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11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA  
13

14 \_\_\_\_\_ :  
HERBERT LESLIE GREENBERG, :

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

15  
16 Plaintiff, :

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

17 v. :

18  
19 UNITED STATES SECURITIES :  
AND EXCHANGE COMMISSION, :

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

20 Defendant. :  
21 \_\_\_\_\_ :

22 Nothing argued in Plaintiff's Opposition ("Opp.") demonstrates that the  
23 SEC, either directly or through the self-regulatory organizations ("SROs") that it  
24 regulates, "utilizes" the Securities Industry Committee on Arbitration ("SICA") in  
25 the strict sense in which courts apply that term in the Federal Advisory Committee  
26 Act ("FACA"). Plaintiff also fails to demonstrate that this Court has jurisdiction  
27 over his Administrative Procedure Act ("APA") claim, nor does he identify a  
28 cognizable claim raised in his Complaint ("Compl.") that the SEC has

1 either unreasonably delayed in addressing his petition for rulemaking filed with  
2 the SEC (“Petition 4-502”), or that the SEC has violated any statute or regulation  
3 in its handling of Petition 4-502. As Plaintiff’s Complaint fails to state allegations  
4 that, taken as true, could either (1) state a cognizable FACA or APA claim, or (2)  
5 establish jurisdiction for his APA claim, his claims should be dismissed pursuant  
6 to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *See Adams v. Johnson*,  
7 355 F.3d 1179, 1183 (9th Cir. 2004) (Rule 12(b)(6) standard); *Whisnant v. United*  
8 *States*, 400 F.3d 1177, 1179 (9th Cir. 2005) (Rule 12(b)(1) standard).<sup>1</sup>

9 **I. Plaintiff’s FACA Claim Must Be Dismissed.**

10 Plaintiff’s claim that SICA is subject to the requirements of FACA must  
11 fail. He concedes that the SEC did not establish SICA. Opp. at 2, 6 (“SICA . . .  
12 was formed by SROs”). Moreover, Plaintiff’s allegations fail to show that the  
13 SEC “utilizes” SICA in the narrow meaning of that term under FACA. Plaintiff  
14 has not alleged that SICA receives funding from the SEC or that the SEC exercises  
15 such strict control over SICA’s operations and actions that the SEC can be deemed  
16 to utilize SICA. Nor has Plaintiff established that the SROs are “quasi-public”  
17 organizations created or permeated by the SEC, or that SICA was established to  
18 provide advice *to the SEC*.

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21 <sup>1</sup>Plaintiff’s contention that the SEC improperly seeks to introduce evidence  
22 in a motion to dismiss, Opp. at 4, is misguided. The SEC cited documents quoted  
23 in the Complaint. *See* SEC Br. at 7-8. It is axiomatic that “a document is not  
24 ‘outside’ the complaint if the complaint specifically refers to the document.”  
25 *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994); *see Cooper v. Pickett*, 122  
26 F.3d 1186, 1192 (9th Cir. 1997) (“a court ruling on a motion to dismiss may  
27 consider the full texts of documents which the complaint quotes only in part”),  
28 *superseded on other grounds*, 137 F.3d 616 (9th Cir. 1997). Moreover, the  
document citations to which Plaintiff objects only support the SEC’s argument  
that it did not “establish” SICA, and Plaintiff concedes the SROs established  
SICA and does not challenge the accuracy of what the SEC has quoted. Opp. at 6.

