

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

7 Plaintiff In Propria Persona
8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

14	HERBERT LESLIE GREENBERG,)	
15	Plaintiff,)	CASE NO. CV 06-7878-GHK(CTx)
16	v.)	MEMORANDUM OF POINTS AND
17	UNITED STATES SECURITIES)	AUTHORITIES IN RESPONSE TO
18	AND EXCHANGE COMMISSION,)	OPPOSITION TO MOTION FOR
19	Defendant.)	LEAVE TO FILE SECOND
20		AMENDED COMPLAINT
21		DATE: August 18, 2008
22		TIME: 9:30 A.M.
23		JUDGE: Honorable George H. King

24
25
26 /////
27 /////
28 /////
29

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. INTRODUCTION 2

II. BACKGROUND 3

 A. Plaintiff's First Amended Complaint Has NOT
 Been Fully Resolved 5

 1. Lack of Minute Record Demonstrates NO Action 5

 2. Defendant SEC's Allegation NOT Supported
 By Admissible Evidence 7

 B. The Proposed Second Amended Complaint 8

III. ARGUMENT 9

 A. The Court Would NOT Lack Jurisdiction Over Plaintiff's Claims 9

 1. The APA Claim Does NOT Involve Interim Agency
 Action, Which Issue Was Previously Resolved by the
 Court 9

 2. This Court Has Subject Matter Jurisdiction to Hear
 Plaintiff's "Pattern and Practice" Claim 11

 B. Plaintiff's First Proposed Claim Is NOT Moot 13

 1. Admissible Evidence Indicates NO SEC Staff Recommendation
 To Commissioners or Denial of Petition by
 Commissioners; Defendant SEC's Purported Evidence Is
 Inadmissible 14

 2. Defendant SEC Has Not Met Its Heavy Burden to
 Demonstrate That It Will Not Repeat Violations
 Of the Challenged Practice 16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

C. Plaintiff Has NOT Sued Over the Petitions of Others 16

 1. Plaintiff Has Standing to Bring the
 Proposed Second Claim 16

 2. Court Has Authority to Issue Appropriate Relief 17

 3. Cited "Pattern and Practice" Cases Applicable 18

IV. Objections to Declaration of Florence E. Harmon 18

V. Conclusion 20

1 **TABLE OF AUTHORITIES**

2

3 **CASES**

4 *Allen v. Matson,*
5 255 F.2d 273 (9th Cir. 1958) 7

6 *Center For Biological Diversity v. Veneman,*
7 394 F.3d 1108 (9th Cir. 2005) 10

8 *Cutler v. Hayes,*
9 818 F.2d 879 (D.C. Cir. 1987) 4

10 *High Sierra Hikers Ass'n v. Blackwell,*
11 381 F.3d 886 (9th Cir. 2004) 11-12, 17

12 *Institute for Wildlife Protection v. Norton,*
13 337 F.Supp.2d 1223 (W.D. Wash. 2004) 14

14 *International Mining v. Babbit,*
15 105 F3d 502 (9th Cir 1997) 4

16 *Linville v. Barrows,*
17 489 F.Supp.2d 1278 (W.D. Okla. 2007) 3

18 *Lujan v. National Wildlife Federation,*
19 497 U.S. 871, 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990) 12-13

20 *Muwekma v. Babbitt,*
21 133 F.Supp.2d 30 (D.D.C. 2000) 4

22 *NAACP v. Secretary of Hous. & Urban Dev.,*
23 817 F.2d 149 (1st Cir. 1987) 12

24 *Natural Resources Defense Council v. Abraham,*
25 233 F.Supp.2d 162 (D.C. Cir. 2002) 12, 13, 17, 18

26 *Norton v. Southern Utah Wilderness Alliance,*
27 542 U.S. 55, 124 S. Ct. 2373, 159 L.Ed. 2d 137 (2004) 10

28

1	<i>Payne v. United States,</i>	
2	837 F.2d 486 (D.C. Cir. 1987)	16

3
4

STATUTES

5	5 U.S.C. 551	3
6	5 U.S.C. 702	17
7	5 U.S.C. 703	17
8	5 U.S.C. 706	<i>passim</i>
9	15 U.S.C. 78d(a)	5

10

RULES AND REGULATIONS

11	FRE, Rule 402.....	15, 19
12	FRE, Rule 404(b)	5
13	FRE, Rule 602.....	15, 19, 20
14	FRE, Rule 802.....	8, 15, 20
15	FRE, Rule 803(7)	6, 14
16	FRE, Rule 901.....	15, 20
17	FRE, Rule 1002.....	15, 19, 20
18	17 C.F.R 200.30-3	5, 20
19	17 C.F.R 200.101	5
20	17 C.F.R. 192(a)	<i>passim</i>
21	17 C.F.R. 200.42	6, 20
22	Local Rule 7-3	6

23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. INTRODUCTION**

4
5 In substance, defendant SECURITIES AND EXCHANGE COMMISSION
6 ("SEC") submits its Opposition to Plaintiff's Motion for Leave to File Second
7 Amended Complaint ("Opp." or "Opposition") of HERBERT LESLIE
8 GREENBERG ("Plaintiff") to dispute facts pleaded in the proposed Second
9 Amended Complaint for Declaratory and Injunctive Relief ("PSAC"). (PSAC ¶¶ 58-
10 62.) The factual dispute has not been resolved or extinguished, *i.e.*, whether the
11 staff of defendant SEC ("SEC Staff") made and transmitted written
12 recommendations concerning Plaintiff's Petition for Rulemaking (SEC File No. 4-
13 502)("Petition") to the Commissioners of defendant SEC ("Commissioners").

14 The parties' factual dispute is not resolvable at the pleading stage. Defendant
15 SEC audaciously claims that the Court should not require it to submit any
16 admissible evidence to support its alleged defense.¹ The Opposition is replete with
17 vague references to alleged writings not before the Court and misquotations of
18 writings on file with the Court.²

19
20
21 ¹ "It would be a pointless endeavor to entertain an amended complaint to require the SEC to
22 further prove the existence of a DTM recommendation that obviously was made, based simply on
23 plaintiff's baseless denial of that reality." (Opp. at 11:12-15.)

