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**THE FIRING OF AN SEC ATTORNEY
AND THE INVESTIGATION OF PEQUOT
CAPITAL MANAGEMENT**

PREPARED BY THE MINORITY STAFF OF THE
**COMMITTEE ON FINANCE
UNITED STATES SENATE**

MAX BAUCUS, *Chairman*
CHARLES E. GRASSLEY, *Ranking Member*

AND THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

ARLEN SPECTER, *Ranking Member*



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I. INTRODUCTION

Last year, under the leadership of then-Chairmen Charles Grassley and Arlen Specter, the staff of the Senate Committees on Finance and Judiciary (“the Committees”) conducted an extensive joint investigation into allegations of lax enforcement, improper political influence, whistleblower retaliation, and related matters involving the Securities and Exchange Commission (SEC). In this report, we detail our findings and recommendations. Our recommendations follow the review of about 10,000 pages of documents, over 30 witness interviews, three Judiciary Committee hearings, and a previously released set of interim findings.

On June 28, 2006, the Judiciary Committee held a hearing examining short selling activities of hedge funds and independent analysts. On September 26, 2006, the Committee’s second hearing examined enforcement of insider trading prohibitions and insider trading by hedge funds, especially trading ahead of mergers. On December 5, 2006, the Committee’s third hearing focused on allegations that (1) the SEC mishandled its investigation of a major hedge fund, Pequot Capital Management, (2) the SEC fired its lead investigator in retaliation for reporting evidence of improper political influence on the investigation, and (3) the SEC’s Office of Inspector General failed to conduct a serious, credible inquiry into the fired attorney’s allegations. Senators Specter and Grassley presented interim findings on the Senate floor on January 31, 2007. This report concludes the investigation.

We commend SEC Chairman Christopher Cox for his full and complete cooperation. Although the SEC initially “circled the wagons,” its eventual cooperation allowed us to conduct a thorough, independent review of allegations by the fired SEC attorney, Gary Aguirre. According to Aguirre, his efforts to investigate insider trading violations by Pequot were thwarted by his superiors after he focused on the current Morgan Stanley Chief Executive Officer John Mack. Aguirre alleged that requests to take Mack’s testimony met resistance within the SEC and that his supervisor told him it was because of Mack’s “powerful political connections.” Aguirre claimed this dispute ultimately led to his firing. These allegations were given short shrift by the SEC Office of Inspector General in its initial report. However, under Chairman Cox’s leadership, when Senate investigators raised questions, the SEC eventually opened its investigative files. By making documents and witnesses available, Chairman Cox demonstrated a commitment to accountability and transparency. That is the first crucial step to the SEC restoring confidence in the integrity of its enforcement operations.

We also commend the SEC for increased enforcement efforts regarding insider trading, and specifically insider trading by hedge funds, following our investigation. On March 1, 2007, in announcing charges against 14 individuals in a brazen insider trading

scheme, Chairman Cox stated: “Our action today is one of several that will make it very clear the SEC is targeting hedge fund insider trading as a top priority.” Linda Thomsen, Director of the SEC’s Division of Enforcement, recently stated that the SEC has made investigating insider trading ahead of mergers and acquisition one of its top priorities. Peter Bresnan, Deputy Director of the SEC’s Division of Enforcement, stated in a CNBC interview on May 11, 2007: “Hedge fund managers are under enormous pressure to show profits for their clients. . . . Not every hedge fund manager can get those kinds of return through legitimate trading.” Bruce Karpati, an Assistant Regional Director in the SEC’s New York office stated in May 2007 that the SEC is “actively studying the relationships that hedge funds have both inside the hedge funds and outside” to see how information flows around financial markets, and that the SEC is also looking at “more complex trading strategies” at hedge funds. Also in May 2007, when the SEC filed charges against a Hong Kong couple alleging they illegally traded ahead of News Corp.’s offer to buy Dow Jones, Cheryl Scarborough, SEC Associate Enforcement Director, stated: “Cases like this, insider trading ahead of mergers, are a top priority and we will continue our pursuit of it, no matter where it occurs.” Finally, in early 2007 it was widely reported that the SEC began a fact-finding study of the relationships hedge fund advisers have with brokerages to determine if those contacts could lead to insider trading, and specifically has requested information about stock and options trading by major firms, including Merrill Lynch, Morgan Stanley, UBS, and Deutsche Bank.

Linda Thomsen testified at the hearing on September 26, 2006 that “[r]igorous enforcement of our current statutory and regulatory prohibition on insider trading is an important part of the Commission’s mission.” The SEC, a civil enforcement agency that uses civil sanctions to address insider trading, works with the Department of Justice to enforce federal criminal law prohibiting insider trading. In addition, the New York Stock Exchange’s 160 member Market Surveillance branch utilizes real time trading data and specialized algorithms that generate alerts when stocks exceed preset trading limits, which may be flagged for the SEC. Since 2001, the SEC has brought more than 300 insider trading cases against several hundred individuals and entities.

Since our joint investigation commenced, the SEC and the Department of Justice have brought several high profile insider trading cases.

- In November 2006, the SEC charged the head of several San Francisco-based hedge funds with defrauding investors in the Compass West Fund, Viper Founders Fund, and Viper Investments.
- In February 2007, the SEC charged seven individuals and two hedge funds with insider trading ahead of announcements by Taro Pharmaceuticals Industries regarding earnings and FDA drug approvals.
- In March 2007, the SEC and federal prosecutors filed charges against a dozen defendants, including a Morgan Stanley compliance officer who pled guilty in May 2007 to charges that she and her husband sold information about four deals—including

Adobe Systems Inc.'s \$3.4 billion purchase of Macromedia and the \$2.1 billion acquisition of Argosy Gaming by Penn National Gaming, Inc.—to individuals who used the information in trading for hedge fund Q Capital Investment Partners and other accounts.

- In March 2007, the SEC charged a UBS research executive with selling information about upcoming UBS upgrades and downgrades of the stock of Caterpillar, Goldman Sachs, and other companies. The information was then used in trading on behalf of hedge funds Lyford Cay, Chelsea Capital and Q Capital Investment Partners.
- In May 2007, a Credit Suisse investment banker was charged with insider trading for leaking details of acquisitions involving nine publicly traded U.S. companies, including the \$45 billion takeover of TXU Corp by a private equity firm.
- In May 2007, the SEC accused a former analyst at Morgan Stanley and her husband, a former analyst in the hedge fund group at ING, of making more than \$600,000 by trading on companies advised by Morgan Stanley's real estate subsidiary.
- On May 30, 2007, the Barclays Bank and its former head trader consented to entry of a court order requiring Barclays to pay \$10.94 million to settle charges of insider trading based on Barclays' authorization of trading in securities of companies while the trader had material nonpublic information about those companies because he served on bankruptcy creditor committees of those companies.
- On June 13, 2007, the SEC filed and settled a civil injunctive action against the former managing partner of a large law firm who traded in securities of a company after he learned from a job applicant that the company was about to be acquired.
- On June 13, 2007, the SEC filed an unlawful insider trading complaint against a former bank vice president who had information concerning an imminent sale of the bank.

