendant SEC (DMR) has referred Petitions directly to SROs (or
25 indirectly to SROs through SICA) for comment, awaited comment or related rule
26 proposals from SROs and, in the interim, made no recommendation to the
27 Commission on the respective the Petitions.
28

1 15. Plaintiff is informed and believes and thereupon alleges that, at all
2 times material hereto, defendant SEC has not maintained or utilized any tracking
3 system with respect to its status of acting upon Petitions submitted by other than
4 SROs, *e.g.*, SEC File Nos. 4-403, 4-501, 4-502, 4-506, 4-541.

5
6 16. Plaintiff is informed and believes and thereupon alleged that, during the
7 period of 1997 to the date hereof, the only Petitions filed by other than SROs, are
8 Petitions for Rulemaking (SEC File Nos. 4-403, 4-501, 4-502, 4-506 and 4-541).

9
10 **Petition for Rulemaking (SEC File No. 4-403) --- More Than Ten**
11 **Years without Recommendation to the Commission**

12
13 17. Plaintiff is informed and believes and thereupon alleges that, on or
14 about October 1, 1997, the PUBLIC INVESTORS ARBITRATION BAR
15 ASSOCIATION ("PIABA"), an organization composed of attorneys who represent
16 customers of securities brokerage firms, filed Petition for Rulemaking (SEC File
17 No. 4-403) ("Petition No. 4-403") with defendant SEC and it was forwarded to
18 DMR, as the appropriate division.

19
20 18. Plaintiff is informed and believes and thereupon alleges that Petition
21 No. 4-403 seeks rules to: (1) establish the AMERICAN ARBITRATION
22 ASSOCIATION as an alternative venue for customer arbitrations; (2) change the
23 composition of arbitration panels hearing customer arbitrations, *e.g.*, hearing panels
24 consisting of three persons with no affiliation to the securities industry; and (3)
25 provide for a rotational system for the selection of arbitrators.

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19. Plaintiff is informed and believes and thereupon alleges that defendant SEC has not promulgated any policy setting forth the criteria, if any, upon which it may request that a Petition be withdrawn.

20. Plaintiff is informed and believes and thereupon alleges that, on or about October 21, 1997, SICA requested that PIABA withdraw Petition No. 4-403 and so informed defendant SEC (DMR).

21. Plaintiff is informed and believes and thereupon alleges that, on or about March 23, 1998, PIABA informed defendant SEC (DMR) that PIABA refused to withdraw Petition No. 4-403 and has not subsequently withdrawn Petition No. 4-403.

22. Plaintiff is informed and believes and thereupon alleges that, on or about April 28, 1998, defendant SEC (DMR) requested comments and recommendations on Petition No. 4-403 from SICA, but never established a definite timeframe within which it expected to receive those comments from SICA.

23. Plaintiff is informed and believes and thereupon alleges that, as of January 18, 2000, SICA continued to request that PIABA withdraw Petition No. 4-403 and defendant SEC (DMR) was so aware.

24. Plaintiff is informed and believes and thereupon alleges that, at no time did defendant SEC object that SICA had requested that PIABA withdraw Petition No. 4-403.

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25. Plaintiff is informed and believes and thereupon alleges that SICA never made any recommendation to defendant SEC with respect to Petition No. 4-403.

26. Plaintiff is informed and believes and thereupon alleges that defendant SEC never established a definite timeframe within which it expected to receive comments from SICA with respect to Petition No. 4-403.

27. Plaintiff is informed and believes and thereupon alleges that defendant SEC has no reasonable expectation of receiving any comment or recommendation from SICA with respect to Petition No. 4-403.

28. Plaintiff is informed and believes and thereupon alleges that no SRO has made any recommendation to or any rule filing with defendant SEC relating to each of the proposals of Petition No. 4-403.

29. Plaintiff is informed and believes and thereupon alleges that defendant SEC never established a definite timeframe within which it intends to make a recommendation to the Commission with respect to Petition No. 4-403.

30. Plaintiff is informed and believes and thereupon alleges that defendant SEC (DMR) never made any recommendation to the Commission with respect to Petition No. 4-403.