24 ² Defendant SEC has misrepresented the content of the Joint Status Report. The Opposition
25 erroneously states, "Plaintiff even, incredibly, suggests that 'the SEC did not deny Petition 4-502,'
26 2nd Am Compl. ¶62, even though the parties clearly informed the Court on March 28, 2008 that
27 the Commission had so acted *see* Joint Status Report (March 28, 2008 at 1..." (Opp. at 2:11 - 3:2)
28 However, the Joint Status Report (March 28, 2008) states, "[T]he Commission has informed
Plaintiff that it has acted on Plaintiff's petition for rulemaking." (Emphasis added.) Plaintiff
contends that admissible evidence set forth herein demonstrates that defendant SEC (SEC Staff)
provided untruthful information to him and that he has never informed the Court that "the
Commission had so acted."

1 In 2007, defendant SEC unsuccessfully argued the issue of alleged "interim
2 agency action" before this Court. The SEC Staff's failure to make and transmit
3 recommendations concerning the Petition to the Commissioners, as required by SEC
4 General Rule 192a ("Rule 192"),³ is the relevant final agency action.⁴

5 For the reasons set forth herein, the Court should reject the Opposition and
6 grant the Motion for Leave to File Second Amended Complaint ("Motion").

7
8 **II. BACKGROUND**

9
10 As material hereto, Plaintiff brought the within action based upon allegations
11 that defendant SEC (SEC Staff) has unreasonably delayed making and transmitting
12 recommendations to the Commissioners with respect to the Petition in violation of
13 the Administrative Procedure Act ("APA"), Section 706(1).⁵ "What constitutes an
14 unreasonable delay ... depends to a great extent on the facts of the particular case."
15 *Linville v. Barrows*, 489 F.Supp.2d 1278, 1282 (W.D. Okla. 2007).

16 Currently available documents, going back to 1997, show that the SEC Staff
17 has established what one could consider "underground" regulations that were not
18 vetted with the public and essentially nullify Rule 192. The SEC Staff has, in
19 practice, rewritten Rule 192 to require that it first send all Petitions for Rulemaking

20
21 ³ 17 C.F.R. 192(a). ["Any person desiring the issuance, amendment or repeal of a rule of general
22 application may file a petition therefor with the Secretary. ... The Secretary shall ... refer it to the
23 appropriate division ... for consideration and recommendation. Such recommendations shall be
24 transmitted with the petition to the Commission for such action as the Commission deems
appropriate." (Emphasis added.)].

25 ⁴ 5 U.S.C. 551 [(13) 'agency action' includes the whole or a part of an agency rule ... or the
26 equivalent or denial thereof, or failure to act..."; "(4) 'rule' means the whole or a part of an agency
27 statement of ... procedure, or practice requirements of an agency... " (Emphasis added.)]

28 ⁵ 5 U.S.C. 706(1) ["The reviewing court shall - (1) compel agency action unlawfully withheld or
unreasonably delayed."]

1 sponsored by the public and related to securities arbitration ("public Petitions") to
2 self-regulatory organizations ("SROs") for comment and recommendations, but does
3 not establish a return deadline. (*See, e.g.*, PSAC ¶¶ 12-15 and 26-27.) *Muwekma v.*
4 *Babbitt*, 133 F.Supp.2d 30, 37 (D.D.C. 2000) ["(T)he defendants' refusal to provide
5 the plaintiff with a definite time frame for review of its petition ... defeats any
6 assertion that the process proceeds with reasonable dispatch."]. Prior to referring
7 the public Petitions to the SECURITIES INDUSTRY CONFERENCE ON
8 ARBITRATION ("SICA"), the majority of whose members are SROs, SEC Staff
9 reasonably knows that the proposals are anathema to the SROs and would be
10 rejected. (*See, e.g.*, PSAC ¶¶ 7-8, 81 and 89.) If the SROs (through SICA or
11 directly) fail to propose a rule change based upon the public Petitions, the SEC Staff
12 takes no action and feels that it is not bound by the provisions of Rule 192 to make
13 recommendations on the public Petitions to the Commissioners. (*See, e.g.*, PSAC ¶¶
14 12-16, 30, 40, 63, 77, 84 and 89.) *International Mining v. Babbitt*, 105 F.3d 502, 510
15 (9th Cir 1997) ["We question whether the Secretary is free to make ... administrative
16 changes with the intent to defeat the mandate of the law by making the process so
17 slow and/or cumbersome as to ensure that no patents would issue."]. Additionally,
18 there is an issue of whether the SEC Staff's "administrative changes were within his
19 powers and supported by reasonable explanations." *Id.* at 510.

20 The SEC Staff has utilized this unauthorized procedure with all public
21 Petitions, except one that the SEC Staff summarily rejected, and has never issued
22 recommendations to the Commissioners. (PSAC ¶¶ 12-87.) *Cutler v. Hayes*, 818
23 F.2d 879, 898 (D.C. Cir. 1987) ["(I)f an agency's failure to proceed expeditiously
24 will result in ... substantial nullification of a right conferred by statute, 'the courts
25 must act to make certain that what can be done is done.'"].

26 An agency's bad faith is the equivalent of unreasonable delay. *International* at
27 509-10 ["(I)f the court determines that the agency [has] delay[ed] in bad faith, it
28 should conclude that the delay is unreasonable...."].

1 Other similar instances of bad faith constitute admissible evidence.
2 *International* at 510 ["(T)he Secretary's motivations were, at least, relevant."]. *See,*
3 *e.g.,* FRE, Rule 404(b) ["Evidence of other ... wrongs, or acts ... may, however, be
4 admissible for other purposes, such as proof of motive, opportunity, intent,
5 preparation, plan, knowledge, identity, or absence of mistake or accident...."].

6 The Court "*strongly urged*" defendant SEC to act upon the Petition within
7 sixty days after the Scheduling Conference. (Minute Order 1/29/08.) A factual
8 dispute now exists as to whether defendant SEC acted and, if so, what it did.