The notion advanced by some that insider trading—unlawful trading based on material, non-public information—is a victimless crime, or that it benefits investors by more quickly introducing new information into the market, is not accepted by Congress. Three primary objectives of good securities market regulation are (1) investor protection, (2) ensuring that markets are fair, efficient and transparent, and (3) reducing systemic risk. Moreover, Congress has passed legislation intended to protect investors from misleading, manipulative, or fraudulent practices, including insider trading, front-running or trading ahead of customers, and misuse of client assets.

Maintaining transparency, public confidence in the integrity of our securities market, and a level playing field for the average investor are important goals of the SEC's enforcement practices. The booming merger and acquisitions market, lightly regulated hedge funds under pressure to deliver extraordinary returns, and increased use of complex trading strategies all present new opportunities to profit from, and hide, unlawful insider trading. The junk bond and insider trading scandals tied to the heavy corporate merger and acquisition activity in the 1980s may have contributed to the 1990 recession, and led to many successful criminal prosecu-

tions. Because those events may be forgotten by a new generation working on Wall Street, it is important for Congress to continue to ensure that regulators have an appropriate focus on preventing a recurrence of such activity and to effectively utilize the authority and tools given to them under statutes and in the funding process. Robust, but balanced, regulation is the foundation of our prosperity and growth and the reason U.S. capital markets succeed. Detering, detecting, and eliminating fraud in an environment free of political influence is good for business.

II. EXECUTIVE SUMMARY

Pequot's trades in advance of the GE acquisition of Heller Financial were highly suspicious and deserved a thorough investigation. In the weeks after a conversation with John Mack and prior to the public announcement of GE's acquisition of Heller, Pequot CEO Arthur Samberg purchased over one million shares of Heller Financial stock, and also shorted GE shares. On the day the deal was announced, Samberg sold all of the Heller stock. He also covered the short positions in GE shortly thereafter, for a total profit of about \$18 million for Pequot in a matter of weeks.

The SEC examined only a fraction of the other suspicious Pequot trading highlighted by Self-Regulatory Organizations (SROs). GE-Heller represented just one of at least 17 sets of suspicious transactions involving Pequot brought to the SEC's attention by organizations like the NYSE and NASD. However, SEC managers ordered the staff to focus on only a few transactions. In addition to GE-Heller, the SEC investigated trades involving (1) Microsoft, (2) Astra Zeneca and Par Pharmaceutical, and (3) various "wash sales."

Staff Attorney Gary Aguirre said that his supervisor warned him that it would be difficult to obtain approval for a subpoena of John Mack due to his "very powerful political connections." Aguirre's claim is corroborated by internal SEC e-mails, including one from his supervisor, Robert Hanson. Hanson also told Aguirre that Mack's counsel would have "juice," meaning they could directly contact the Director or an Associate Director of Enforcement.

Attorneys for Pequot and Morgan Stanley had direct access to the Director and an Associate Director of the SEC's Enforcement Division. In January 2005, Pequot's lead counsel met with the SEC Director of Enforcement Stephen Cutler. Shortly thereafter, SEC managers ordered the case to be narrowed considerably. In June 2005, Morgan Stanley's Board of Directors hired former U.S. Attorney Mary Jo White to determine whether prospective CEO John Mack had any exposure in the Pequot investigation. White contacted Director of Enforcement Linda Thomsen directly, and other Morgan Stanley officials contacted Associate Director Paul Berger. Soon afterward, SEC managers prohibited the staff from asking John Mack about his communications with Arthur Samberg at Pequot.

Seeking John Mack's testimony was a reasonable next step in the investigation. Several SEC staff wished to take Mack's testimony because they believed he: (1) had close ties to Samberg, (2) had potential access to advanced knowledge of the deal, (3) had spoken to Samberg just before Pequot started buying Heller and shorting GE, and (4) was an investor in Pequot funds and was allowed to share in a lucrative direct investment in a

start-up company along side Pequot, possibly as a reward for providing inside information.

SEC management delayed Mack's testimony for over a year, until days after the statute of limitations expired. After Aguirre complained about his supervisor's reference to Mack's "political clout," SEC management offered conflicting and shifting explanations for blocking Mack's testimony. Although Paul Berger claimed that the SEC had always intended to take Mack's testimony, Assistant Director Mark Kreitman said that definitive proof that Mack knew about the GE-Heller deal was the "necessary prerequisite" for taking his testimony. The SEC eventually took Mack's testimony only after the Senate Committees began investigating and after Aguirre's allegations became public, even though it had not met Kreitman's prerequisite.

The SEC fired Gary Aguirre after he reported his supervisor's comments about Mack's "political connections," despite positive performance reviews and a merit pay raise. Just days after Aguirre sent an e-mail to Associate Director Paul Berger detailing his allegations, his supervisors prepared a negative re-evaluation outside the SEC's ordinary performance appraisal process. They prepared a negative re-evaluation of only one other employee. Like Aguirre, that employee had recently sent an e-mail complaining about a similar situation where he believed SEC managers limited an investigation following contact between outside counsel and the Director of Enforcement.

After being contacted by a friend in early September 2005, Associate Director Paul Berger authorized the friend to mention his interest in a job with Debevoise & Plimpton. Although that was the same firm that contacted the SEC for information about John Mack's exposure in the Pequot investigation, Berger did not immediately recuse himself from the Pequot probe. Berger ultimately left the SEC to join Debevoise & Plimpton. When initially questioned, Berger's answers concerning his employment search were less than forthcoming.

The SEC's Office of Inspector General failed to conduct a serious, credible investigation of Aguirre's claims. The OIG did not attempt to contact Aguirre. It merely interviewed his supervisors informally on the telephone, accepted their statements at face-value, and closed the case without obtaining key evidence. The OIG made no written document requests of Aguirre's supervisors and failed to interview SEC witnesses whom Aguirre had identified in his complaint as likely to corroborate his allegations.

III. RECOMMENDATIONS

The controversy over allegations of improper political influence and the firing of SEC attorney Gary Aguirre garnered considerable media attention. The public airing of evidence in support of those allegations undoubtedly had an adverse impact on public confidence in the SEC. The damage to public confidence in the SEC as a fair and impartial regulator must be repaired if the agency is to be effective and able to fulfill its mission.

However, the controversy is more than merely an issue of perception. Our investigation uncovered real failures that need real solutions. Our recommendations focus on improving the Commission's approach to the management of complex securities investigations, personnel problems, the handling of ethics issues, and the role of the Inspector General. A more standardized, professional system for dealing with these issues could have averted much of the controversy. It could also improve employee morale and confidence in management by ensuring more consistent, documented, transparent, and careful internal deliberations.

