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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 GREGORY J. LAROCHE) CASE NO.
14 Plaintiff,)
15 vs.) COMPLAINT FOR
16 UNITED STATES SECURITIES AND EXCHANGE) DECLARATORY AND
COMMISSION,) INJUNCTIVE RELIEF
17 Defendant.)
18

19 **I. INTRODUCTION**

20 1. Plaintiff Gregory LaRoche (hereinafter "LaRoche") brings this action to redress
21 violations of the Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. § 552, by Defendant
22 United States Securities And Exchange Commission (hereinafter "SEC" or "Commission") by
23 failing to provide the records requested by Plaintiff sought in two separate FOIA requests made by
24 LaRoche to the SEC. Defendant has refused to provide the SEC records in the electronic format
25 expressly requested by LaRoche's FOIA request sent to the SEC dated April 6, 2005. In addition,
26 Defendant has failed to provide any responsive records, or to timely issue a final determination, in
27 response to Plaintiff's FOIA request dated September 29, 2005 to the SEC. This action requests an
28 order declaring that SEC has violated FOIA, and enjoining the SEC to provide the requested

1 information forthwith.

2 **II. JURISDICTION**

3 2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 28
4 U.S.C. § 1331 (federal question), and pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

5 **III. VENUE AND INTRA DISTRICT ASSIGNMENT**

6 3. Venue in this Court is proper, as Plaintiff LaRoche's principal place of business
7 is located in San Francisco County, California. 5 U.S.C. § 552(a)(4)(B); 28 U.S.C. § 1391(e).

8 **IV. PARTIES**

9 4. Plaintiff, Gregory J. LaRoche, is an individual business entrepreneur, whose principle
10 place of business is in San Francisco County, California.

11 5. Defendant United States Securities And Exchange Commission ("SEC") is an agency
12 of the United States, and as such, is subject to FOIA pursuant to 5 U.S.C. § 552(f).

13 **V. FACTS**

14 **April 6, 2005 FOIA Request**

15 6. On or about April 6, 2005, Plaintiff, by and through his attorney Daniel J. Stotter, sent
16 a FOIA Request to the SEC's Alexandria, Virginia office, requesting electronic format copies of
17 SEC records submitted within SEC Form BD registration and Form BD amendments and
18 supplements, which the SEC requires to be filed by all SEC regulated Broker-Dealers in electronic
19 format. In particular, Plaintiff's FOIA request of April 6, 2005 sought the electronic data containing
20 all current information for the following data fields filed on all SEC Form BD registration and in
21 Form BD amendments and supplements: (1) the names of the Broker-Dealers; (2) CRD Numbers
22 of the Broker-Dealers; (3) IRS Employer Identification Numbers of the Broker-Dealers; (4) Main
23 Addresses of Broker-Dealers; (5) Main Telephone Numbers of Broker-Dealers; (6) Organizations
24 (SROs) in which Broker-Dealers are registered; (7) Jurisdictions in which Broker-Dealers are
25 registered; (8) Legal status of Broker-Dealers (*ie*: partnership, sole proprietor, LLC, corporation);
26 (9) Month of fiscal year end of Broker-Dealers; (10) State and county of formation of Broker-
27 Dealers; (11) Date of formation of Broker-Dealers; (12) Types of businesses in which Broker-
28 Dealers are engaged; (13) Names and titles of executive officers of Broker-Dealers; (14) Clearing

1 firm of Broker-Dealers; and, (15) Branch offices of the Broker-Dealers.

2 7. Plaintiff's April 6, 2005 FOIA request was received by the SEC on April 8, 2005.

3 8. On or about April 18, 2005, Debra Walker, FOIA/Privacy Act research Specialist
4 with the SEC's FOIA office sent Plaintiff's attorney correspondence indicating that his FOIA
5 request had been received by the SEC on April 12, 2005, and that the agency was allegedly
6 "consulting with other Commission staff regarding information that may be responsive to your
7 request." This correspondence also indicated that Plaintiff's FOIA request of April 6, 2005 had been
8 designated as FOIA Request No. 05-05034 by the SEC.

