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August 18, 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)  
FOIA Request No. 08-05421

Counsel:

Receipt of the SEC's letter dated August 14, 2008 and the enclosed substantially redacted, undated and unsigned "Minutes of the Securities and Exchange Commission - Seriatim Dispositions Pursuant to C.F.R. 200.42 --- Tuesday, March 25, 2008" ("Minutes") is hereby acknowledged. A copy of the Minutes is enclosed.

As set forth herein, the SEC should provide me with a fully unredacted copy of the Minutes and you should recuse yourselves from representation in the above-entitled action. Further, use of the *seriatim* process with respect to Petition for Rulemaking (SEC File No. 4-502)("Petition") would constitute unreasonable delay.

**Recusal of Counsel**

You have made yourselves potential witnesses in the above-referenced action as to whether the Minutes is a recent fabrication.

In my letter dated May 21, 2008, in preparation for our good faith meeting and conference, pursuant to Local Rule 7-3, I wrote,

If the SEC acted pursuant to seriatim Commission consideration, I respectfully suggest that the SEC voluntarily provide me a copy of the

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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.

During our conference, you stated that you did not have information as to whether such document exists. From the SEC's letter dated May 5, 2008, you knew of the alleged existence of a "seriatim." However, the SEC has not explicitly claimed that the alleged "seriatim" is the requested Minute Record of the SEC. The SEC's subsequent Opposition to Motion for Leave to File Amended Complaint did not mention the existence of the Minutes.

The SEC's letter dated August 14, 2008 does not claim that the Minutes and its previously mentioned "seriatim" are the same.

Based upon the foregoing and other information, it is my contention that the Minutes have been recently fabricated. In that regard, you would be potential witnesses.

Further, I respectfully request that you take possession of the Word, Word Perfect or other original electronic file containing the Minutes or make sufficient arrangements to assure that it is available for discovery.

### **Feigned or Improper Use of *Seriatim* Procedure Constitutes Unreasonable Delay**

17 C.F.R. 240.30 limits the SEC's ability to utilize the *seriatim* procedure by stating, in part:

Whenever the Commission's Chairman ... is of the opinion that joint deliberation among the members of the Commission upon any matter is unnecessary in light of the nature of the matter, impracticable, or contrary to the requirements of agency business, but is of the view that such matter should be the subject of a vote of the Commission, such matter may be disposed of by circulation of any relevant materials concerning the matter among all Commission members.

Evidently, the SEC admits that the Petition "should be the subject matter of a vote of the Commission." However, the SEC has the burden of proof to demonstrate that it satisfied

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the criteria permitting use of the *seriatim* process. In *SEC v. Zahareas*, 374 F.3d 624 (8<sup>th</sup> Cir. 2004), the Court stated:

The SEC fell short on several procedural fronts.... [T]he SEC failed to obtain approval for this action during a meeting of all the Commissioners. .... These meetings allow for discussion and debate within the SEC and result in approval of an action only after a consensus is reached. In this case, the Commissioners' approval was obtained by "seriatim" consideration. That is, the staff approached each of the Commissioners individually to solicit their approval for this action. Therefore, the action ... was approved of by each Commissioner without the benefit of a meeting or group discussion. The SEC argues that seriatim consideration is a perfectly appropriate means of seeking approval. Pursuant to 17 C.F.R. § 200.42(a), however, individual approval of an action is allowed when a full meeting is "unnecessary in light of the nature of the matter, impracticable, or contrary to the requirements of agency business." There is nothing about this case which causes us to think that a full meeting was neither "unnecessary," nor did the SEC present any evidence that a full meeting was "impracticable."

It is obvious that the SEC did not meet that specific criteria to warrant a *seriatim* process with respect to the Petition. In its letters, the SEC stressed the importance of the issues raised in the Petition. In its letter dated August 19, 2005, the SEC states, "Your petition and letter raise important issues...." In its letter dated March 27, 2008, the SEC states,

The Petition raises important issues about a subject matter with a long history. ... The Commission recognizes the importance that private claims, securities arbitration, and arbitration rules play in protecting investors. ... The proper functioning of securities arbitration system of FINRA and its predecessors has long been a priority of the Commission. ... These concerns about the securities arbitration process must be taken seriously because fairness and the appearance of fairness of the procedures for securities arbitrations are important components of investor protection, as is the goal of efficient and cost-effective dispute resolution. ... Once again, we thank you for raising these important issues, which are of such consequence for investors and for our markets.

Redacted portions of the Minutes may deal with whether the SEC met or improperly

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waived the requirements for use of the *seriatim* process and may contradict the SEC's admissions in the aforesaid letters.

Other information indicates that the Commissioners did not rule upon the Petition. A former SEC employee, who worked with a SEC Commissioner and is familiar with the *seriatim* process, informed me, "[T]here are documents actually signed by each Commissioner on a *seriatim* rulemaking." The SEC did not provide me with any such document in response to my Freedom of Information Act request dated March 28, 2008. Neither has the SEC claimed that it is withholding such obviously non-privileged documents.

Even if SEC Staff recommendations were transmitted to the Commissioners, feigned or improper use of the *seriatim* process (to avoid public scrutiny of the important issues presented in the Petition) constitutes bad faith. Bad faith is the equivalent of unreasonable delay. *International Mining v. Babbitt*, 105 F.3d 502 (9th Cir. 1997) ["(I)f the court determines that the agency (has) delay(ed) in bad faith, it should conclude that the delay is unreasonable.... (T)he Secretary's motivations were, at least, relevant."].

### **Minutes Show Petitions Approved**

The Minutes state, "The Commission approved (3-0)...(redacted portion)." Without removal of the redaction, it appears that the Commissioners "approved" the "two petitions for rulemaking." Additionally, there is no justification to redact the numeric designation(s), if any, of the referenced petitions.

### **Conclusion**

The *seriatim* procedure should not be used to conceal activities of the SEC Staff. The SEC should promptly provide me with a fully unredacted copy of the Minutes, while preserving the complete electronic file(s) from which it was created. You should recuse yourselves from representing the SEC in the above referenced action.

Very truly yours,

LES GREENBERG

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Enclosure

MINUTES OF THE SECURITIES AND EXCHANGE COMMISSION

SERIALIZED DISPOSITIONS  
PURSUANT TO 17 C.F.R. 200.42

Tuesday, March 25, 2008

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COMMISSIONERS VOTING:

Christopher Cox, Chairman  
Paul S. Atkins  
Kathleen L. Casey

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[REDACTED]

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The Commission considered a memorandum from the Division of Trading and Markets, dated March 18, 2008, concerning two petitions for rulemaking regarding self-regulatory organization arbitration.

Staff recommended that [REDACTED]

The Commission approved (3-0) [REDACTED]

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Nancy M. Morris  
Secretary

By: Ida Williams  
Program Information Specialist