For these reasons, we offer the following recommendations for consideration:

1. **Standardized Investigative Procedures:** The SEC should draft and maintain a uniform, comprehensive manual of procedures for conducting enforcement investigations, along the lines of the United States Attorney's Manual. The manual should attempt to address situations or issues likely to recur. It should set a consistent SEC policy where possible and provide general guidance for complex issues that require individual assessment on a case-by-case basis, so that inquiries are handled as uniformly as possible throughout the Enforcement Division.
2. **Directing Resources to Significant and Complex Cases:** The SEC currently lacks a set of objective criteria for setting staffing levels and has no mechanism for designating a case as critically important. The SEC should set standards for assessing the size, complexity, and importance of cases to ensure that significant cases receive more resources. The Enforcement Division should develop and apply objective criteria for determining how many attorneys, paralegals, and support personnel should be assigned to a particular case.
3. **Transparent and Uniform External Communications:** The SEC should issue written guidance requiring supervisors to keep complete and reliable records of all outside communications regarding any investigation.* The need for a

*As a starting point for drafting such a policy, the SEC should review and consider adapting an approach similar to that of the Food and Drug Administration in 21 C.F.R. §10.65(e). How-

Continued

clear record and transparency is especially acute regarding any communications by supervisors that exclude the staff attorney assigned to the case. The SEC's guidance should generally discourage supervisors from engaging in such communications without the knowledge or participation of the lead staff attorney. The SEC needs to present one, consistent position to parties involved in its investigations.

4. **Greater Office of Inspector General (OIG) Independence and More Thorough Investigative Procedures:** The hallmarks of any good Inspector General are independence and integrity. However, the reputation of the Inspector General within the SEC appears to be that of an office closely aligned with management, lacking independence. In addition to the facts of the Aguirre case, we received numerous complaints about the OIG from both current and former SEC employees. The OIG should develop a plan to ensure independence from SEC management and the General Counsel's Office, and to ensure that its future investigations of allegations against management are thorough, fair, and credible. The SEC needs to implement a directive requiring its Office of Information Technology to provide thorough and timely responses to SEC/OIG document requests. Since the purpose of the OIG is to ensure integrity and efficiency, a document request in connection with an SEC/OIG investigation should be among the highest priorities.
5. **Timely and Transparent Recusals:** The SEC should review its guidance to employees regarding their obligations to recuse themselves immediately from any matter involving a potential employer with whom the employee has had contact, either directly or indirectly through an agent. Recusals should be communicated in writing to all SEC staff who have official contact with the recused individual, and a record of the recusals should be centrally maintained by a designated ethics officer. The appearance created by having undisclosed contacts with potential employers while still participating in an enforcement matter involving that potential employer undermines public confidence in the fairness and impartiality of the SEC.
6. **Standardized Evaluation Procedures:** Employee evaluations should be submitted in a timely manner, according to an established schedule. Evaluations should not be prepared outside or apart from the established procedure. Although it is appropriate to document performance issues and to discuss them with the employee as the issues arise, submitting a re-evaluation with substantive changes after the regularly scheduled evaluation is submitted can raise questions. Where the re-evaluation occurs just after an employee reports alleged wrongdoing by a supervisor, it tends to suggest that retaliation is driving the process rather than an honest attempt to evaluate employee performance.

ever, the current FDA regulation has its own flaw in that it only requires documentation of outside meetings when the agency "determines that such documentation is useful." That exception is too broad. All material communications about an investigation between senior SEC managers and third parties should be included in the policy.

IV. TABLE OF NAMES

U.S. Securities and Exchange

Commission:

Christopher Cox Chairman

Enforcement Division:

Linda Thomsen Director
 Paul Berger Associate Director (now partner at
 Debevoise & Plimpton)
 Mark Kreitman Assistant Director
 Robert Hanson Branch Chief
 Gary Aguirre Former Attorney
 James Eichner Attorney
 Hilton Foster Attorney (Ret.)

Office of General Counsel:

William Lenox Ethics Counsel

Office of Inspector General:

Kelly Andrews Associate Counsel
 Walter Stachnik Inspector General (Ret.)
 Mary-Beth Sullivan Assistant Inspector General for Inves-
 tigations

Office of Market Surveillance:

Joseph Cella Chief (Ret.)
 Thomas Conroy Market Surveillance Specialist
 Eric Ribelin Branch Chief

Pequot Capital Management:

Gerald Poch Managing Director, Applied Technology
 Arthur Samberg Chief Executive Officer
 David Zilkha Former Pequot and Microsoft employee

Morgan Stanley:

Eric Dinallo Former Head of Regulatory Group
 Gary Lynch Chief Legal Officer
 John Mack Chief Executive Officer

Other Counsel

Attorney	Firm	Representing
Irving Pollack	Fulbright & Jaworski	Pequot
Larry Storch	Fulbright & Jaworski	Pequot
Audrey Strauss	Fried Frank	Pequot
Mary Jo White	Debevoise & Plimpton	Morgan Stanley Board

Gary Aguirre's Chain of Command

LINDA THOMSEN, DIRECTOR, DIVISION OF ENFORCEMENT



PAUL BERGER, ASSOCIATE DIRECTOR OF ENFORCEMENT DIVISION



MARK KREITMAN, ASSISTANT DIRECTOR, DIVISION OF ENFORCEMENT



ROBERT HANSON, BRANCH CHIEF, DIVISION OF ENFORCEMENT



GARY AGUIRRE, SENIOR COUNSEL

V. KEY EVENTS

Pequot's Suspicious Trading

March 2001	John Mack leaves as CEO of Morgan Stanley.
April 2001	First known contact between with between Morgan Stanley and GE regarding the Heller acquisition.
May 11, 2001	Arthur Samberg tells a Pequot employee that John Mack would like to invest \$5 million in Partners, a closed Pequot fund.
June 20, 2001	Samberg tells another Pequot employee that Mack wants to invest in a private equity deal known as Fresh Start alongside Pequot funds. Mack is the only individual investor allowed to participate.
June 26–28, 2001	Mack travels to Switzerland to meet with Senior officials from Credit Suisse, the parent company of Credit Suisse First Boston (CSFB) about becoming CSFB CEO.
June 29, 2001	Immediately upon his return from Switzerland Mack contacts Samberg.
June 30, 2001	Poch writes to Samberg “Great call with John Mack last night.” Samberg replies, “He called here looking for you last night.”
July 2, 2001	Upon Samberg’s direction, Pequot begins purchasing large amounts of Heller stock. Also in July, Samberg directs large amounts of GE stock to be shorted.
July 12, 2001	Credit Suisse First Boston (CSFB), a firm working on the GE-Heller deal, hire’s John Mack as its CEO.
July 30, 2001	GE-Heller acquisition is announced. Pequot begins selling its Heller shares and covering shorts on GE, earning \$18 million in profit in a matter of weeks.
January 30, 2002	The NYSE highlights Heller trades as a matter warranting further scrutiny and surveillance.