9
10 **A. Plaintiff's First Amended Complaint Has NOT**
11 **Been Fully Resolved**

12
13 The APA Claim of the First Amended Complaint has NOT been resolved.
14 Available admissible evidence indicates that the Commissioners did not deny the
15 Petition and the SEC Staff did not make or transmit recommendations related to the
16 Petition to the Commissioners. The Opposition contains no admissible evidence.

17
18 **1. Lack of Minute Record Demonstrates NO Action**

19
20 Rule 192 specifically requires SEC Staff to make and transmit
21 recommendations to the Commissioners. "*Commission* means the United States
22 Securities and Exchange Commission, or a panel of Commissioners constituting a
23 quorum of the Commission...." 15 U.S.C. §78d(a); 17 C.F.R. 200.101. The
24 Commission has not delegated authority to rule upon public Petitions. 17 C.F.R.
25 200.30-3.

26 Without evidentiary support, the Opposition states, "[T]he Commission
27 decided his petition by written *seriatim* process." (Opp. at 10:22-24.) Any such
28 vote must be officially recorded in the "Minute Record of the Commission" ---

1 indicating whether or how each of the Commissioners voted on the Petition.⁶
2 However, no Minute Record of the Commission exists with respect to the Petition
3 ("Minute Record"). Defendant SEC is unable to produce any Minute Record.
4 (Declaration of HERBERT LESLIE GREENBERG In Response to Opposition to
5 Motion for Leave to File Second Amended Complaint ["GREENBERG
6 Declaration"] ¶¶ 3-5; Opp., Exhibit B.) The nonexistence of this official record is
7 persuasive evidence, pursuant to FRE 803(7),⁷ that the Commissioners did not vote
8 upon the Petition.

9 In response to Plaintiff's Freedom of Information Act ("FOIA") request⁸,
10 defendant SEC has failed to the produce any Minute Record and does not claim that
11 it withholds such writing. (GREENBERG Declaration ¶¶ 2-5; PSAC ¶¶ 61-62;
12 Opp., Exhibit B.)

13 Pursuant to the good faith meet and confer requirements of Local Rule 7-3,
14 Plaintiff attempted to resolve the disputed factual issue by asking defendant SEC
15 voluntarily to produce any Minute Record, if one exists.⁹ Defendant SEC did not
16 claim that any Minute Record exists. (GREENBERG Declaration ¶¶ 3-4.)

17
18 ⁶ 17 C.F.R. 200.42 ["Each participating Commission member shall report his or her vote to the
19 Secretary, who shall record it in the Minute Record of the Commission. Any matter circulated for
20 disposition pursuant to this subsection shall not be considered final until each Commission
21 member has reported his or her vote to the Secretary or has reported to the Secretary that the
Commissioner does not intend to participate in the matter." (Emphasis added.)].

22 ⁷ FRE, Rule 803(7) ["Evidence that a matter is not included in the memoranda reports, records ...
23 to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a
24 memorandum, report, record, or data compilation was regularly made and preserved...."].

25 ⁸ "[A] copy of all writings ... that evidence ... (3) the identity of the Commissioners who voted in
26 favor or against the action upon the Petition or abstained...." (GREENBERG Declaration, Exhibit
A.)

27 ⁹ Local Rule 7-3 ["(C)ounsel contemplating the filing of any motion shall first contact opposing
28 counsel to discuss thoroughly ... the substance of the contemplated motion and any potential
resolution."]; Declaration of GREENBERG ¶¶ 3-5, Exhibit B.

1 The Opposition totally ignores the lack of existence of any Minute Record
2 and its significance. A letter by SEC Staff is not a Minute Record. Defendant SEC's
3 allegation that the Commissioners denied Plaintiff's Petition, and other
4 representations to the Court, should be treated with distrust.¹⁰

5
6 **2. Defendant SEC's Allegation NOT Supported**
7 **By Admissible Evidence**
8

9 Defendant SEC has not presented any admissible evidence that the
10 Commissioners denied the Petition. Further, even if the Commissioners denied the
11 Petition, it does not logically follow that they received recommendations from SEC
12 Staff, satisfying the requirements of Rule 192.

13 Defendant SEC submitted the Declaration of FLORENCE E. HARMON
14 ("HARMON Declaration") in support of the Opposition. However, the HARMON
15 Declaration is so fundamentally objectionable that it has no evidentiary value, *e.g.*,
16 no showing that the witness has personal knowledge of alleged events described in
17 the declaration, testimony as to the content of alleged writings in violation of the
18 best evidence rule. (*See*, Section IV, below.) Additionally, the HARMON
19 Declaration ignores the lack of existence of any Minute Record.

20 Based upon the Opposition's Exhibit B, to which Plaintiff objects as hearsay,
21 defendant SEC impliedly asks the Court to consider the alleged existence and non-
22 specified content of writings vaguely described as "action memorandum" and
23 "*seriatim*." (Opp., fn. 3; 10:25 - 11:1.) The references should be ignored.

24
25 _____
26 ¹⁰ *See, e.g., Allen v. Matson*, 255 F.2d 273, 280 (9th Cir. 1958) ["(I)f weaker and less satisfactory
27 evidence is offered, when it appears that stronger and more satisfactory evidence was within the
28 power of the party to produce, the evidence offered should be viewed with distrust."]. Defendant
SEC is required to maintain a Minute Record of the Commission with respect to all action taken
via the written *seriatim* process.

1 The Opposition refers to a letter from SEC Staff to Plaintiff. However, the
2 letter implies that no recommendation was made to the Commissioners. (Joint
3 Status Report, March 28, 2008, Exhibit A.)¹¹ The letter's truthfulness is in doubt
4 due to the non-existence of any Minute Record. The letter has no evidentiary value
5 as the statements therein are hearsay. (FRE, 802 ["Hearsay is not admissible...."].)
6 However, the letter states, "The Commission has carefully considered the Petition,
7 as well as comments it has received about the Petition¹, and has determined...." The
8 footnote lists eleven (11) public comments and one from SICA that were allegedly
9 forwarded to the "Commission." There is absolutely no mention of any
10 recommendation by SEC Staff. This omission is most incredible as the letter was
11 obviously written in response to the Court order, which "*strongly* urged" defendant
12 SEC (SEC Staff) to make the recommendations to the Commissioners. (Minute
13 Order 1/29/08.)