1           **A.     The SEC Does Not Utilize SICA.**

2           If not established by a federal agency, a group must be “utilized” by a federal  
3 agency in order for it to be subject to the requirements of FACA. 5 U.S.C. App. 3.  
4 “Utilization” is a “stringent standard, denoting something along the lines of actual  
5 management or control of the advisory committee.” *Washington Legal Found. v.*  
6 *United States Sentencing Comm’n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994); *see also*  
7 *Holy Cross Neighborhood Ass’n v. Julich*, 106 F.Supp.2d 876, 883 (E.D. La. 2000)  
8 (“it is quite clear that [the Supreme Court] and the lower courts have interpreted the  
9 term ‘utilized’ quite stingily.”) The Ninth Circuit has stressed that a committee is  
10 not utilized for purposes of FACA unless it is “so closely tied to [the agency] as to  
11 be amenable to strict management.” *Alcoa v. National Marine Fisheries Serv.*, 92  
12 F.3d 902, 905 (9th Cir. 1996) (quoting *Food Chem. News v. Young*, 900 F.2d 328,  
13 332-33 (D.C. Cir. 1990)). Plaintiff does not allege that SICA is subject to the  
14 SEC’s strict management and control – to the contrary, he states that the “SEC has  
15 not . . . [e]xercised control and supervision over procedures and accomplishments  
16 of SICA.” Compl. ¶12(F)(1). While Plaintiff alleges that SEC staff members  
17 attend meetings of SICA, *id.* ¶30(A)-(B), that is palpably insufficient to translate  
18 into a finding that the SEC “utilizes” SICA. *See Washington Legal Found.*, 17  
19 F.3d at 1450 (group was not utilized by DOJ even though DOJ likely exerted  
20 “significant influence” on its deliberations).

21           Although Plaintiff tries to dismiss the fact that the SEC provides no funding  
22 to SICA as “not relevant,” Opp. at 19, to the question as to whether the SEC  
23 utilizes SICA, the Supreme Court, the Ninth Circuit, and other courts have  
24 underscored the importance of this factor. *See Public Citizen v. United States DOJ*,  
25 491 U.S. 440, 459-60 (1989); *see Alcoa*, 92 F.3d at 906; *Washington Toxics*  
26 *Coalition v. EPA*, 357 F.Supp.2d 1266, 1272 (W.D. Wash. 2004). Indeed, the  
27 Supreme Court stressed that Congress passed FACA largely to prevent the  
28 “wasteful expenditure of public funds.” *Public Citizen*, 491 U.S. at 453. Thus, the

1 admitted fact that SICA receives no public funding further demonstrates that the  
2 SEC does not manage or control, and thus does not “utilize,” SICA.<sup>2</sup>

3 **B. SROs Are Not “Quasi-Public” Organizations Created or**  
4 **Permeated by the SEC.**

5 Plaintiff argues that SICA was formed by “quasi-public” organizations – the  
6 SROs – because SROs have “numerous public obligations imposed by federal law  
7 and subject to defendant SEC’s regulatory authority.” Opp. at 6. He goes on to  
8 argue that an advisory committee is “utilized by a federal agency and thus, subject  
9 to FACA, if the advisory committee was formed by a ‘quasi-public’ entity to  
10 render advice and recommendations to the federal agency.” *Id.* On both counts,  
11 Plaintiff is wrong: the SROs are not quasi-public organizations created or  
12 permeated by the SEC – the standard set forth in *Public Citizen* – nor was SICA  
13 formed to advise the SEC.

14 The Supreme Court suggested in *Public Citizen* that an entity could  
15 constitute an advisory committee for FACA purposes if it were formed by a quasi-  
16 public organization “created or permeated” by the federal government. *See* 491

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17  
18 <sup>2</sup> Plaintiff argues that because SICA was formed by “quasi-public” entities,  
19 he need not show that the SEC manages and controls SICA. *See* Opp. at 14-17  
20 (citing *Animal Legal Defense Fund v. Shalala*, 104 F.3d 424, 428 (D.C. Cir. 1997)  
21 (“*ALDF*”). However, the Ninth Circuit requires that an agency have active  
22 management or control of an entity for it be “utilized” for FACA purposes. *See*  
23 *Alcoa*, 92 F.3d at 905 (committee must be “so closely tied to [the agency] as to be  
24 amenable to strict management”). While Congress, post-*ALDF*, amended FACA  
25 to exclude committees formed by the National Academy of Sciences (“NAS”)  
26 unless they are managed or controlled by the government, *see* Opp. at 16-18, then  
27 (as now) NAS was the only entity found to meet *Public Citizen*’s stringent  
28 standard for what constitutes a “quasi-public” organization created or permeated  
by a federal agency; it was thus understandable that Congress limited the  
amendment to the only entity affected by *ALDF*. Of course, courts should be wary  
of reading intent into Congress’s failure to enact certain legislation. *See NAACP*  
*v. American Fam. Mut. Ins. Co.*, 978 F.2d 287, 299-300 (7th Cir. 1992).