Aguirre Hired at SEC

May, 2003	Gary Aguirre begins applying for positions at the Securities Exchange Commission.
June, 2004	Prior to being hired at the SEC, Aguirre files an EEO complaint alleging that the SEC is discriminating against him on the basis of age.
September 7, 2004	Aguirre is hired by the SEC Enforcement Division.

The Pequot Investigation Builds

Oct/Nov, 2004	Pequot Capital Management investigation is opened.
January 10, 2005	Aguirre requests transfer via letter to Paul Berger.
January/February, 2005	Lead lawyer representing Pequot meets with Director of Enforcement Stephen Cutler. Aguirre is not invited, and following the meeting is told to narrow the scope of the investigation to only the most promising referrals.
May-June, 2005	Aguirre develops theory that John Mack tipped Arthur Samberg regarding General Electric acquisition of Heller Financial.
June 1, 2005	Aguirre receives “acceptable” performance evaluation, and Hanson notes his “unmatched dedication to [the] case.”
June 1, 2005	Hanson writes to Aguirre, remarking “Mack is another bad guy [in my view].”
June 14, 2005	Kreitman asks Aguirre to brief him on the evidence concerning PCM’s suspicious activity.

V. KEY EVENTS—Continued

- June 15, 2005 Aguirre and Ribelin meet with two FBI agents and an AUSA for the Southern District of New York to discuss the evidence.
- June 20, 2005 Hanson e-mails Aguirre, telling him, “Okay Gary you’ve given me the bug. I’m starting to think about the case during my non work hours.”

The Turnaround: Aguirre Attempts to Sustain Pequot Investigation

- June 23, 2005 Morgan Stanley’s Eric Dinallo contacts Aguirre to ask if he is “going to proceed against Mack,” due to concerns that an SEC investigation of Mack would affect Morgan Stanley’s decision to hire him as CEO.
- June 23, 2005 Hanson allegedly tells Aguirre it will be difficult to subpoena Mack because of his “very powerful political connections.”
- June 23, 2005 Berger states that no case will likely be filed against Mack, despite never having been briefed on the investigation, according to Aguirre.
- June 26, 2005 Mary Jo White, an attorney at Debevoise & Plimpton hired by Morgan Stanley to vet John Mack, contacts Thomsen. According to Thomsen, she told White that she couldn’t “tell [her] anything.” However, a set of White’s talking points indicate that Thomsen said there was “smoke” regarding Mack, but “surely not fire.”
- June 27, 2005 Aguirre e-mails his supervisors an analysis of the evidence against PCM, alleging Samberg engaged in insider trading based on a tip from John Mack.
- June 28, 2005 Aguirre proposes the interview of John Mack. He and Kreitman have a “heated discussion” over the SEC’s refusal.
- June 29, 2005 Hanson gives Aguirre a positive evaluation, commenting “he has consistently gone the extra mile, and then some.”
- June 29–30, 2005 Aguirre verbally informs Berger that he is resigning from the SEC effective July 30, 2005.
- June 30, 2005 Morgan Stanley hires John Mack as CEO.
- July 19, 2005 Compensation Committee meets and approves Aguirre’s pay increase.
- July 25, 2005 Kreitman calls evidence of Samberg’s motive “too vague, as articulated to be meaningful.”

Allegations of Political Considerations/Aguirre Termination

- July 27, 2005 Aguirre rescinds his “resignation of June 30, 2005” by sending an electronic message to Berger. He reports Hanson’s comment about Mack’s “political connections.”
- August 1, 2005 Days after Aguirre alleges to Berger that Hanson blocked Mack subpoena due to political considerations, Berger instructs Hanson to do a supplemental evaluation of Aguirre and another staff attorney in the group after Hanson told him they were “looking to raise trouble.”
- August 3, 2005 Hanson and Aguirre discuss the Mack issue. Hanson again refers to Mack’s “political connections,” according to Aguirre.
- August 4, 2005 Aguirre writes to Hanson about his “political connections” comment. Hanson replies, suggesting that “Mack’s counsel will have ‘juice’ as I described last night—meaning that they may reach out to Paul and Linda (and possibly others).”

V. KEY EVENTS—Continued

August 18, 2005	Aguirre receives a merit increase based upon his performance.
August 24, 2005	Kreitman proposes that Aguirre be fired. Hanson writes in an e-mail to Aguirre that “the political clout I mentioned to you was a reason to keep Paul and possibly Linda in the loop on the testimony. As far as I know, politics are never involved in determining whether to take someone’s testimony.”
September 1, 2005	Aguirre is terminated from the SEC during his one-year probationary period.
September 2, 2005	On his last day of employment at the SEC, Aguirre wrote to SEC Chairman Cox alleging that Mack was receiving preferential treatment because of his political connections.

After Aguirre: Investigation Moves Away from John Mack and the GE-Heller Trades

Fall 2005–Spring 2006	SEC abandons Mack-related aspects of the investigation.
September 8, 2005	In an e-mail with the subject heading “Debevoise,” Lawrence West (same staff level as Berger, and not a supervisor of Aguirre’s) e-mails Berger, letting him know that he mentioned Berger’s “interest” to Mary Jo White during a call.
October 20, 2005	Rumors begin to circulate that Berger is leaving the SEC to accept a partnership position at Debevoise & Plimpton.
November 29, 2005	The SEC Office of Inspector General completes its investigation and concludes Aguirre’s allegations lack sufficient corroborating evidence.
January 20, 2006	Aguirre files a lengthy 56-page confidential Office of Special Counsel Complaint against the SEC, several of its Commissioners and his superiors. He later withdraws the complaint and seeks review by the Merit Systems Protection Board (MSPB), which remains pending.
February 10, 2006	Berger recuses himself from any matter involving Debevoise & Plimpton and Goodwin Proctor.
April 17, 2006	Finance Committee sends its first letter to the SEC requesting a briefing on the Pequot investigation, cosigned by the Banking Committee Chair.
April 28, 2006	The SEC’s Office of Inspector General issues its semi-annual report for the period October 1, 2005 to March 31, 2006. The OIG Report recounts an allegation of abuse of discretionary authority and the resulting investigation.
May 15, 2006	Aguirre’s third-level manager, Paul Berger, submits his resignation to SEC Human Resources. He becomes a partner at Debevoise & Plimpton in its D.C. office beginning June 1, 2006.
June 23, 2006	The <i>New York Times</i> runs a story by Walt Bogdanich and Gretchen Morgenson titled “S.E.C. is Reported to be Examining a Big Hedge Fund.”
June–July, 2006	SEC prepares to take Mack testimony, subpoenas two CSFB executives. Kreitman assigns a staff attorney to take the testimonies with only two days advanced notice. Kreitman tells attorney, “you don’t need to prepare that much for it.”
July 6, 2006	At Chairman Cox’s request, OIG reopens its investigation into Aguirre’s allegations.
August 1, 2006	The SEC questions John Mack.