9 9. On or about May 16, 2005, Plaintiff, by and through his attorney Daniel J. Stotter,
10 sent a follow-up correspondence to the SEC's FOIA office in Alexandria, Virginia, inquiring as to
11 the status of SEC FOIA Request No. 05-05034 (Plaintiff's April 6, 2005 FOIA request). This
12 correspondence requested that the SEC provide Plaintiff with a date by which he could expect to
13 receive the records he had requested or a final determination by the SEC on this FOIA request. In
14 addition, this correspondence requested that the SEC inform Plaintiff in writing as to any "unusual
15 circumstances" or any "extraordinary circumstances" that would cause any delay in the SEC issuing
16 a final determination on this FOIA request, and requested that the agency provide all responsive
17 records as of the date that the SEC actually processed Plaintiff's FOIA request.

18 10. On or about May 20, 2005, Debra Walker, FOIA/Privacy Act Research Specialist
19 with the SEC's FOIA office, sent Plaintiff's attorney a correspondence indicating that it was still
20 consulting with other SEC staff regarding Plaintiff's FOIA request. This correspondence also
21 indicated that it could provide limited data responsive to some of the data fields requested by
22 Plaintiff, and invited Plaintiff to contact the SEC via telephone if he was interested in receiving the
23 limited information while the agency was seeking answers regarding the remaining requested fields
24 of data.

25 11. On or about June 1, 2005, Plaintiff, by and through his attorney Daniel J. Stotter, sent
26 another follow-up letter to the SEC's FOIA office in Alexandria Virginia, inquiring as to the status
27 of the SEC's issuance of a final determination on Plaintiff's April 6, 2005 FOIA request, and noting
28 that the SEC was currently in violation of its statutory duty to timely issue a final determination on

1 Plaintiff's FOIA request. This correspondence indicated that if the SEC failed to provide the records
2 requested by Plaintiff or to issue a final determination on this FOIA request within ten working
3 days, Plaintiff would need to file a civil action to redress the agency's violation of the statutory
4 requirements of FOIA regarding this FOIA request.

5 12. On or about June 10, 2005, Debra Walker, FOIA/Privacy Act Research Specialist
6 with the SEC's FOIA office, issued a determination on Plaintiff's FOIA request of April 6, 2005
7 (SEC FOIA Request No. 05-05034) denying Plaintiff's request to receive all of the fields of
8 electronic data required to be filed by SEC regulated Broker-Dealers on SEC Form BD registration
9 and Form BD amendments and supplements, with the exception of the following fields of data,
10 which the SEC was willing to provide to Plaintiff: (1) the CRD number of the broker-dealer, (2) the
11 name of the broker-dealer, (3) the IRS Employer Identification of the broker dealer, (4) the main
12 address of the broker-dealer, (6) the main telephone number of the broker dealer, (7) the legal status
13 of the broker dealer (sole proprietor, partnership, LLC or corporation), (7) the month of the fiscal
14 year end of the broker dealer, (8) and the date of the formation of the broker dealer. The SEC's
15 determination expressly indicated that no other responsive information exists, notwithstanding the
16 fact that SEC Form BD registration and in Form BD amendments and supplements expressly
17 require SEC regulated broker-dealers to provide information pertaining to all fifteen data fields
18 requested by Plaintiff's April 6, 2005 FOIA request, and notwithstanding SEC regulations expressly
19 indicating that these Form BD registrations, amendments and supplements were public records.

20 13. On or about June 24, 2005, pursuant to 17 CFR 200.80(d)(6) and 5 U.S.C. §
21 552(a)(6)(A)(ii), Plaintiff, by and through his attorney Daniel J. Stotter, filed an administrative
22 appeal of the SEC's June 10, 2005 final decision denying Plaintiff's FOIA request to the SEC's
23 Office of Freedom of Information and Privacy Act Operations and to the SEC's Office of General
24 Counsel. This appeal was received by the SEC on June 28, 2005.