14
15 **B. The Proposed Second Amended Complaint**

16
17 The proposed Second Amended Complaint sets forth two separate claims.
18 The proposed first claim is based upon the unreasonable delay of defendant SEC
19 (SEC Staff) in failing to make and transmit recommendations concerning the
20 Petition to the Commissioners. It is essentially the same as the remaining APA
21 Claim in the First Amended Complaint. The proposed second claim is based upon
22 the harm caused to Plaintiff by defendant SEC's lengthy pattern and practice of
23 unreasonable delay in failing to make recommendations to the Commissioners upon
24

25
26 ¹¹ The Opposition erroneously contends that Plaintiff believes that the Commissioners must sign
27 any notice to him of action upon the Petition. (Opp. at 3, fn. 4.) Plaintiff makes no such allegation.
28 Plaintiff contends that available evidence reasonably suggests that SEC Staff provided false
information in its letter.

1 all public Petitions, including the Petition. (PSAC ¶¶ 12-87.)

2
3 **III. ARGUMENT**

4
5 **A. The Court Would NOT Lack Jurisdiction Over Plaintiff's Claims**

6
7 **1. The APA Claim Does NOT Involve Interim Agency Action,**
8 **Which Issue Was Previously Resolved by the Court**

9
10 The proposed claims deal with discrete acts required by Rule 192 --- SEC
11 Staff shall make and transmit recommendations on public Petitions to the
12 Commissioners --- not "interim agency action."

13 The issue has already been litigated before this Court and resolved against
14 defendant SEC. (Minute Order 7/16/07.) Defendant SEC previously asserted, "The
15 grounds for this motion are: ... (2) Plaintiff's Third Claim under Administrative
16 Procedure Act ('APA') should be dismissed because ... (c) plaintiff has not alleged
17 any cognizable violations of the APA or of the SEC rule governing petitions."
18 (Notice of Motion to Dismiss 2/14/07 at 2:3-14.) Defendant SEC long-ago argued,
19 "[T]he APA does not grant jurisdiction for interlocutory review of ongoing agency
20 decisionmaking." (Emphasis added.) (Memorandum of Points and Authorities in
21 Support of Motion to Dismiss 2/14/07 at 15:3-4.) Defendant SEC is attempting to
22 re-litigate this issue.

23 "The APA provides relief for a failure to act in §706(1): 'The reviewing court
24 shall ... compel agency action unlawfully withheld or unreasonably delayed.'
25 *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62, 124 S. Ct. 2373, 159
26 L.Ed. 2d 137 (2004). "A 'failure to act' is not the same thing as a 'denial.' The latter
27 is the agency's act of saying no to a request; the former is simply the omission of an
28 action without formally rejecting a request...." *Id.* at 63. For purposes of APA

1 enforcement, "[a]gency rules ... have the force of law." *Id.* at 65 n.2. There has
2 been a "failure to act" with respect to an agency rule, *i.e.*, Rule 192.

3 In *Center For Biological Diversity v. Veneman*, 394 F.3d 1108 (9th Cir. 2005),
4 the Court found that a claim under APA § 706(1) is proper where an agency fails to
5 do an act required by its regulations by stating:

6 [T]he Supreme Court held in *Norton v. Southern Utah*
7 *Wilderness Alliance*, 124 S. Ct. 2373 (2004) ('*SUWA*'), that a claim
8 under § 706(1) 'can proceed only where a plaintiff asserts that an
9 agency failed to take a *discrete* agency action that it is *required to take*.'
10 *Id.* at 2379.

11 ...

12 [T]he Center may be able to assert a 'discrete agency action that
13 [the agency] is required to take' under § 1276(d)(1) of the WSRA by
14 alleging specific failures of the Forest Service to consider specific
15 rivers when planning for specific projects.

16 ...

17 [T]he Center may be able to allege a failure to comply with the
18 regulations promulgated by the Departments of Agriculture and the
19 Interior....

20 *Id.* at 1109-1114.

21 Plaintiff alleges that, after unreasonable delay, defendant SEC (SEC Staff)
22 has failed to make and transmit recommendations to the Commissioners, actions that
23 defendant SEC (SEC Staff) is required to take under Rule 192. Such is discrete
24 agency action. Plaintiff does not ask the Court to micromanage or measure the
25 quality of any recommendation, but to cause compliance with Rule 192.

26 The Opposition confuses Rule 192 --- SEC Staff make and transmit
27 recommendations --- with the content of any recommendation. (Opp. at 7:4-5.)
28 ["(S)imply put, a recommendation is not a 'rule, order, license, sanction, relief, or

1 the equivalent or denial thereof,' and thus, is *not* agency action."] Defendant SEC
2 erroneously contends that the recommendations (made pursuant to Rule 192) must
3 qualify as rules before an APA § 706(1) claim could be brought. However, the
4 content of SEC Staff recommendations is irrelevant --- Rule 192 only requires that
5 recommendations be made and transmitted. Agency action is based upon the
6 requirements of Rule 192. The cases cited in the Opposition do not deal with a
7 failure to make recommendations pursuant to the requirements of a rule, *e.g.*, Rule
8 192, but deal with the nature of recommendations.

9
10 **2. This Court Has Subject Matter Jurisdiction to Hear**
11 **Plaintiff's "Pattern and Practice" Claim**

12
13 An agency's "pattern and practice" of unlawful activity may be challenged
14 under APA. Plaintiff asks the Court to order defendant SEC to perform specific
15 discrete acts as opposed to asking the Court to supervise "how an agency conducts
16 its business on a system-wide level." (Opp. at 8:10-12; PSAC at 26.) Plaintiff does
17 not ask the Court to micromanage some unspecified program of defendant SEC.

18 *High Sierra Hikers Ass'n v. Blackwell*, 381 F.3d 886 (9th Cir. 2004)("High
19 Sierra v. Blackwell"), cited in the Opposition, supports Plaintiff's position that an
20 APA claim may be based upon specific discrete actions, *e.g.*, violations of Rule 192.
21 The Court stated, in part:

22 Forest Service and Intervenors contend that High Sierra has
23 made an impermissible programmatic challenge to the forest
24 management plan and have failed to allege any specific challenges to a
25 final agency action.