V. KEY EVENTS—Continued

November 30, 2006	The SEC closes the Pequot investigation.
December 5, 2006	Judiciary Committee holds hearing, “Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity.”
January 31, 2007	Committees release interim findings.

VI. The Pequot Investigation

A. Pequot's Suspicious Trading Surrounding the GE-Heller Acquisition

Pequot Capital Management (PCM or Pequot) is “an investment advisory firm.”¹ Led by Chairman and CEO Arthur Samberg, Pequot employs numerous analysts who are charged with following various companies’ stock and making investment recommendations.² The firm employs “a research driven approach” to guide its investments in publicly traded companies.³ The fund managers whom Samberg supervises interact with Pequot’s analysts daily and make “sure they are doing diligent work in understanding balance sheets, income statements” and “meeting with companies [and] assessing industry trends.”⁴ At all times relevant to this report, Pequot “was managing over \$15 billion” in stocks and other investments.⁵

In the summer of 2001, General Electric (GE) acquired Heller Financial. The deal was in progress for months, but was not announced until July 30th.⁶ Before that announcement, knowledge that the deal was in progress constituted material non-public information and was therefore subject to prohibitions on insider trading. In other words, a reasonable investor contemplating a purchase or sale of either GE or Heller stock would want to know about the acquisition in assessing the companies’ stock prices. When an acquisition is announced, the price of the purchasing company typically falls, and the price of the purchased company typically rises. In this case anyone with knowledge of the deal before it was announced could purchase Heller and short GE for virtually guaranteed profits.⁷

Samberg directed the purchase of “a little over a million shares” of Heller Financial stock in July 2001, before GE’s acquisition was announced⁸ at an estimated cost between \$34 and \$38 million.⁹ He directed Pequot to short shares of GE during the same time period.¹⁰ Just after the acquisition was announced, Samberg sold the Heller stock and covered the GE short position, resulting in approximately \$18 million in profits over a period of a few weeks.

Pequot’s trading in Heller and GE is summarized in **Figure 1** and **Figure 2** (see pps. 47-48). As illustrated in the figures, Samberg attempted to purchase many more shares of Heller than his traders could safely execute without driving up the price. On some days, he authorized purchases of well over 200% of the total daily volume of trading in Heller.

The Heller transactions were initially highlighted in an advisory from the New York Stock Exchange (NYSE) to the SEC Enforcement Division as suspicious.¹¹ Nearly three years later, the matter was investigated by SEC Enforcement Staff Attorney Gary Aguirre who also discovered that Pequot had shorted GE.

During the SEC investigation, Arthur Samberg testified that he decided to purchase Heller stock without any assistance, advice, or consultation with the fund managers he had hired to analyze possible investments for Pequot.¹² Though he testified generally about outside analyst reports,¹³ Samberg did not “have a clear recollection of reading any analyst’s report in that time period.”¹⁴ He could not identify even a single analyst’s report upon which he relied in making the decision to purchase Heller Financial shares in July 2001.¹⁵

When asked how long he had been following Heller Financial stock prior to buying over one million shares, Samberg testified, “I really had not [followed] Heller Financial closely in the way people follow stocks before it was purchased.”¹⁶ Samberg’s account described the trades in Heller and GE as being executed contrary to the regular process for investments at Pequot.¹⁷

Taken together, the timing of the trades, the lack of consultation or advice, the unsuccessful attempts to purchase even larger amounts of Heller stock prior to the acquisition, Samberg’s evolving rationalizations for the trades, and the NYSE advisory all add up to circumstances that are, at the very least, suspicious. These transactions suggest that a thorough and wide-ranging investigation was needed.

B. The Early Stages of the Investigation

1. The SEC’s Delayed and Truncated Investigation

a. Time Elapsed between Trades and Serious Investigation

The trading occurred in July 2001 when Pequot CEO Arthur Samberg began purchasing Heller and shorting GE a few weeks before the announcement that GE would purchase Heller. The NYSE highlighted some of these trades for the SEC on January 30, 2002.¹⁸ It appears that the SEC did little to investigate these trades until after Gary Aguirre joined the Commission over two years later on September 7, 2004. In fact, it is clear that Aguirre was the driving force behind the investigation of the GE-Heller trades that had otherwise remained dormant at the SEC. The original investigation of Pequot was opened on other suspect trades that were investigated prior to Aguirre’s employment. It was not until Aguirre took over the case that the investigation made real progress in examining suspect trades in GE and Heller.

b. Supervisors Order a Limited Inquiry

The staff initially believed that the key to bringing an insider trading case against a large hedge fund would be to demonstrate a pattern of suspicious behavior in a series of transactions. As retired SEC Senior Counsel Hilton Foster explained, proving a case against a hedge fund would be difficult because of the sheer volume of hedge fund transactions:

A hedge fund is an entity that has a whole bunch of other people’s money and invests in all kinds of different securities. So if you go in and say, I think, Hedge Fund A, you engaged in insider trading in IBM, they will open their files and say, we make two million trades a year, and so what if we got lucky

on IBM? It's very difficult to prove a case where they've got that kind of trading history all over the board. So what you do, from an investigative standpoint, is you see whether there's a pattern there. . . . So hedge funds are different than the ordinary investigation.

* * *

So that's why you have to go back and say, if we're going to do this investigation we can't just be looking at Heller, because no matter what we find there will be an explanation. But if you've got Heller and 12 others . . . then you've got something you can work with.¹⁹

Ultimately, however, the SEC did not pursue this strategy. Instead, following a meeting between Pequot's lead counsel, Audrey Strauss, and the SEC Enforcement Director Stephen Cutler, the staff was ordered to investigate only a few of the suspicious transactions identified by the self-regulatory organizations (SROs). According to Aguirre:

[I]n early February 2005, less than a month after staff had obtained subpoena power and before any subpoenas had been issued. [Assistant Director Mark] Kreitman directed that the PCM investigation be narrowed to two or three matters. Kreitman had expressed his approval a few days before when the investigation was increased to include seventeen referrals. . . . It came approximately two weeks after an influential attorney representing PCM met with Enforcement Director Stephen Cutler.²⁰

This account was corroborated by Eric Ribelin, who added that the team members working on the case were left out of the meeting between Strauss and the Director of Enforcement.²¹

SROs identified between 17 and 25 sets of suspicious trading involving Pequot. The GE-Heller trades represent only one such set of transactions. Others investigated by the SEC will be discussed briefly below. However, the SEC did not examine most of the suspicious activity in any depth. Given the SEC's limited resources, it may have been reasonable to focus on the most suspicious transactions. SEC Enforcement Division Associate Director Paul Berger and Assistant Director Mark Kreitman described the need to triage especially large cases due to limited resources.²² However, an arbitrary restriction on investigating other transactions that could help demonstrate a pattern, as in the strategy described by Hilton Foster, simply makes an already difficult task even more so.