1 U.S. at 463; *see also id.* (committee must have been formed by “some semiprivate  
2 entity the Federal Government helped bring into being”); *ALDF*, 104 F.3d at 428.  
3 While Plaintiff attempts to read the “created or permeated” language out of this  
4 test in *Public Citizen*, *see Opp.* at 12, *Public Citizen* made clear that the entity  
5 cannot just be “quasi-public”; it must also be a creation or instrument of the  
6 agency. Thus, while Plaintiff quotes four passages where officials have described  
7 SROs as “quasi-public,” *see id.* at 8, these quotes – just as whether an entity might  
8 be deemed quasi-public for some purposes – are irrelevant to the question of  
9 whether the SROs are so much the creature of the SEC as to transform committees  
10 formed by them into advisory committees to the SEC under the FACA.

11 The necessity that the “quasi-public” entity be created or permeated by the  
12 federal government is readily apparent when one considers the only quasi-public  
13 entity held to have been created or permeated by the government – the NAS in  
14 *ALDF*. The *ALDF* court pointedly noted that the NAS – unlike the SROs – was  
15 chartered by Congress and has a duty to “whenever called on by any department of  
16 the Government, investigate, examine, experiment, and report upon any subject of  
17 science or art.” *Id.* at 425 (citing 36 U.S.C. § 253 (1994)). Further, *ALDF* noted  
18 that the NAS – unlike SICA – receives public funds. *Id.* at 428.

19 Thus, while the NAS may have qualified as a quasi-public institution that  
20 was created or permeated by the federal government, which was “a close and  
21 difficult” question,<sup>3</sup> the SROs are not. In this regard, the cases which the SEC  
22 cited, *see SEC Br.* at 12, establishing that the SROs are private entities are highly  
23 relevant, despite Plaintiff’s attempt to summarily dismiss them. *See Opp.* at 10-  
24 11. They demonstrate – as Plaintiff does not and cannot dispute – that the SROs  
25 are privately created, privately funded, and neither staffed nor managed by the

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27 <sup>3</sup> *ALDF v. Shalala*, 114 F.3d 1209, 1210 (D.C. Cir. 1997) (Wald, J. & Tatel,  
28 J., dissenting from denial of rehearing *en banc*).

1 federal government. As such, one cannot seriously contend that they are created  
2 or permeated by the SEC.

3 Plaintiff argues that the SEC permeates these SROs because it regulates or  
4 oversees them. *See* Opp. at 9. This argument must fail. The SEC also exercises  
5 considerable regulatory oversight over broker-dealers, *see* 15 U.S.C. 78a *et seq.*,  
6 and investment companies and investment advisers. *See* 15 U.S.C 80a-1 *et seq.*;  
7 15 U.S.C. 80b-1 *et seq.* To cite other examples, the Federal Deposit Insurance  
8 Corporation exercises a high degree of oversight over banks, and the Federal  
9 Aviation Administration closely regulates airlines. To suggest that this means the  
10 federal government “created or permeated” those private entities simply because it  
11 regulates them, however pervasively, hopelessly contorts the meaning of the test  
12 set forth in *Public Citizen* and applied in *ALDF*.