26 We disagree. High Sierra has alleged specific discrete agency
27 actions taken by the Forest Service that have caused harm. High Sierra
28 did not challenge the entirety of the wilderness plan, but instead

1 challenged certain agency actions, for example the grant of certain
2 special-use permits, and the calculation of certain trailhead limits.

3 *Id.* at 895. Plaintiff asserts much more specific discrete agency action --- failure to
4 make and transmit recommendations pursuant to Rule 192.

5 Other courts have held that "pattern and practice" allegations support APA
6 claims. *NAACP v. Secretary of Hous. & Urban Dev.*, 817 F.2d 149, 158, 160-161
7 (1st Cir. 1987) ("*NAACP v. HUD*") ["The NAACP does not complain of individual
8 instances so much as it *uses* individual instances to show a pattern of activity, which
9 pattern constitutes the alleged violation. ... (H)ere the court must decide whether,
10 over time, HUD's pattern of activity reveals a failure to live up to its obligation. It
11 should be able to determine whether the agency's practice, over time, in respect to
12 this mandate has been 'arbitrary, capricious, an abuse of discretion, or otherwise not
13 in accordance with law.' 5 U.S.C. § 706(2)(A). Doing so, in the context of a claim
14 of serious failure over time ... need not involve the court in 'superintend[ing]
15 economic and managerial decisions'.... [W]e do not believe that judicial review of
16 this kind of claim threatens unwarranted interference with HUD's ability to carry out
17 its basic statutory missions."]; *Natural Resources Defense Council v. Abraham*, 233
18 F.Supp.2d 162, 174, 179, 193-4 (D.D.C. 2002)("*NRDC v. Abraham*") ["Plaintiffs
19 allege that, for the past five years, DOE has engaged in a pattern and policy of
20 establishing and using advisory committees ... without complying ... with FACA....
21 Plaintiffs' claim of procedural injury is clearly sufficient to establish standing. ...
22 Plaintiffs' claim ... arises pursuant to the APA. ... (D)efendants have acted in a
23 manner that is contrary to law in violation of the APA by ... implementing a policy
24 of convening committees ... in violation of FACA."].

25 *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S. Ct. 3177, 111
26 L.Ed.2d 695 (1990) ("*Lujan*") is not applicable as it deals with "wholesale
27 improvement" of a program; whereas, Plaintiff has directed his attack against
28 particular agency action that causes him harm. The Opposition does not identify

1 any alleged program. The Supreme Court has made clear that the APA does not
2 allow "programmatically" challenges to agency land management procedures, but
3 instead requires that there be a specific final agency action. *Id.* at 882-94. In *Lujan*,
4 the plaintiffs failed to challenge any particular agency action that caused harm. *Id.* at
5 875, 891. The Court held that the "land withdrawal review program" was not an
6 identifiable, much less final, agency action or series of such actions within the
7 meaning of the APA, but rather a general label sweeping into its purview policies
8 and practices as broad and multi-faceted as those of a "drug interdiction program" of
9 the Drug Enforcement Administration. *Id.* at 890. However, the Court found, "[A]
10 regulation is ... 'ripe' for judicial review under the APA ... (when) the scope of the
11 controversy has been reduced to more manageable proportions, and its factual
12 components fleshed out, by some concrete action applying the regulation to the
13 claimant's situation in a fashion that harms or threatens to harm him." *Id.* Rule 192
14 requires such "concrete action."

15 *Institute for Wildlife Protection v. Norton*, 337 F.Supp.2d 1223 (W.D. Wash.
16 2004) is not applicable. There, the court had already granted plaintiff the personal
17 relief that it sought. *Id.* at 1228. Further, plaintiffs therein sought a mechanism for
18 challenging the government's prioritization of its workload and "steps to address the
19 funding problems," which the court considered to be "wholesale improvements." *Id.*
20 at 1226, 1229. Plaintiff has not made such broad allegations.

21
22 **B. Plaintiff's First Proposed Claim Is NOT Moot**

23
24 A factual dispute exists as to whether the Commissioners denied the Petition
25 or SEC Staff made and transmitted recommendations to the Commissioners. The
26 factual dispute is not resolvable at the pleading stage.
27
28

1 **1. Admissible Evidence Indicates NO SEC Staff**
2 **Recommendation to Commissioners or Denial of**
3 **Petition; Defendant SEC's Purported Evidence Is**
4 **Inadmissible**
5

6 Currently available evidence demonstrates that Plaintiff's first proposed claim
7 is not moot. (*See*, Section II.A., above, and Section IV, below .) Defendant SEC is
8 unable to produce any Minute Record, lack of which evidences that the
9 Commissioners did not deny the Petition. (FRE, Rule 803[7].) Defendant SEC's
10 purported evidence is suspect and inadmissible.

11 Defendant SEC relies on various alleged writings and unsworn allegations in
12 the Opposition to support its position. Plaintiff objects to the assumption of the
13 existence, relevance or alleged content of the alleged writings without proper
14 presentation of the writing and its authentication and overcoming other evidentiary
15 objections. (FRE, Rules 402, 602, 802, 901, 1002.) Further, defendant SEC
16 alleges, "In a telephone call with plaintiff ... counsel for the SEC told plaintiff that
17 such a recommendation has indeed been made," but failed to provide the Court with
18 a declaration by "counsel," claiming that the alleged underlying events actually
19 occurred and demonstrating his/her personal knowledge thereof. (Opp. at 11:5-6.)

20 Defendant SEC's letter dated March 27, 2008 states, "The Commission (vis-à-
21 vis the Commissioners) has carefully considered the Petition, as well as comments it
22 has received about the Petition..."; however, among the numerous documents listed,
23 it fails to mention any recommendation from SEC Staff. Thus, even if the letter was
24 admissible into evidence, it does not state that any SEC Staff recommendation was
25 made or was transmitted to the Commissioners.

26 Defendant SEC claims that it withheld documents, which it vaguely describes
27 as a "seriatim" and "action memorandum," in response to Plaintiff's FOIA request,
28 expecting the Court to speculate as to the alleged content of the alleged writings.