Even after narrowing the scope of the case, there were complex transactions to analyze and millions of documents to review. Despite the number and complexity of the remaining suspicious Pequot transactions, the SEC assigned only one staff attorney to the investigation full-time: Gary Aguirre. He had part-time assistance from just a few other staff, including some attorneys and some personnel from the Office of Market Surveillance. Aguirre shared one paralegal with several other staff attorneys working other cases. By contrast, one law firm representing Pequot said it had 59 attorneys and paralegals working on the case and reviewing docu-

ments 6 days and 60 hours per week.²³ Given the importance and size of the case, the SEC should have devoted more resources to it.

In cases of large, document intensive investigations, it appears that the core mission of the SEC could be better served by the dedication of more support staff and attorneys. Such inquiries require considerable support from administrative professionals, paralegals, and law clerks.²⁴ Aguirre shared one administrative assistant with many other attorneys working on dozens of other investigations. His pleas for additional assistance went largely unanswered. Without full-time assistants to focus on tasks such as document management and correspondence tracking, it is difficult to imagine how one full-time attorney could conduct a complex securities investigation effectively.

2. Other Suspicious Pequot Trading

a. Wash Sales and Potential Stock Manipulation

Wash sales occur when someone both buys and sells the same security at the same price in a short period of time. Such trades are not illegal *per se*, but are suspicious because they incur commission costs yet offer no potential profit or loss.²⁵ Sometimes such trades are conducted for illegitimate accounting, tax, or market manipulation purposes. Pequot engaged in a large number of wash sales that the SEC began to investigate. Pequot provided the SEC with “an extensive written response explaining that its trading occurred to *transfer beneficial ownership*” of the stocks acquired in initial public offerings (IPOs) from one class of fund investors to another—from those eligible to participate in the offering to those ineligible to participate.²⁶ Pequot argued that the practice was specifically sanctioned by the National Association of Securities Dealers (NASD), one of the securities industry’s self-regulatory organizations (SROs).²⁷ However, the SEC did not independently determine whether Pequot’s investors met the criteria for participation or exclusion of the IPOs at issue.²⁸ It is therefore unclear whether the SEC, the government body responsible for overseeing SROs, sufficiently reviewed the NASD’s decision in order to make an independent judgment that such wash sales should be allowed.

On August 3, 2005, Market Surveillance analyst Tom Conroy generated a memorandum to the Pequot File in which he discusses three scenarios in which Pequot engaged in “apparent” wash sales.²⁹ The three scenarios were as follows: (1) wash sales reported as an agency cross³⁰ in the immediate aftermarket of an IPO, (2) wash sales reported as an agency cross in the aftermarket of a secondary offering, and (3) wash sales in which buy and short sale orders are executed against each other.³¹ According to Conroy:

We believe that in the first two scenarios above, the trades are designed to benefit Pequot by artificially inflating the volume and/or price and thus inflating the value of shares received by Pequot in the offerings. In the third, scenario, staff has noted several instances of trading following the wash sale trade in which Pequot does substantial selling, short selling and then buying and/or covering at substantially lower prices.³²

Conroy suggested five lines of inquiry for the ongoing investigation and noted, “[w]e are concerned that insufficient brokerage surveillance systems may be in place that allow for the execution of manipulative orders that artificially elevate or reduce the price of securities for the benefit of Pequot *and to the detriment of market integrity*.”³³

The market surveillance team working the Pequot investigation wrote another memorandum regarding the wash sales on November 14, 2005.³⁴ This memorandum was prepared by Craig Miller, Tom Conroy, and Eric Ribelin. It explores theories surrounding the intent and purpose of Pequot’s trading.³⁵ Specifically, the memorandum highlights a specific type of trade called a “short to buy”³⁶ that was “repeated hundreds of times over a four-year period.”³⁷

The “short to buy” transaction takes place when,

Pequot instructs its executing broker to effect an agency cross transaction in which one side of the trade is a short sale and the other side is a buy. Both the short sale and the buy are for the same number of shares at the same price and are executed simultaneously against each other. The trade is reported to NASDAQ as an agency cross, but the Pequot trade report reflects the same Pequot funds on both sides of the trade, *thus causing no change in beneficial ownership*.³⁸

According to the memorandum, Pequot was able to use this opportunity to make a profit on the short side should an opportunity present itself. Otherwise, Pequot could “simply close out the net flat position with a journal entry in the back office.”³⁹

The memorandum goes on to provide a case study with particular trades made by Pequot in the stock of Atheros Communications.⁴⁰ It also notes that there are questions surrounding the nature of borrowed stock leveraged by Pequot to short.⁴¹ The memorandum concludes that the shorting of the borrowed shares would “appear to decrease the amount of stock available for others to borrow for shorting purposes.”⁴²

Chief of Market Surveillance Joe Cella forwarded the memo to the Division of Market Regulation.⁴³ In response, an Associate Director in Market Regulation indicated, “This memo describes some wild and troubling trading. The wash sales may be manipulative or fraudulent . . . Either case involves potential SEC or [NASD] rule violations.”⁴⁴

Although employees within SEC’s Market Surveillance branch saw potential violations, the Enforcement Division ultimately closed the case without action on the wash sales. The concerns raised by Market Surveillance warrant further attention. They raise serious questions about how prevalent these practices are among hedge funds and whether they ought to be considered legitimate. These issues go far beyond the simple question of whether the wash sales were designed to artificially inflate the volume or price of a security.

b. The AstraZeneca and Par Pharmaceutical Trades

In October 2002, a federal district court held that Par Pharmaceutical had infringed on drug patents held by another drug company, AstraZeneca.⁴⁵ The decision caused AstraZeneca’s stock price

to rise and Par's price to fall significantly on the day the decision was announced.⁴⁶ The NYSE alerted the SEC to suspicious trading by Pequot in both AstraZeneca and Par leading up to the date of the court decision, as well as Pequot trading in Par in advance of positive earnings estimates announced about a month earlier, in September 2002. Pequot was "the largest institutional buyer" of Par in the week before the earnings announcement.⁴⁷ Pequot also reversed its trading positions in both AstraZeneca and Par just before the announcement of the court decision.⁴⁸

In other words, the trading activity made it appear that Pequot may have profited or avoided losses on advance knowledge of both events—the earnings announcement (which caused Par's price to rise) and the court decision (which caused Par's price to fall and AstraZeneca's price to rise). Gary Aguirre outlined the trading early on in the investigation to his supervisors:

On 9/12/02, one month before the court announced its decision, [Par] announced its earnings. From 8/12/02 through 9/11/02, Pequot bought 605,000 shares of [Par] for a total position of 776,600 shares on 9/12/02, the date of the earnings announcement. Sixteen days later, [Pequot] began to sell [Par] and, by 10/4/02, a week before the court decision was announced, it had a short position of 34,000 shares.⁴⁹

Following this e-mail, Aguirre's supervisor directed him to include the AstraZeneca and Par transactions into the formal order of investigation memorandum, which was later adopted by the SEC to authorize the Pequot probe.⁵⁰ Authorities in the Southern District of New York (SDNY) also conducted a criminal investigation of whether a judicial law clerk had leaked the outcome of the patent case.⁵¹ As of the date of this report, no charges have been filed in connection with the alleged leak.

c. The Microsoft Trades

Until the summer of 2006, the SEC took significant interest in Pequot's April 2001 trades in Microsoft stock. Initially, many of the SEC Enforcement Division attorneys were optimistic about the prospect of proving Pequot illegally traded on material, non-public information concerning Microsoft stock.⁵² Aguirre's successor as lead counsel in the Pequot probe, James Eichner, eventually drafted an outline in preparation for a Wells notice, the formal procedure by which the SEC informs a potential defendant that it intends to file an enforcement action.⁵³ SEC Enforcement personnel agreed Aguirre had unearthed "direct evidence" of insider trading.⁵⁴ Both Eichner and Kreitman described the Microsoft aspect of the investigation as "promising."⁵⁵ Eichner went as far as to suggest that when Samberg traded Microsoft stock in April 2001, he did so thinking he was engaged in "insider trading."⁵⁶

In its Wells notice, the SEC quotes several e-mail exchanges between Samberg and a Microsoft employee named David Zilkha. Zilkha eventually left Microsoft for employment at Pequot.

- In the same e-mail in which Samberg offered Zilkha a job, he asked whether Zilkha had any current views on Microsoft that

- might be helpful. He wrote ‘might as well pick your brain before you go on the [Pequot] payroll!’
- On April 6, 2001, Samberg asked Zilkha if he had any ‘tidbits’ about Microsoft. . . . Zilkha responded that he would get back to Samberg about Microsoft ‘ASAP’
 - On April 16, 2001, Samberg asked Zilkha if he had ‘any further [c]olor’ on Microsoft.
 - On April 17, 2001, at 8:01 p.m., after the close of the market, Zilkha informed Samberg ‘I heard this afternoon from the MSN finance controller that our CFO has been more relaxed before this next earnings release than he has been in the last year. Augurs well.’ . . .⁵⁷
 - On April 19, 2001, at or right before the close of the market, Microsoft announced its quarterly earnings. (Microsoft press release). Microsoft’s results beat estimates for revenues and earnings. (4/20/01 e-mail from Samberg to Zilkha). Microsoft’s stock price rose 2.5 points (about 3.6%) on April 19 and another point on April 20.
 - On April 20, 2001, Samberg closed out his April 19, 2001 position, realizing a profit of approximately \$1.6 million. That same day Samberg wrote Zilkha, in an e-mail exchange containing the news about Microsoft’s earnings, ‘*I shouldn’t say this, but you have probably paid for yourself already!*’⁵⁸

This sort of evidence clearly warranted a serious and thorough investigation by the SEC.

3. Pequot and the SEC Fight over Document Production

Pequot retained Fried, Frank, Harris, Shriver, & Jacobson (Fried Frank) to represent its interests in the SEC’s investigation. Individual Pequot employees were represented by six different law firms.⁵⁹ Audrey Strauss of Fried Frank was the lead counsel and handled the document production for Pequot. On February 7, 2005, Aguirre sent the first SEC subpoena to Pequot seeking e-mails and other documents.⁶⁰ In response to a February 23 e-mail from Aguirre complaining about Fried Frank’s lack of cooperation on previous requests for information, Kreitman wrote, “Agreed. We need to continue to document this pattern of behavior with a view to possible §17(b) charge and perhaps some disciplinary action against the law firm.”⁶¹ However, others in the SEC doubted the resolve of Aguirre’s supervisors to support pressing for complete compliance with document subpoenas. In an e-mail exchange with Eric Ribelin, one wrote:

I have seen these [SEC Enforcement] Lawyers get all huffy before. They are empty suits. When push comes to shove, no one in the SEC is going to take on [Fried Frank] or any other major player. Not going to happen. . . . When Fried Frank gets a handle on the email, they will produce them, and not before[.]⁶²

A second subpoena for documents was sent on March 22, 2005.⁶³ These subpoenas were among over 90 that the SEC issued in the Pequot investigation.⁶⁴ Pequot began producing “significant volumes of its records” in response to these subpoenas in April and

May of 2005.⁶⁵ This included nearly 80,000 electronic records and 300,000 pages per week.⁶⁶ However, by the middle of May 2005, production began to slow as Pequot raised claims of attorney-client privilege.⁶⁷

In fact, Pequot withheld over 200,000 pages of documents sought by the March 22, 2005 subpoena based on claims of privilege.⁶⁸ The privilege claims continued through spring 2005 and ultimately led to a dispute between SEC employees and Pequot attorneys.⁶⁹ Mark Kreitman minimized the dispute, calling it “the kind of ordinary resistance that we [SEC] encounter in seeking full, accurate, and complete compliance with subpoenas.”⁷⁰

The dispute eventually focused on back-up tapes that contained e-mails from the 2001 timeframe when Pequot was making the suspect trades. Given the time elapsed between the trades and the SEC’s investigation, obtaining e-mails from these tapes would seem to be a critical step. Pequot retained two outside attorneys, Irving Pollack and Larry Storch of Fulbright & Jaworski L.L.P., to review the documents that were being withheld.⁷¹ They were friends of Mark Kreitman, who testified that Storch was “a classmate from law school and a friend” and that Pollack was “a mentor.”⁷²

Kreitman instructed Aguirre not to contact Pollack or Storch. Although Strauss had delegated the backup-tape issue to them, she did not officially acknowledge that Pollack and Storch represented Pequot for some time.⁷³ Kreitman’s instruction that Aguirre not contact them because it was not clear whose interests they represented had the effect of delaying the investigation. Aguirre repeatedly attempted to deal with Strauss on document production issues, only have Strauss refer him to Pollack and Storch. Yet, because Aguirre was instructed not to talk to Pollack and Storch, the document production dispute continued to linger into June 2005 with little or no clarification. As late as June 28, 2005, Aguirre described the situation this way:

I think Audrey [Strauss] has the best of all worlds right now regarding these three categories of tapes: the Pollack-Storch wall of integrity and my inability to press them for answers to pertinent questions. . . . Mark’s call last week to Fried Frank may get Pollack-Storch to concede they simply represent Pequot.⁷⁴

This situation was eventually rectified as Strauss conceded in writing that Pollack and Storch were counsel representing Pequot sometime after July 13.⁷⁵ However, this concession came too late to have much practical effect as many of the documents sought were never produced, even after Aguirre was fired.⁷⁶ When documents were produced, they were delivered, “on the day of, days after, and weeks after testimony” was taken.⁷⁷

Aguirre explained the significance of obtaining the e-mails to his supervisors: “the second best source of proving the Samberg GE tip is from the backup tapes.”⁷⁸ Thus, the failure to produce all of the backed-up e-mails in a timely fashion represented another barrier to success in the investigation.