31. Plaintiff is informed and believes and thereupon alleges that defendant SEC (DMR) has no reasonable expectation of making any recommendation to the Commission with respect to Petition No. 4-403.

1 **Petition for Rulemaking (SEC File No. 4-501) --- DMR Denied**
2 **Petition without Recommendation to the Commission**

3
4 32. Plaintiff is informed and believes and thereupon alleges that, on or
5 about May 6, 2005, DANIEL SOLIN filed Petition for Rulemaking (SEC File No.
6 4-501) ("Petition No. 4-501") with defendant SEC and it was forwarded to DMR, as
7 the appropriate division.

8
9 33. Plaintiff is informed and believes and thereupon alleges that Petition
10 No. 4-501 seeks rules to prevent the NASD and NYSE from placing, by contract,
11 any restriction of the use of either the paper copies or their database of arbitration
12 awards and, also, preventing the NASD and NYSE from requiring third-party
13 vendors to limit access to the awards, in order that statistical analyses could be
14 performed and published with respect to arbitration award results.

15
16 34. Plaintiff is informed and believes and thereupon alleges that defendant
17 SEC (DMR) has not requested comments on Petition 4-501 from SICA.

18
19 35. Plaintiff is informed and believes and thereupon alleges that SICA
20 never made any recommendation to defendant SEC with respect to Petition No. 4-
21 501.

22
23 36. Plaintiff is informed and believes and thereupon alleges that no SRO
24 has made any recommendation to or rule filing with defendant SEC relating to
25 Petition No. 4-501.

1 37. Plaintiff is informed and believes and thereupon alleges that defendant
2 SEC (DMR) never established a definite timeframe within which DMR intends to
3 make a recommendation to the Commission with respect to Petition No. 4-501.
4

5 38. Plaintiff is informed and believes and thereupon alleges that defendant
6 SEC has not promulgated any policy setting forth the criteria, if any, upon which it
7 may reject a Petition.
8

9 39. Plaintiff is informed and believes and thereupon alleges that, on or
10 about February 23, 2006, defendant SEC (DMR), without legal authority to do so,
11 rejected Petition No. 4-501.
12

13 40. Plaintiff is informed and believes and thereupon alleges that defendant
14 SEC (DMR) never made any recommendation to the Commission with respect to
15 Petition No. 4-501.
16

17 41. Plaintiff is informed and believes and thereupon alleges that DMR has
18 no expectation of making any recommendation to the Commission with respect to
19 Petition No. 4-501.
20

21 **Petition for Rulemaking (SEC File No. 4-502) --- Three Years**
22 **Without Recommendation to the Commission**
23

24 42. On or about May 13, 2005, Plaintiff filed Petition No. 4-502 with
25 defendant SEC and it was forwarded to DMR, as the appropriate division. On June
26 22, 2005, Plaintiff filed Supplemental Information to Petition No. 4-502 with
27 defendant SEC.
28

1 43. Petition No. 4-502 describes deficiencies in the process of resolving
2 disputes between public investors and securities firms by means of arbitration before
3 forums sponsored by SROs and advocates associated changes, which are contrary to
4 the procedures promulgated by SICA and/or its member SROs, *e.g.*:

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

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

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

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

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

20
21 44. On or about May 13, 2005, defendant SEC published Petition No. 4-
22 502 on its website and requested public comment. Defendant SEC received several
23 supportive comment letters that it promptly published on its website. Neither SICA
24 nor any SRO availed itself of that process to comment upon Petition No. 4-502.

25
26 45. On or prior to August 19, 2005, defendant SEC referred Petition No. 4-
27 502 and the associated public comments to SICA to obtain SICA's advice and
28 recommendations.

1 46. Plaintiff is informed and believes and thereupon alleges that defendant
2 SEC never established a definite timeframe within which it expected to receive
3 comments from SICA with respect to Petition No. 4-502.

4
5 47. Plaintiff is informed and believes and thereupon alleges that defendant
6 SEC never established a definite timeframe within which it intended to make a
7 recommendation to the Commission with respect to Petition No. 4-502.