25 14. On or about June 29, 2005, Plaintiff, by and through his attorney Daniel J. Stotter,
26 sent the SEC FOIA Office and the SEC Office of General Counsel a correspondence inquiring as
27 to the status of the agency's determination on Plaintiff's FOIA appeal, and noting that FOIA
28 expressly requires a final determination on FOIA appeals within twenty working days of receipt of

1 the FOIA appeal per 5 U.S.C. § 552(a)(6)(ii). This correspondence also requested that the SEC
2 identify any “unusual circumstances” or any “extraordinary circumstances” that would impact the
3 agency’s ability to timely respond to this FOIA administrative appeal.

4 15. On or about August 17, 2005, Plaintiff, by and through his attorney Daniel J. Stotter,
5 sent the SEC FOIA Office and the SEC Office of General Counsel another correspondence inquiring
6 as to the status of the agency’s determination on Plaintiff’s FOIA appeal, noting that the agency had
7 failed to ever respond to Plaintiff’s prior inquiry of July 29, 2005 or to otherwise issue a
8 determination on Plaintiff’s FOIA administrative appeal. This correspondence also expressly
9 requested that the agency issue a final determination on Plaintiff’s FOIA appeal within ten days of
10 its receipt of this correspondence. The SEC received Plaintiff’s August 17, 2005 correspondence on
11 August 22, 2005.

12 16. On or about September 23, 2005, Richard M. Humes, Associate General Counsel for
13 the SEC, issued a final determination on Plaintiff’s FOIA appeal for FOIA Request No. 05-05034,
14 affirming the SEC’s determination finding no additional responsive material on Plaintiff’s April 6,
15 2005 FOIA request. This determination on Plaintiff’s administrative appeal asserted that the SEC
16 only maintains the requested documents in paper format, and alleged that the paper version of these
17 records was publicly available through the SEC’s Public Reference Room.

18 **September 29, 2005 FOIA Request**

19 17. On or about September 29, 2005, Plaintiff, by and through his attorney Daniel J.
20 Stotter, sent another FOIA request to the SEC’s FOIA Office in Alexandria, Virginia, expressly
21 requesting the following agency records: (1) all SEC documents and records which discuss or
22 describe the SEC’s ability to access electronic data from Form BD registrations and Form BD
23 Amendments filed electronically with the National Association of Securities Dealers, (2) all
24 contracts or agreements made between the SEC and the National Association of Securities
25 Dealers concerning SEC’s ability to access electronic data from SEC filings made directly to the
26 National Association of Securities Dealers, (3) all other documents or records which discuss or
27 otherwise describe SEC’s ability to access data from SEC filings made directly to the National
28 Association of Securities Dealers (including electronic data) including but not limited to all

1 communications between the SEC and the National Association of Securities Dealers which
2 discuss SEC access to this data.

3 18. Plaintiff's September 29, 2005 FOIA request was received by the SEC's FOIA
4 office on October 3, 2005.

5 19. On or about October 5, 2005, Debra Walker, FOIA/Privacy Act research
6 Specialist with the SEC's FOIA office sent Plaintiff's attorney a correspondence indicating that
7 Plaintiff's September 29, 2005 FOIA request had been received by the SEC on September 30,
8 2005, and that the agency was allegedly "consulting with other Commission staff regarding
9 information that may be responsive to your request." This correspondence also indicated that
10 Plaintiff's FOIA request of September 29, 2005 had been designated as FOIA Request No. 05-
11 08712 by the SEC.

12 **Procedural Allegations**

13 20. To date, Plaintiff LaRoche has not received any responsive documents or a final
14 determination on his September 29, 2005 FOIA request to the SEC.

15 21. Plaintiff is directly and adversely affected by Defendant's failure to provide all
16 responsive records and documents to his April 6, 2005 and September 29, 2005 FOIA requests to
17 the SEC.

18 22. Plaintiff has fully exhausted all administrative remedies required by FOIA prior
19 to seeking judicial review of the SEC's failure to provide responsive records and documents to
20 his April 6, 2005 and September 29, 2005 FOIA requests to the SEC.

21 23. Plaintiff has been required to expend costs and to obtain the services of a law
22 firm, consisting of attorneys, law clerks, and legal assistants, to prosecute this action.