13 In addition, Plaintiff concedes that for an advisory committee created by a  
14 quasi-public organization to be subject to the requirements of FACA, that  
15 committee must be formed “to render advice and recommendations to the *federal*  
16 *agency*.” Opp. at 6 (emphasis added). However, as he notes, SICA was formed to  
17 develop nationwide uniform rules governing the arbitration of disputes between  
18 broker/dealers and customers at securities industry SROs, *see* Compl. ¶¶ 8(B)-(D),  
19 9(B), and to render advice and recommendations *to the SROs* themselves. Because  
20 SICA was established to advise the SROs, not the SEC, for this reason as well it is  
21 not subject to the requirements of FACA.<sup>4</sup> *See, e.g., Sofamor Danek Group, Inc.*  
22

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23  
24 <sup>4</sup> Plaintiff alleges that the SEC’s sending a copy of Petition 4-502 to SICA  
25 shows SICA is subject to FACA because the SEC is seeking advice from SICA.  
26 *See* Compl. ¶ 1(B). But even assuming the accuracy of his characterization – *i.e.*,  
27 that the SEC was soliciting SICA’s advice concerning Petition 4-502, rather than  
28 asking SICA to consider the ideas expressed in Petition 4-502 in advising the  
SROs – the fact that an agency obtains information or advice from a committee  
does not classify that committee as a federal advisory committee subject to FACA,

1 v. *Gaus*, 61 F.3d 929, 934 (D.C. Cir. 1995) (purpose of panel was to develop  
2 guidelines for health care practitioners, rather than to advise federal government,  
3 so not covered by FACA); *Cowlitz Indian Tribe v. FERC*, 186 Fed. Appx. 806,  
4 (9th Cir. 2006) (committee’s purpose is not to provide advice or recommendations  
5 to federal agency, rather advice and recommendations to city).

6 **C. Recognition that SICA Is Not a Federal Advisory Committee**  
7 **Does Not Frustrate Congressional Intent in Enacting FACA.**

8 Contrary to Plaintiff’s arguments, recognizing that SICA is not a federal  
9 advisory committee will not undermine public accountability in SRO rulemaking  
10 on arbitration. As noted in *Public Citizen*, Congress in enacting FACA was  
11 largely concerned with the accountability of preexisting committees being funded  
12 by the government. 491 U.S. at 445-46. Moreover, here Congress has already  
13 created a mechanism – wholly separate from FACA – to ensure public  
14 accountability in the SRO rulemaking process. Anytime an SRO proposes to  
15 change its arbitration rules, it must submit the proposal to the SEC. 15 U.S.C.  
16 78s(b)(1). The SEC publishes the proposal, solicits public comments, and publicly  
17 articulates its reasons for its final action on the proposal. *Id.* §§ (b)(1), (b)(2). Its  
18 action on that proposal is then subject to judicial review. 15 U.S.C. 78y(b)(1).  
19 Thus, any proposed changes the SROs wish to make (whether based on SICA’s  
20 model rules or not) are already subject to ample public scrutiny.<sup>5</sup>

21  
22 nor does it indicate that the agency “utilizes” a committee. *See, e.g., Washington*  
23 *Toxics Coalition v. EPA*, 357 F.Supp.2d 1266, 1273 (W.D. Wash. 2004).

24 <sup>5</sup>As demonstrated, the SEC’s function is not simply to “rubber stamp” the  
25 SROs’ proposed rules. *See Food Chem. News*, 900 F.2d at 331(suggesting FACA  
26 applies to advisory groups if intermediaries are merely “rubber stamping” the  
27 group’s recommendations “with little or no independent consideration.”) (quoting  
28 *National Anti-Hunger Coalition v. Executive Comm. of President’s Private Sector*  
*Survey on Cost Control*, 711 F.2d 1071, 1075-76 (D.C. Cir. 1983)).