8
9 48. On or about August 30, 2005, upon first learning of the referral of
10 Petition No. 4-502 to SICA, in a letter sent to defendant SEC via electronic
11 communication, which Plaintiff is informed and believes and thereupon alleges that
12 defendant SEC received, but to which it has not responded, Plaintiff objected to that
13 referral to SICA by stating, in part:

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

26
27 49. On or about July 24, 2006, after Plaintiff made several inquires of
28 defendant SEC as to the status of Petition No. 4-502, defendant SEC informed

1 Plaintiff that it had been referred to a SICA subcommittee and, via letter, stated, in
2 pertinent part:

3 [W]e have asked the Securities Industry Conference on
4 Arbitration ("SICA") to consider your petition and to provide us with
5 its views. ... We have not yet received a formal response or final
6 recommendation from SICA.

7
8 50. During the period of July 28, 2006 to August 5, 2006, Plaintiff
9 corresponded via electronic communications, with SICA (through SICA's Chairman
10 CONSTANTINE KATSORIS) inquiring as to:

11 (A) At which quarterly SICA meetings the issues (in Petition No. 4-
12 502) were discussed;

13 (B) The date when the subcommittee was first appointed;

14 (C) The identity and email address of the members of the
15 subcommittee;

16 (D) Whether the subcommittee had issued a report with respect to the
17 issues; and,

18 (E) If the subcommittee had not already issued such report, when the
19 subcommittee expected that it would issue it.

20
21 51. SICA has failed and, thus, refused to answer questions (A)-(E) of
22 Paragraph 50, above, or any of them. SICA responded to Plaintiff by stating,
23 "When SICA reaches definite conclusions ... we will forward them to ... the
24 SEC...." Plaintiff further inquired, "[I]s SICA under any time constraint to reach
25 'definite conclusions'? In other words, what assurance does the SEC have that SICA
26 will ever reach 'definite conclusions' and provide that information to the SEC?"
27 SICA responded by stating, in part, "[S]ome of your suggestions are controversial
28

1 and not subject to simple answers; thus, subject to serious debate. ... SICA will
2 report directly to the SEC when it has completed its study."

3
4 52. Plaintiff, in the communications described in Paragraph 51, above,
5 requested admission to and an opportunity to present his positions related to Petition
6 No. 4-502 to members of SICA at its then forthcoming meeting in October 2006.

7
8 53. SICA declined to permit Plaintiff to attend its meeting.

9
10 54. Plaintiff provided defendant SEC (DMR) with a copy of each of
11 Plaintiff's communications with SICA as the respective communications occurred.
12 Defendant SEC did not communicated with Plaintiff as to any of those
13 communications or the content thereof.

14
15 55. On or about August 8, 2006, by letter sent to defendant SEC (DMR)
16 via electronic communication, which Plaintiff is informed and believes and
17 thereupon alleges that defendant SEC (DMR) received, but to which defendant SEC
18 has not responded, Plaintiff informed defendant SEC (DMR) that SICA had recently
19 "declined to offer any assurance that it will ever make any recommendation
20 (concerning Petition No. 4-502) to the SEC" and, Plaintiff, in effect, stated that,
21 pursuant to SEC General Rule 192, defendant SEC should promptly proceed to act
22 upon Petition No. 4-502.

23
24 56. Plaintiff is informed that, on or about November 6, 2006, defendant
25 SEC (DMR) received comments on Petition No. 4-502 from SICA.

1 57. Plaintiff is informed and believes and thereupon alleges that no SRO
2 has made any recommendation to or rule filing with defendant SEC relating to
3 Petition No. 4-502.

4
5 58. On January 29, 2008, pursuant to a Scheduling Conference between the
6 Plaintiff and defendant SEC, the Court issued a Minute Order stating, in part: "With
7 respect to Plaintiff's Administrative Procedure Act ... claim, we hereby stay
8 discovery with respect to this claim for 60 days hereof. The government is *strongly*
9 urged that, if Defendant is going to act on Plaintiff's petition for rulemaking, it do so
10 within that time." (Emphasis in original.)

11
12 59. On or about March 27, 2008, the Secretary of defendant SEC provided
13 Plaintiff with a document stating, in part:

14 The Commission has carefully considered the Petition, as well as
15 comments it has received about the Petition, and has determined to
16 refer it to the Financial Industry Regulatory Authority, Inc.
17 ("FINRA")....