1 (Opp. at 10:25-11:11.) Even if an "action memorandum" related to the Petition
2 exists, there is no evidence that it was ever transmitted to the Commissioners with
3 the Petition.

4 The HARMON Declaration contains no admissible evidence. (See, Section
5 II.A., above, and Section IV, below.)

6 Defendant SEC asks this Court to make an impermissible giant leap of faith.
7 The underlying factual dispute is not capable of resolution at the pleading stage.

8

9 **2. Defendant SEC Has Not Met Its Heavy Burden to**
10 **Demonstrate That It Will Not Repeat Violations**
11 **Of the Challenged Practice**

12

13 It is premature to argue about exceptions to the mootness rule when the
14 dispute is not moot --- defendant SEC has not complied with Rule 192 regarding the
15 Petition. (See, Sections II and B.1, above, and Section IV, below.) Even if SEC
16 Staff so complied, in a pattern and practice case, defendant SEC bears a heavy
17 burden to demonstrate that it will not repeat violations of the challenged practice.
18 *Payne v. United States*, 837 F.2d 486, 491-2 (D.C. Cir. 1987) ["The Government
19 contends ... this suit is moot. This contention must fail ... (as) the Government has
20 not come close to satisfying the heavy burden of demonstrating 'that "there is no
21 reasonable expectation ..." that the alleged violation will recur."].

22 Defendant SEC has implemented an informal procedure in violation of APA
23 706(1) and has done so for over ten years and with all/multiple public Petitions.
24 (PSAC ¶¶ 12-87.) There is no assurance that defendant SEC will desist from
25 continuing that pattern and practice.

26

27 /////
28 /////
29

1 **C. Plaintiff Has NOT Sued Over the Petitions of Others**

2
3 The Opposition argument is premature as defendant SEC (SEC Staff) has
4 failed, in violation of APA § 706(1), to make and transmit recommendation
5 concerning the Petition to the Commissioners. (*See*, Sections II and B.1, above, and
6 Section IV, below.) In the proposed claims, Plaintiff asserts that, during the past ten
7 (10) years, defendant SEC has engaged in a recurring pattern and practice of
8 conduct, in contravention of Rule 192 and violation of APA § 706(1), that has
9 harmed Plaintiff and others.

10
11 **1. Plaintiff Has Standing to Bring the Proposed Second Claim**

12
13 Defendant SEC's pattern and practice of failing to make and transmit
14 recommendations, pursuant to the requirements of Rule 192, on public Petitions has
15 harmed Plaintiff --- the sponsor of the Petition. (PSAC ¶¶ 12-87, 42-66.) Defendant
16 SEC's violation of Rule 192 is sufficient to confer standing. *NRDC v. Abraham* at
17 178 ["(T)he Court finds that plaintiffs have demonstrated a procedural injury
18 sufficient for standing purposes...."].

19 The Opposition erroneously claims, "[P]laintiff's second claim only raises the
20 legal rights of others." (Opp. at 15:15.) This argument is based upon the
21 assumption, without admissible evidence, that the proposed first claim is moot.

22
23 **2. Court Has Authority to Issue Appropriate Relief**

24
25 Plaintiff seeks injunctive and declaratory relief and "(S)uch other and further
26 relief as the Court may deem just and proper." (PSAC at 26.) "A person suffering
27 legal wrong because of agency action ... is entitled to judicial review thereof." 5
28 U.S.C. § 702. "The form of proceeding for judicial review is ... any applicable form

1 of legal action, including actions for declaratory judgments ... or mandatory
2 injunction ... in a court of competent jurisdiction." (Emphasis added.) 5 U.S.C. §
3 703.

4 Courts may grant injunctive relief in "pattern and practice" APA cases. *High*
5 *Sierra v. Blackwell* at 898-900 ["A district court has 'broad latitude in fashioning
6 equitable relief when necessary to remedy an established wrong.' ... In issuing an
7 injunction, the court must balance the equities between the parties and give due
8 regard to the public interest. ... After briefing from all sides on the needed remedy,
9 the district court adopted a combination of remedies that were proposed by the
10 parties at the hearing and in post-hearing submissions. ... In determining whether to
11 issue an injunction, courts also consider the public."]; *NRDC v. Abraham* at 194
12 ["The Court enters a declaratory judgment that the agency's policy of establishing
13 committees to advise it on the NIF without complying with FACA contravenes
14 FACA. ... (D)efendants have acted in a manner that is contrary to law in violation
15 of the APA by ... implementing a policy of convening committees to advise DOE on
16 the NIF in violation of FACA."]. Declaratory relief would provide valuable
17 ammunition for publicly questioning the underpinning and conclusions of defendant
18 SEC's rules/guidelines/positions, or lack thereof, concerning securities arbitration
19 before forums sponsored by SROs. *Id.* at 181 ["A declaratory judgment from this
20 Court would enable plaintiffs to publicly challenge the underpinnings and
21 conclusions of the NIF committees established and utilized by DOE.... (I)t was not
22 for the court to judge how effective that 'ammunition' would be."]. Plaintiff is a
23 public advocate of reform in the securities arbitration process and would use the
24 declaration to publicly question defendant SEC's rules/regulations concerning
25 securities arbitration. (PSAC ¶ 3.)

26 The exact nature of appropriate relief is not determinable at the pleading
27 stage. In fashioning an appropriate remedy, defendant SEC will have ample
28 opportunity to put forth evidence as to the alleged "complexity of certain petitions,

1 the varying volume of petitions pending at a given time, or the myriad of competing
2 agency interests." (Opp. at 17:6-9) See, e.g., *NAACP v. HUD* at 161 ["In
3 formulating its remedy, of course, the district court may... seek the advice and
4 participation of HUD."].

5
6 **3. Cited "Pattern and Practice" Cases Are Applicable**

7
8 The cited cases demonstrate a judicial philosophy to entertain pattern and
9 practice cases, which do not involve micromanagement of government programs,
10 even after agencies cease the offensive conduct. Otherwise, those agencies would be
11 able to repeatedly unreasonably delay and, after substantial litigation, cease
12 violating the law in order to claim that the matter is "moot." To permit such conduct
13 would, in practice, nullify the law.