23 **VI. LEGAL FRAMEWORK OF FOIA**

24 24. FOIA requires, *inter alia*, that federal agencies must promptly provide copies of
25 agency records to those persons who make a request for records that reasonably describes the nature
26 of the records sought, and which conforms with agency regulations and procedures in requesting
27 such records. 5 U.S.C. § 552(a)(3)(A).

28 25. FOIA specifically provides that: "In making any record available to a person under

1 this paragraph, an agency shall provide the record in any form or format requested by the person if
2 the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B).

3 26. FOIA expressly defines the term ‘record’ as including any information that would
4 be an agency record subject to the requirements of FOIA when maintained by an agency in any
5 format, including an electronic format. 5 U.S.C. § 552(f)(2).

6 27. FOIA requires federal agencies to make a final determination on FOIA requests that
7 it receives within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the
8 receipt of such request unless the agency provides notice to the requester of “unusual circumstances”
9 meriting additional time for responding to a FOIA request. 5 U.S.C. § 552(a)(6)(A)(i).

10 28. FOIA also requires federal agencies to make a final determination on FOIA
11 administrative appeals that it receives within twenty days (excepting Saturdays, Sundays, and legal
12 public holidays) after the receipt of such appeal, unless the agency provides notice to the requester
13 of “unusual circumstances” meriting additional time for responding to a FOIA request. 5 U.S.C. §
14 552(a)(6)(A)(ii).

15 29. FOIA expressly provides that a person shall be deemed to have exhausted their
16 administrative remedies if the agency fails to comply with the applicable time limitations provided
17 by 5 U.S.C. § 552(a)(6)(A)(i) - (ii). 5 U.S.C. § 552(a)(6)(C).

18 30. FOIA provides that any person who has not been provided the records requested
19 pursuant to FOIA may, after exhausting their administrative remedies, seek legal redress from the
20 federal district court to “enjoin the agency from withholding agency records and to order agency
21 records improperly withheld from the complainant.” 5 U.S.C. 552(a)(4)(B).

22 31. Under FOIA, a federal agency has the burden to sustain its action. 5 U.S.C.
23 §552(a)(4)(B).

24 32. The Court may assess attorney fees and litigation costs against the United States if
25 Plaintiffs substantially prevail in this action. 5 U.S.C. § 552(a)(4)(E).

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VII. CLAIMS FOR RELIEF

**CLAIM ONE - VIOLATION OF FOIA FOR FAILURE TO PROVIDE DOCUMENTS
RESPONSIVE TO PLAINTIFF'S APRIL 6, 2005 FOIA REQUEST**

33. Plaintiff realleges, as if fully set forth herein, the allegations and averments previously made in paragraphs 1 through 16 and in paragraphs 21 through 32 herein.

34. Defendant has denied Plaintiff's request of April 6, 2005, in that the SEC has failed to provide Plaintiff with all records responsive to his FOIA request of April 6, 2005 in an electronic format.

35. By administrative regulations and rules, the SEC requires Broker-Dealers to file Form BD registration data to comply with the SEC's statutory mandates arising under the Securities Exchange Act of 1934. SEC rules and regulations also require Broker-Dealers to file Form BD registration documents to report any amendments to data previously filed by SEC registered Broker-Dealers.

36. Pursuant to SEC regulations, the information submitted by applicant Broker-Dealers for Form BD registrations and amendments are expressly public records subject to FOIA. *See* 17 CFR 200.80a.

37. The SEC's instructions for completing Form BD registrations and amendments provided to applicant Broker-Dealers indicates that the information submitted to the SEC in Form BD shall be treated as public information, and therefore subject to FOIA.

35. Form BD registration documents are used by Defendant SEC to permit the SEC to determine whether Broker-Dealers meet the statutory requirement to engage in the securities business pursuant to the agency's duties arising under the Securities Exchange Act of 1934. More specifically, Defendant SEC uses the information disclosed by applicants in Form BD to (1) determine whether broker-dealer applicants meet all of the standards for registration set forth in the provisions of the Securities Exchange Act; (2) develop and maintain a central information resource where members of the public may obtain relevant, current information about broker-dealers, municipal securities dealers, and government securities brokers or government securities dealers, and where the Commission and other securities regulators may obtain information for investigatory

1 purposes; and (3) develop statistical information concerning broker-dealers, municipal securities
2 dealers, and government securities brokers or government securities dealers.