18 Accordingly, the Commission hereby DENIES the Petition.
19 The specific sources of the numerous comments were listed, but did not include any
20 recommendation from defendant SEC (DMR).

21
22 60. On March 28, 2008, Plaintiff filed a Freedom of Information Act
23 ("FOIA") request with defendant SEC seeking:

24 [A]ll writings ... that evidence: (1) that recommendations were
25 transmitted to and received by the Commission with respect to Petition
26 for Rulemaking 4-502 ('Petition'); ... (3) the identity of the
27 Commissioners who voted in favor or against the action upon the
28 Petition or abstained....

1 61. On May 5, 2008, defendant SEC replied to Plaintiff's FOIA request by
2 stating, in substance, that defendant SEC has no document evidencing that
3 recommendations were transmitted to and received by the Commissioners with
4 respect to Petition 4-502, the existence of any meeting of the Commission at which
5 Petition No. 4-502 was purportedly denied or a Minute Record of the Commission
6 (if the Commissioners acted pursuant to seriatim consideration) purportedly denying
7 Petition No. 4-502.

8
9 62. Plaintiff is informed and believes and thereupon alleges that defendant
10 SEC did not deny Petition No. 4-502 as the Commissioners did not vote upon an
11 order denying Petition No. 4-502, defendant SEC did not issue any notice of
12 meeting, conduct a meeting or prepare minutes, agenda or a transcript with respect
13 thereto, as required by the Sunshine Act (5 U.S.C. § 552, *et seq.*) and defendant SEC
14 did not execute a Minute Record of the Commission (if the Commission acted
15 pursuant to seriatim consideration) related to Petition 4-502, as required by SEC
16 General Rule 200.42 ["Each participating Commission member shall report his or
17 her vote to the Secretary, who shall record it in the Minute Record of the
18 Commission. Any matter circulated for disposition pursuant to this subsection shall
19 not be considered final until each Commission member has reported his or her vote
20 to the Secretary or has reported to the Secretary that the Commissioner does not
21 intend to participate in the matter."].

22
23 63. Plaintiff is informed and believes and thereupon alleges that DMR has
24 not made any recommendation to the Commissioners with respect to Petition No. 4-
25 502.

26 64. Plaintiff is informed and believes and thereupon alleges that, on or
27 about March 27, 2008, defendant SEC (DMR) referred Petition No. 4-502 to FINRA
28

1 for comment without specifying a definite timeframe within which it expects to
2 receive a response.

3
4 65. Plaintiff is informed and believes and thereupon alleges that defendant
5 SEC has no reasonable expectation that it would receive any comment with respect
6 to Petition No. 4-502 from FINRA that would substantially differ from the
7 comments it has already received from SICA.

8
9 66. On March 28, 2008, Plaintiff wrote to defendant SEC stating, in part,
10 [F]INRA has already examined the Petition. ... The NASD and
11 NYSE constituted the major members of SICA and the SICA sub-
12 committee that determined SICA's response to the Petition. FINRA
13 consists of those same NASD and NYSE members of SICA.
14 Hopefully, the SEC recognizes that FINRA has a definite conflict of
15 interest in examining the relevant securities arbitration issues. In order
16 for FINRA to find merit in the issues set forth in the Petition, it must
17 conclude that its longstanding practices have been unfair to the
18 investing public. Thus, arbitration rulemaking proposals from FINRA
19 based upon the Petition are highly unlikely. ... Without establishing and
20 enforcing a strict timeframe within which to proceed, it would be
21 ingenuous to state, "[T]he SEC will continue to make the fairness of the
22 arbitration system a priority..."

23
24 **Petition for Rulemaking (SEC File No. 4-506) --- Three Years**
25 **Without Recommendation to the Commission**

26
27 67. Plaintiff is informed and believes and thereupon alleges that, on or
28 about July 15, 2005, AVERY B. GOODMAN filed Petition for Rulemaking (SEC

1 File No. 4-506)("Petition No. 4-506") with defendant SEC which was forwarded to
2 DMR, as the appropriate division.

3
4 68. Petition No. 4-506 seeks a rule change to permit appeals to
5 Administrative Judges of defendant SEC concerning arbitrator classification
6 decisions made by SROs.