1 Similarly, with regard to Petition 4-502, the SEC has provided Plaintiff with  
2 SICA's comments, and he is free to respond to them as the SEC considers his  
3 petition. To the extent the SEC relies upon comments from SICA, or any other  
4 person or entity, in taking its final action regarding Petition 4-502, that reliance  
5 will also be part of the public record, and can be challenged in the court of  
6 appeals. 15 U.S.C. 78y(b)(1). Thus, Congress has already provided mechanisms  
7 for public accountability in SEC review of SRO rulemaking,<sup>6</sup> further  
8 demonstrating the inapplicability of FACA to SICA's advice to the SROs.

9 **II. Plaintiff's APA Claims Must Be Dismissed.**

10 Plaintiff's defense of his APA claim is notable for what it lacks. He does  
11 not dispute that any review of the SEC's handling of his Petition belongs  
12 exclusively in the courts of appeals, *see* SEC Br. at 13-14. Nor does he dispute  
13 that there has been no final agency action regarding his Petition, or that he has an  
14 adequate post-action remedy. *See id.* at 14-15. For these reasons, his APA claim  
15 must be dismissed.

16 Nor can Plaintiff sustain his claims based on arguments that (1) the SEC has  
17 unreasonably delayed action on his Petition in violation of Section 706(1) of the  
18 APA, or (2) that the SEC has not acted in accordance with law, in violation of  
19 Section 706(2)(A). Even if the Court need reach those arguments, both must fail.

20 A. **Plaintiff's Complaint Does Not Allege a Violation of Section**  
21 **706(1), Nor Has the SEC Unreasonably Delayed Action on**  
22 **Petition 4-502.**

23 Plaintiff's argument that the SEC has violated Section 706(1) must fail for  
24 two reasons. First, he did not make a claim under Section 706(1). *See* Compl. ¶45  
25 (alleging violations of Section 706(2) only). Nor did he ask, as relief, for a finding

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27 <sup>6</sup> In addition, as is the case here, persons may also make FOIA requests for  
28 documents pertaining to the SEC's interaction with SICA.

1 that the SEC unreasonably delayed, or that the Court order the SEC to take final  
2 action on his Petition within a fixed time frame. *See id.* at 19-20. Plaintiff cannot  
3 assert a claim absent from his Complaint.

4 Even if the Complaint did raise a Section 706(1) claim, that claim would  
5 lack merit. SEC Rule 192 provides no fixed deadline for the consideration of  
6 petitions for rulemaking. *See* 17 C.F.R. 201.192. Absent such deadlines, courts  
7 compel agency action – through the extraordinary remedy of mandamus – only  
8 where such action “has been delayed to such an extent as to frustrate the court’s  
9 role of providing a forum of review.” *In re Calif. Power Exch. Corp.*, 245 F.3d  
10 1110, 1124 (9th Cir. 2001). The delays that have occasioned such judicial  
11 intervention have lasted several years.<sup>7</sup>

12 Here, the Petition had been pending for only 19 months when he filed suit,  
13 *see* Compl. ¶13. Since receiving the Petition, the SEC has solicited and received  
14 public comments, *id.* ¶14, and SEC staff provided SICA a copy for its  
15 consideration.<sup>8</sup> In sum, there has been neither an egregious delay, nor a total lack  
16 of activity regarding the Petition, as to support a claim for violation of Section  
17 706(1) had such a claim been made.

18 **B. Plaintiff Identifies No Violations of Law in the SEC’s Handling of**  
19 **His Petition.**

20 Plaintiff also argues that the SEC’s handling of his Petition is “not in  
21

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22 <sup>7</sup> *Compare Telecomm Research & Action Ctr. v. FCC*, 750 F.2d 70, 81 (D.C.  
23 Cir. 1984) (delays of 2 and 5 years, respectively, did not warrant mandamus), *and*  
24 *Towns of Wellesley, Concord & Norwood v. FERC*, 829 F.2d 275, 277 (1st Cir.  
25 1987) (14-month delay did not warrant mandamus), *with Nader v. FCC*, 520 F.2d  
26 182, 206 (D.C. Cir. 1975) (10-year delay unreasonable), *and Pepco v. ICC*, 702  
F.2d 1026, 1035 (D.C. Cir. 1983) (8-year delay unreasonable).