3 36. The SEC has issued administrative regulations and rules which require that every
4 Form BD registration and amendment shall be filed with the Central Registration Depository
5 database that is directly maintained by the National Association of Securities Dealers, Inc.
6 (“hereinafter “NASD”), and said regulations and rules further provide that an applicant’s filing of
7 Form BD registrations and registrations with the NASD shall be deemed to be a filing with the SEC
8 for purposes of compliance with the Securities Exchange Act of 1934.

9 37. SEC administrative rules and regulations expressly provide that “an application for
10 registration that is filed with the Central Registration Depository pursuant to this section shall be
11 considered a “report” filed with the Commission for purposes of Sections 15(b), 17(a), 18(a), 32(a)
12 (15 U.S.C. 78o(b), 78q(a), 78r(a), 78ff(a)) and other applicable provisions of the Act.” *See* 17 CFR
13 Title II, § 240.15b1-1. The SEC’s administrative rules and regulations further provide that “every
14 amendment [to Form BD registrations] filed with the Central Registration Depository pursuant to
15 this section shall constitute a “report” filed with the Commission within the meaning of Sections
16 15(b), 17(a), 18(a), 32(a) (15 U.S.C. 78o(b), 78q(a), 78r(a), 78ff(a)) and other applicable provisions
17 of the Act.” *See* 17 CFR Title II, Section 240.15b3-1.

18 38. Pursuant to SEC administrative rules and regulations, as of August 16, 1999, all
19 Broker-Dealer Amendments or Refillings for any pre-existing Form BD registrations are filed with
20 the SEC by a Broker Dealer by sending this filing data electronically to the NASD, and all Form BD
21 Amendment and Refilling data is filed with the SEC only through said electronic filings to NASD.

22 39. The SEC states in its general instructions for preparing Form BD filings that “the
23 Commission and the National Association of Securities Dealers, Inc. maintain the [Form BD] files
24 of the information on this Form and will make the information publicly available.”

25 40. The SEC has testified to Congress that it has access to the electronic data from SEC
26 filings made to the National Association of Securities Dealers, Inc, and in fact, has access to use the
27 electronic data of all SEC filings and SEC data submitted electronically to the NASD, including
28 Form BD registrations, amendments and refilling data.

1 41. The SEC continues to exercise control over access to all SEC filings and SEC data
2 submitted electronically to the NASD, including Form BD registration, amendment and refilling
3 data.

4 42. In enacting the final rule requiring electronic filing of Form BD registration,
5 amendments and Refillings, the SEC indicated that the filing of this data electronically would
6 facilitate greater public access to Form BD data by interested members of the public.

7 43. The SEC has asserted to Plaintiff that it cannot access or use the electronic data from
8 Form BD registration, amendments and Refillings that is filed with the NASD electronically by
9 Broker-Dealers.

10 44. In fact, the SEC maintains the right to access and use the electronic data from Form
11 BD registration, amendments and Refillings filed with the NASD electronically by Broker-Dealers.

12 45. Defendant has violated FOIA by failing and refusing to provide Plaintiff with all of
13 the records requested by Plaintiff in his FOIA request of April 6, 2005 in an electronic format

14 46. By failing to provide Plaintiff with all records responsive to its FOIA requests,
15 Defendant has denied Plaintiff's right to this information under the Freedom of Information Act.

16 47. Unless enjoined by this Court, Defendant will continue to violate Plaintiff's legal
17 rights to access all of the records that he has requested pursuant to the FOIA, and Plaintiff's right
18 to receive these agency records in an electronic format.

19 48. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant
20 to FOIA. 5 U.S.C. § 552(a)(4)(E).