7
8 69. On or about July 19, 2005, defendant SEC published Petition No. 4-506
9 on its website and requested public comment. Defendant SEC received several
10 supportive comment letters that it promptly published on its website. Neither SICA
11 nor any SRO availed itself of that process to comment upon Petition No. 4-506.

12
13 70. Plaintiff is informed and believes and thereupon alleges that, on or
14 prior to August 19, 2005, defendant SEC referred Petition No. 4-506 and the
15 associated public comments to SICA to obtain SICA's advice and recommendations.

16
17 71. Plaintiff is informed and believes and thereupon alleges that defendant
18 SEC never established a definite timeframe within which it expected to receive
19 comments from SICA with respect to Petition No. 4-506.

20
21 72. Plaintiff is informed and believes and thereupon alleges that defendant
22 SEC (DMR) never established a definite timeframe within which it intended to
23 make a recommendation to the Commission with respect to Petition No. 4-506.

24
25 73. Plaintiff is informed and believes and thereupon alleges that, on or
26 about November 6, 2006, defendant SEC received comments on Petition No. 4-506
27 from SICA.

1 74. Plaintiff is informed and believes and thereupon alleges that no SRO
2 has made any recommendation to or rule filing with defendant SEC relating to
3 Petition No. 4-506.

4
5 75. Plaintiff is informed and believes and thereupon alleges that on or
6 about March 27, 2008, the Secretary of defendant SEC provided AVERY B.
7 GOODMAN with a document stating that the Commission issued an order denying
8 Petition No. 4-506.

9
10 76. Plaintiff is informed and believes and thereupon alleges that defendant
11 SEC did not deny Petition No. 4-506 as the Commissioners did not vote upon an
12 order denying Petition No. 4-506, defendant SEC did not issue any notice of
13 meeting, conduct a meeting or prepare minutes, agenda or a transcript with respect
14 thereto, as required by the Sunshine Act and defendant SEC did not execute a
15 Minute Record of the Commission related to Petition 4-506.

16
17 77. Plaintiff is informed and believes and thereupon alleges that defendant
18 SEC (DMR) has not made any recommendation to the Commissioners with respect
19 to Petition No. 4-506.

20
21 78. Plaintiff is informed and believes and thereupon alleges that, on or
22 about March 27, 2008, defendant SEC referred Petition No. 4-506 to FINRA for
23 comment without specifying a definite timeframe within which it expects to receive
24 a response.

25
26 79. Plaintiff is informed and believes and thereupon alleges that defendant
27 SEC has no reasonable expectation that it would receive any comment from FINRA
28

1 with respect to Petition No. 4-506 that would substantially differ from the comments
2 it has already received from SICA.

3
4 **Petition for Rulemaking (SEC File No. 4-541) --- One Year Without**
5 **Recommendation to the Commission, But Defendant SEC (DMR)**
6 **Completed Analysis Almost Ten Years Ago**
7

8 80. Plaintiff is informed and believes and thereupon alleges that, on or
9 about June 18, 2007, DANIEL SOLIN filed Petition for Rulemaking (SEC File No.
10 4-541)("Petition No. 4-541") with defendant SEC and it was forwarded to DMR, as
11 the appropriate division.

12
13 81. Plaintiff is informed and believes and thereupon alleges that Petition
14 No. 4-541 seeks a rule to prohibit securities brokerage firms from requiring
15 customers to sign predispute arbitration agreements as a condition of opening
16 brokerage accounts.

17
18 82. The *Oversight of Self-Regulatory Organization Arbitration* (Audit 289)
19 dated August 24, 1999 by defendant SEC states, in pertinent part:

20 The MR (Division of Market Regulation) officials responsible
21 for overseeing arbitration were well aware of the arguments in favor of
22 and against mandatory predispute arbitration agreements. In 1988, MR
23 forwarded a legislative proposal to the Commission that would have
24 prohibited broker-dealers from requiring customers to sign predispute
25 arbitration agreements as a condition of opening brokerage accounts.
26
27
28