27 <sup>8</sup> *Id.* ¶15. The SEC staff has since received a letter from SICA concerning  
28 the Petition, which it also provided to Plaintiff.

1 accordance with law,” and thus runs afoul of Section 706(2)(A). As the SEC has  
2 shown, its handling of his Petition comports with SEC Rule 192, *see* SEC Br. at  
3 15-16, and Plaintiff cites no other statute or regulation that the SEC has allegedly  
4 violated. Thus, he cannot claim the SEC has failed to act in accordance with law  
5 regarding his Petition.

6 **CONCLUSION**

7 For the foregoing reasons and the reasons stated in the SEC’s Memorandum  
8 of Points and Authorities in Support of Motion to Dismiss, this Court should grant  
9 the SEC’s motion to dismiss Plaintiff’s FACA and APA claims and to temporarily  
10 stay consideration of his FOIA claims.<sup>9</sup>

11 Respectfully submitted,

12  
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18 Local Counsel for Securities and  
19 Exchange Commission

18 Counsel for the Securities and  
19 Exchange Commission

20 DATED: March 23, 2007  
21 \_\_\_\_\_

22 <sup>9</sup>While Plaintiff claims the stay of his FOIA claim will be “moot at or about  
23 the date of hearing of the Motion,” Opp. at 25, that is not the case. The SEC’s  
24 FOIA Office provided Plaintiff with over 2000 pages of documents on March 13,  
25 2007, including – based on the employees’ consent – the handwritten notes of SEC  
26 staff, which had previously been withheld as personal records, mooting that part of  
27 Plaintiff’s stayed FOIA claim. Plaintiff appealed that initial decision that same  
28 day. Thus, pursuant to SEC regulations and the parties’ agreement, the SEC’s  
final decision on his appeal is not due until April 11, 2007, *see* 17 C.F.R.  
200.80(d)(6)(v), nine days after the scheduled hearing date.

1  
2  
3 **PROOF OF SERVICE**

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

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

7 Telephone No. (202) 551-5172; Facsimile No. (202) 772-9263.

8 On March 23, 2007, I served true copies of documents entitled (1) **DEFENDANT**  
9 **UNITED STATES SECURITIES AND EXCHANGE COMMISSION'S**  
10 **REPLY IN SUPPORT OF MOTION TO DISMISS** upon the parties to this  
11 action addressed as stated on the attached service list:

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

18 [ X] **PERSONAL DEPOSIT IN MAIL:** By placing in sealed  
19 envelope(s), which I personally deposited with the U.S. Postal  
20 Service at Washington, D.C., with first-class postage thereon fully  
21 prepaid.

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

25 [ ] **HAND DELIVERY:** I caused to be hand delivered each such envelope to  
26 the office of the addressee.

27 [ ] **FEDERAL EXPRESS BY AGREEMENT OF ALL PARTIES:** By  
28 placing in sealed envelope(s) designated by Federal Express with delivery  
fees paid or provided for, which I deposited in a facility regularly  
maintained by Federal Express or delivered to a Federal Express courier, at  
Washington, D.C.

[ ] **ELECTRONIC MAIL:** By transmitting the document by electronic mail to  
the electronic mail address as stated on the attached service list.

[ ] **FAX (BY AGREEMENT ONLY):** By transmitting the document by  
facsimile transmission. The transmission was reported complete and  
without error.

1 [ ] **(Federal)** I declare that I am employed in the office of a member of the bar  
2 of this Court, at whose direction the service was made. I declare under  
penalty of perjury that the foregoing is true and correct.

3 Date: March 23, 2007

  
Kristin S. Mackert

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5  
6 **HERBERT LESLIE GREENBERG v. SEC**  
7 **United States District Court - Central District of California**  
8 **Case No. CV 06-7878 GHK (CTx)**

9 **SERVICE LIST**

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13 ***Plaintiff In Propria Persona***  
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