21 **CLAIM TWO - VIOLATION OF FOIA FOR FAILURE TO PROVIDE DOCUMENTS**
22 **RESPONSIVE TO PLAINTIFF'S SEPTEMBER 29, 2005 FOIA REQUEST**

23 49. Plaintiff realleges, as if fully set forth herein, the allegations and averment previously
24 made above in paragraphs 1 through 5 and in paragraphs 17 through 32 herein.

25 50. As of the date of filing this action, Defendant SEC has failed to provide Plaintiff with
26 a final determination to his FOIA request of September 29, 2005, and has failed to provide Plaintiff
27 with any records in response to his September 29, 2005 FOIA request.

28 51. Defendant has violated FOIA by failing and refusing to timely provide Plaintiff with

1 any of the records requested by Plaintiff in his FOIA request of September 29, 2005.

2 52. By failing to provide Plaintiff with all records responsive to its FOIA requests,
3 Defendant has denied Plaintiff's right to this information under the Freedom of Information Act.

4 53. Unless enjoined by this Court, Defendant will continue to violate Plaintiff's legal
5 rights to access the records that it has requested pursuant to the FOIA.

6 54. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant
7 to FOIA. 5 U.S.C. § 552(a)(4)(E).

8 **CLAIM THREE - ADMINISTRATIVE PROCEDURE ACT**

9 55. Plaintiff realleges, as if fully set forth herein, each and every of the proceeding
10 paragraphs previously set forth herein.

11 56. Plaintiff is entitled to judicial review of Defendant's actions concerning its unlawful
12 policies and practices regarding access to electronic data presented in Plaintiff's FOIA request and
13 appeal pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702, 706.

14 57. Defendant has failed to act in an official capacity under color of legal authority by
15 failing to comply with the statutory time frames of FOIA in processing Plaintiff's FOIA requests and
16 appeal.

17 58. Defendant has unlawfully withheld and/or unreasonably delayed agency action by
18 failing to comply with the mandates of FOIA regarding Plaintiff's FOIA requests and appeal.

19 59. Plaintiff has been adversely affected and aggrieved by Defendant's policies and
20 practices with respect to public access to electronic data filed with the SEC through the NASD's
21 electronic database, and said unlawful policies constitute an ongoing violation of Defendant's
22 statutory duties under FOIA and the APA.

23 60. Defendant's actions regarding Plaintiff's FOIA requests and appeal, are arbitrary and
24 capricious, an abuse of discretion and otherwise not in accordance with law.

25 61. Plaintiff is entitled to costs of disbursements and costs of litigation, including
26 reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. §
27 2412.

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CLAIM FOUR - DECLARATORY JUDGMENT ACT

62. Plaintiff realleges, as if fully set forth herein, each and every of the proceeding paragraphs previously set forth herein.

67. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaratory judgement that Defendant violated FOIA by failing to provide all documents and records responsive to Plaintiff's April 6, 2005 and September 29, 2005 FOIA requests prior to filing this action.

68. Pursuant to 28 U.S.C. § 2201, Plaintiff is entitled to a declaratory judgement that Defendant violated FOIA by failing to provide all documents and records responsive to Plaintiff's April 6, 2005 FOIA request in an electronic format.

VIII. REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully request that this Court enter judgment providing the following relief:

1. Declare that Defendant SEC has violated FOIA by improperly denying Plaintiff's April 6, 2005 FOIA request;
2. Declare that Defendant SEC has violated FOIA by failing to provide Plaintiff with all records responsive to his April 6, 2005 FOIA request in the electronic format as requested;
3. Declare that Defendant SEC has violated FOIA by failing to timely issue a final determination or provide any records responsive to Plaintiff's September 29, 2005 FOIA request.
4. Direct by injunction that Defendant SEC immediately provide Plaintiff with all of the electronic records requested in Plaintiff's April 6, 2005 request, and all non-exempt documents and records responsive to Plaintiff's September 29, 2005 FOIA request.
5. Grant Plaintiffs their costs of litigation, including reasonable attorney fees, as provided by FOIA, 5 U.S.C. § 552(a)(4)(E); and
6. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED,

November 18, 2005

Brian Gaffney
Daniel J. Stotter
For Plaintiff