1 defeat the mandate of the law by making the process so slow and/or cumbersome as
2 to ensure that recommendations by defendant SEC (DMR) on Petitions would not be
3 presented to the Commission and, thus, would result in substantial nullification of a
4 right conferred by SEC General Rule 192(a) to the respective petitioners.
5

6 90. Plaintiff is informed and believes and thereupon alleges that
7 substantially all retail customers of securities brokerage firms are required to enter a
8 customer agreement containing a pre-dispute arbitration agreement, where the
9 arbitration is required to be conducted before the facilities of a SRO.
10

11 91. Plaintiff is informed and believes and thereupon alleges that
12 approximately 4,000 disputes, requiring arbitration before SROs, are filed annually
13 with SROs by customers of securities brokerage firms.
14

15 92. Plaintiff is informed and believes and thereupon alleges that arbitration
16 rules of SROs require that, when a panel of three arbitrators is required to resolve a
17 dispute, one of the three be affiliated with the securities industry.
18

19 93. Plaintiff is informed and believes and thereupon alleges that arbitration
20 rules of SROs prohibit arbitrators who serve on panels to resolve customer disputes
21 from conducting independent legal research.
22

23 94. Plaintiff is informed and believes and thereupon alleges that FINRA
24 has instructed arbitrators serving on its panel of arbitrators that they are not required
25 to follow the substantive law in their decision-making process.
26

27 95. Plaintiff is informed and believes and thereupon alleges that, pursuant
28 to arbitration rules of SROs, securities industry arbitrators sitting on the respective

1 arbitration panels are permitted to convey purportedly factual information to co-
2 panelists without revealing that same information to the respective parties or their
3 legal counsel.

4
5 96. Plaintiff is informed and believes and thereupon alleges that SROs do
6 not adequately train members of their respective panels of arbitrators in applicable
7 law.

8
9 97. Plaintiff is informed and believes and thereupon alleges that SROs do
10 not conduct adequate continuing evaluations of the ability of every arbitrator on
11 their panels to perform his/her duties, including, but not limited to mandatory peer
12 evaluations.

13
14 98. Plaintiff is informed and believes and thereupon alleges that securities
15 brokerage firms do not disclose in customer agreements whether arbitrators who
16 hear customer disputes are required to follow the substantive law in their decision-
17 making process, whether arbitrators are trained by SROs in applicable law, and/or
18 the process of the SROs, if any, to evaluate their arbitrators on a continuing basis.

19
20 99. Plaintiff is informed and believes and thereupon alleges that securities
21 arbitration occurring before SROs sometimes involves issues of human welfare
22 where the customer disputes involve the loss of a substantial part of a customer's
23 savings.

24
25 100. Defendant SEC has acted in violation of 5 U.S.C. §706 and General
26 Rule 192 by its unreasonable delay in acting upon Petition No. 4-502.

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SECOND CLAIM

(Violation of the Administrative Procedure Act

Re: Pattern and Practice of Unreasonable Delay and SEC General Rule 192)

101. Plaintiff repeats and re-alleges the allegations set forth in Paragraphs 1 through 87, inclusive, and Paragraphs 89 through 100, inclusive, as if they were set forth herein in full.

REQUESTED RELIEF

WHEREFORE, Plaintiff prays judgment and relief that the Court:

ON THE FIRST CLAIM

(1) Declare that defendant SEC has violated defendant SEC's General Rule 192 and, thus, APA through its unreasonable delay in making recommendations to the Commission upon Petition No. 4-502;

(2) Enter a permanent injunction ordering defendant SEC to act, within ninety (90) days, upon Petition No. 4-502, pursuant to the requirements of defendant SEC's General Rule 192, by making recommendations to the Commission; and,

ON THE SECOND CLAIM

(1) Declare that defendant SEC has engaged in a pattern and practice of conduct through unreasonably delay in making recommendations to the Commission upon Petitions for Rulemaking (concerning matters related to securities arbitration) in violation of defendant SEC's General Rule 192 and, thus, APA;

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(2) Enter a permanent injunction ordering defendant SEC to make recommendations, within one year after respective filings, to the Commission upon Petitions for Rulemaking (concerning matters related to securities arbitration) pursuant to the requirements of defendant SEC's General Rule 192; and,

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: May 24, 2008

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 June 5, 2008 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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