14
15 **IV. OBJECTIONS TO DECLARATION OF FLORENCE E. HARMON**

16
17 Plaintiff objects to the the statements contained in the HARMON Declaration
18 as not constituting admissible evidence. In essence, the HARMON Declaration sets
19 forth no fact to demonstrate that the declarant has personal knowledge of the alleged
20 matters to which she purportedly testifies, seeks to introduce the content of vaguely
21 described writings for which no copy was authenticated or provided, and is vague
22 and ambiguous.

23 1. HARMON states, "I am the Acting Secretary in the Office of the
24 Secretary at the Securities and Exchange Commission." The statement is irrelevant.
25 (FRE, Rule 402 ["Evidence which is not relevant is not admissible."].) She does
26 not state the period during which she served as "Acting Secretary" or what her
27 alleged duties entailed during the unspecified time.

1 2. HARMON states, "On March 18, 2008, the Division of Trading and
2 Markets made a written recommendation to the Commission on Petition for
3 Rulemaking No. 4-502." She does not state whether she has personal knowledge of
4 the purported events she describes, *e.g.*, SEC Staff transmitted recommendations to
5 Commissioners, or how, as "Acting Secretary," her alleged functions brought her
6 into contact with the "Division of Trading and Markets." (FRE, Rule 602 ["A
7 witness may not testify to a matter unless evidence is introduced sufficient to
8 support a finding that the witness has personal knowledge of the matter."].) The
9 alleged content of the alleged "written recommendation" is not admissible into
10 evidence without the actual document. (FRE, Rule 1002 ["To prove the content of a
11 writing ... the original writing ... is required."].) She did not authenticate the
12 purported writing. (FRE Rule, 901 ["The requirement of authentication or
13 identification as a condition precedent to admissibility...."].) It would be pure
14 speculation to assume the alleged content of the vaguely described alleged writing.

15 The word "Commission" is vague and ambiguous. She does not state whether
16 she refers to SEC Staff, all of the Commissioners, some of the Commissioners or
17 otherwise. The purported recommendations may only be presented to the
18 Commissioners vis-à-vis SEC Staff. 17 CFR 200.30-3. If she refers to all or some
19 of the Commissioners, she should identify the specific persons.

20 3. HARMON states, "On March 27, 2008, the Commission denied
21 Petition for Rulemaking No. 4-502 in a letter-order signed by the Secretary of the
22 Commission." She does not state whether she has personal knowledge of the
23 purported events, *e.g.*, Commissioners' alleged denial of the Petition. (FRE, Rule
24 602.) The content of the alleged writing, vaguely described as a "letter-order," is
25 only admissible through a proper offering of the actual writing and its content would
26 be hearsay. (FRE, Rules 1002, 802.) HARMON did not authenticate the alleged
27 writing. (FRE, Rule 901.) Again, use of the word "Commission" is vague and/or
28 ambiguous. (*See*, 2, above.)

1 ("FOIA") request dated March 28, 2008 sought such documents, *i.e.*,
2 "[A]ll writings ... that evidence: ... (3) the identity of the
3 Commissioners who voted in favor or against the action upon the
4 Petition or abstained." The SEC's response to the request did not
5 include such a document. Therefore, I assume that none exists.
6

7 4. On May 23, 2008, I spoke with KARR and MACKERT. After inquiry,
8 neither claimed the existence of a Minute Record of the Commission related to the
9 Petition for Rulemaking (SEC File No. 4-502)("Petition").
10

11 5. At no time has the SEC or any of its attorneys of record in the within-
12 entitled action ever provided me with a copy of a Minute Record of the Commission
13 related to the Petition, if one exists, or claimed that one exists.
14

15 I declare under penalty of perjury under the laws of the State of California
16 that the foregoing is true and correct.
17

18 Executed on August 4, 2008, at Culver City, California.
19

20 _____
21 HERBERT LESLIE GREENBERG
22
23
24
25
26
27
28

EXHIBIT "A"

Law Offices of
LES GREENBERG
10732 Farragut Drive
Culver City, California 90230-4105
Tele. & Fax. (310) 838-8105
E-Mail: plgreen@att.net
www.LGEsquire.com

March 28, 2008

VIA EMAIL: foiapa@sec.gov

FOIA/Privacy Act Officer
Office of Freedom of Information and Privacy Act Operations
U.S. Securities and Exchange Commission
FOIA Office, Mail Stop 5100
100 F Street, N.E.
Washington, D.C. 20549

Re: Freedom of Information Act Request

Dear FOIA Officer:

This request is made pursuant to the provisions of the Freedom of Information Act (5 U.S.C. §552, *et seq.*).

Please provide me with a copy of all writings, including drafts thereof, *e.g.*, letters, meeting minutes, emails, audits, reports, notes of oral communications and/or interviews, notices, that evidence;

- (1) that recommendations were transmitted to and received by the Commission with respect to Petition for Rulemaking 4-502 ("Petition");
- (2) the date(s) of the meeting(s) at which the Commission took action upon the Petition;
- (3) the identity of the Commissioners who voted in favor or against the action upon the Petition or abstained;
- (4) the Commission's agenda on the date(s) when the Commission took action upon the Petition;
- (5) the minutes of the meeting (s) at which the Commission took action upon the Petition.

Reasons for Request

On May 13, 2005, I filed the Petition with the SEC. The Petition deals with deficiencies in the securities arbitration process and suggested remedies. On August 19,

FOIA/Privacy Act Officer
March 28, 2008
Page Two

2005, I received correspondence from the SEC, which informed me that the SEC forwarded the Petition to the Securities Industry Conference on Arbitration ("SICA") "to consider issues associated with" the Petition. Allegedly, in November 2006, SICA formally responded to the SEC's request.

The requested documents will demonstrate that the SEC unreasonably delayed in acting upon the Petition.

On December 12, 2006, I commenced litigation against the SEC based upon allegations, among others, that the SEC has unduly delayed acting upon the Petition. The requested information is expected to demonstrate dilatory conduct with regard to the Petition.

On March 27, 2008, the Secretary wrote, in part, "The Commission has carefully considered the Petition ... and has determined to refer it to the Financial Industry Regulatory Authority, Inc. ... for such action as it deems appropriate. ¶ Accordingly, the Commission hereby DENIES the Petition."

Rule 192a states, in pertinent part:

The Secretary shall acknowledge, in writing, receipt of the petition and refer it to the appropriate division or office for consideration and recommendation. Such recommendations shall be transmitted with the petition to the Commission for such action as the Commission deems appropriate. The Secretary shall notify the petitioner of the action taken by the Commission. (Emphasis added.)

Request for Waiver of Fees

I request a waiver of all fees for documents provided in response to this request. The SEC, in response to my prior requests (Request Nos. 06-7533, 08-01852) for similar documents granted a fee waiver and designated me "as a non-commercial requestor and therefore fees limited to duplication of documents, if substantial."

In order to help to determine my status for purposes of determining the applicability of any fees, you should know that I am an individual who seeks the information for personal use and not for a commercial use.

Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest.

FOIA/Privacy Act Officer
March 28, 2008
Page Three

Documents obtained from the Request may be used as evidence to substantiate allegations in litigation and/or to reply to any opposition.

I will be able to understand and digest documents provided to me in response to the Request. From 1971 to 1973, I served as the Associate General Counsel and/or Compliance Director of Mitchum, Jones & Templeton, Inc., a regional New York Stock Exchange Member Firm. From 1973, I have been engaged in the private practice of law as a sole practitioner where substantially all representation dealt with financial/investment litigation. I have represented many individual investors and more than twenty (20) regional securities brokerage firms before arbitration panels and in various state and federal courts in hundreds of securities industry related disputes. I was admitted to the NASD panel of arbitrators in 1976. In addition, I have served on the panels of arbitrators of the American Arbitration Association, Pacific Stock Exchange, NYSE and Municipal Securities Rule Making Board. Further, I serve the Los Angeles civil courts and the Los Angeles County Bar Association as an arbitrator.

Documents derived from the Request would be analyzed by me and published on my website and in my email newsletter. Through my website, I publish information pertinent to the securities arbitration process, deficiencies in that process and suggested remedies. For more than two years, through an email newsletter to approximately 1,000 persons interested in securities arbitration, I have disseminated information concerning the securities arbitration process. Responses to some publications have indicated that recipients were not aware of the existence of SICA and/or its influence upon the SEC and the securities arbitration process.

Please communicate with me in the event that further information is required.

Very truly yours,

LES GREENBERG

LG:pg

cc: Ms. Kristen S. Mackert (MackertK@sec.gov)

EXHIBIT "B"

Law Offices of
LES GREENBERG
10732 Farragut Drive
Culver City, California 90230-4105
Tele. & Fax. (310) 838-8105
E-Mail: LGreenberg@LGEsquire.com
www.LGEsquire.com

May 21, 2008

VIA ELECTRONIC MAIL

Mr. Thomas J. Karr
Ms. Kristin S. Mackert
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9612

Re: Greenberg v. SEC
USDC Case No. CV 06-7878-GHK (CTx)

Counsel:

Your letter claims, "[T]he Commission has denied your petition." There was no response related to the lack of Sunshine Act documentation. Does the SEC contend that the Sunshine Act does not apply to the Commission's alleged denial of Petition 4-502? If the SEC acted pursuant to seriatim Commission consideration, I respectfully suggest that the SEC voluntarily provide me a copy of the related "Minute Record of the Commission," if any, to help resolve that aspect of the dispute. My Freedom of Information Act ("FOIA") request dated March 28, 2008 sought such documents, *i.e.*, "[A]ll writings ... that evidence: ... (3) the identity of the Commissioners who voted in favor or against the action upon the Petition or abstained." The SEC's response to the request did not include such a document. Therefore, I assume that none exists.

The Second Claim deals with the unreasonable delay involving Petition 4-502 as a part of a recurring pattern and practice. There is no issue of legal standing with respect to those other petitions. The same pattern and practice evidences agency bad faith. *See, e.g.*, Joint Discovery/Case Management Plan at pps. 5-7.

As to Petition 4-403, my FOIA request dated November 17, 2007 sought information as to the status of PIABA's petition, *e.g.*, "[A]ll writings, including drafts thereof, *e.g.*, letters, meeting minutes, emails, audits, reports, notes of oral communications and/or interviews, notices, that evidence ... (10) current status of Petition for Rulemaking # 4-403." The SEC did not produce any document indicating that PIABA withdrew its petition.

Mr. Thomas J. Karr
Ms. Kristin S. Mackert
May 21, 2008
Page Two

As to Petition 4-501, your letter makes no mention of the DTM's efforts to unreasonably delay making recommendations by rejecting the petition.

As to Petition 4-502, there is an issue as to whether the Commission denied Goodman's petition and the pattern of using SICA for purposes of unreasonable delay.

As to Petition 4-541, DTM thoroughly analyzed the issue many years ago. The arguments for and against the proposed rule change have not changed, but DTM continues to delay making recommendations to the Commission.

The SEC's responses to my FOIA request dated December 16, 2007 show that the SEC has not established any definite time frame within which to make recommendations to the Commission or established an associated tracking system. Such procedural deficiencies evidence unreasonable delay. *See, e.g.*, Joint Discovery/Case Management Plan at p. 6.

The requested declaratory relief is proper. The allegations in the Second Claim for relief show that the SEC's unreasonable delay in acting upon Petition 4-502 was not an aberration, but was part of a pattern and practice.

In substance, the Court has already ruled that "intermediate recommendations of agency staff" is "agency action." *See, e.g.*, Joint Supplemental Brief on Plaintiff's Administrative Procedure Act Claim. "[A]gency action" includes the whole or a part of an agency rule, order ... relief, or the equivalent or denial thereof, or failure to act(.)" 5 U.S.C. 551(13). SEC General Rule 192 specifically requires the DTM to provide petition recommendations to the Commission. The Court has determined that unreasonable delay in making recommendations constitutes "agency action."

I will be available at 11:00 A.M. (PST) on Friday, May 23, 2008, to discuss the issues with you.

Very truly yours,

LES GREENBERG

LG:pg