4. *The Arthur Samberg Testimonies*

The SEC took Arthur Samberg's testimony twice before Gary Aguirre was fired, and once afterward. In his first session of testimony on May 3, 2005, Arthur Samberg listed a number of specific reasons that he claimed motivated him to purchase Heller stock in July 2001.⁷⁹ In his second session on June 7, 2005, it became clear that each of the reasons he had previously indicated was highlighted in a Legg Mason analyst report that Samberg had reviewed in preparation for his May 3 testimony. During cross-examination by Gary Aguirre, Samberg conceded that he did not recall reviewing the report before ordering the trades and probably would not have done so because it was "sell-side research," which Samberg had said publicly was not "worth a damn."⁸⁰ SEC investigators believed that given these circumstances, Samberg's initial story appeared to be an after-the-fact rationalization using the Legg Mason report as source material.

During our review of the SEC inquiry, we interviewed James Eichner, the SEC Staff Attorney who took over the Pequot investigation after Gary Aguirre was fired. Although Eichner criticized Aguirre's examination of Samberg in other respects, he agreed that Samberg's rationales for the trades were unpersuasive:

Mr. Eichner: [T]here was a sense that [Samberg] had . . . a chance to prepare and it seemed reasonable to think that he had sort of—I mean, spoon-fed is not . . . an inaccurate characterization.

* * *

I mean, if you ask me what I thought, I would say that Samberg was spoon-fed this information after the fact by his attorneys. I think Gary [Aguirre] was right on that, but I'm just—

Question: And in fact . . . Mr. Samberg admits that he had not seen the documents which cited those six reasons by the time he made the trades?

Mr. Eichner: Right.

* * *

I think that's entirely correct, that Mr. Samberg had a suspiciously clearer recollection in the second examination than he did in the first about Heller.

Question: And is it accurate to say that Mr. Aguirre was able to establish in that deposition that [Samberg's] lawyers had provided him with those exact rationalizations after-the-fact, after the trade—years after the trades?

Mr. Eichner: Yeah, I think . . . that was established in the second testimony[.]⁸¹

Samberg had not reviewed analyst reports on Heller or consulted with others at Pequot before purchasing over one million shares. Even though Eichner and Aguirre disagreed on many aspects of the

Pequot investigation, it appears that Eichner agreed that Samberg's testimony added to the suspicion about Pequot's trades.

5. The SEC Briefs Criminal Prosecutors on its Investigation

In mid-June, Kreitman told Berger it was time to consider briefing criminal prosecutors about the case. Berger then called the chief of the Securities and Commodities Fraud Section at the U.S. Attorney's Office for the Southern District of New York.⁸² On June 14, 2005, Kreitman asked Aguirre to walk him through the evidence of Pequot's suspicious trades. Aguirre prepared a tabbed binder with hundreds of pages of documents including both blue sheet data reflecting Pequot's trades and Samberg's e-mail exchanges. The following day, Aguirre, Eric Ribelin, and an SEC intern traveled to New York to meet with two FBI agents and an Assistant U.S. Attorney. Among other things, Aguirre briefed them on Pequot's suspicious trading (1) in advance of the GE acquisition of Heller, (2) in Microsoft stock, and (3) in AstraZeneca and Par Pharmaceuticals. On June 15, 2005, the SEC attempted to interest the Department of Justice in opening up a parallel proceeding to investigate Pequot. Section 21(d) of the Securities and Exchange Act⁸³ authorizes the SEC to furnish the DOJ with evidence of misconduct it has uncovered in its civil proceedings.⁸⁴ Congress has approved of this procedure for the past three decades.⁸⁵

Aguirre's supervisors considered the presentation a success. After Aguirre previewed the presentation for Kreitman, he gave Aguirre a motivational award in recognition of developing the case into a potentially criminal matter. The award was a photocopied picture of Raymond Burr, which Kreitman described as "the Big Perry" in reference to Burr's portrayal of the fictional, legendary attorney Perry Mason.⁸⁶

C. SEC Investigators Identify a Potential Tipper

1. Investigators Suspect John Mack

In a June 27, 2005 e-mail to his supervisors, Aguirre analyzed the evidence gathered in the case so far. According to Aguirre's theory of the evidence, Samberg may have engaged in insider trading based on a tip about the upcoming acquisition from John Mack.⁸⁷ At the time of the trades, John Mack was being considered for the position of Chief Executive Officer of Credit Suisse First Boston (CSFB) and had recently left Morgan Stanley. Both CSFB and Morgan Stanley were firms working on the GE acquisition of Heller, and thus possessed material, non-public information about the deal. Aguirre's e-mail summarized the trading (for a more detailed description, see **Figure 1** and **Figure 2** on pps. 47-48).

Given the appearance that the trades were made based on material, non-public information, Aguirre began to search for potential tipplers. He eventually identified John Mack as a likely candidate. Mack was a close associate of Samberg and an investor in Pequot funds. Mack was thus in a position to share in any profits the funds might make by trading on inside information. Mack also had been in employment negotiations with a firm working on the deal at the time of the trades, which meant he might have had an opportunity to learn of the GE-Heller acquisition before the public an-

nouncement. Moreover, an e-mail from Samberg indicated that he had spoken to Mack on June 29, 2001.⁸⁸ Samberg began directing large purchases of Heller stock on the next trading day.

Aguirre theorized that Mack may have tipped Samberg about the acquisition in exchange for Samberg allowing Mack to invest in a “closed” Pequot fund or directly alongside Pequot in a private equity deal. To bolster the point, Aguirre pointed out that on May 11, 2001, Samberg wrote another Pequot employee that “John Mack would like to put \$5mm into Partners at the 1st available opening. He’d also like to put more \$ into Scout, if that’s possible, and would like a recap of what he has where.”⁸⁹ On June 20, 2001, Samberg wrote to a different Pequot employee, Jerry Poch, to report, “I’m sitting here with John Mack and . . . John is busting my chops cuz he hasn’t gotten the Freshstart material yet.”⁹⁰ “Partners” and “Scout” were two of the funds managed by Pequot. Fresh Start was not a Pequot fund, but rather a start-up company in which Mack was allowed to invest directly, alongside Pequot. On June 30, 2001, Poch wrote to Samberg, “I had a great call with John Mack last night. He wants to go forward with Freshstart and put 5mm in.”⁹¹ Mack was the only individual investor allowed to participate in the deal.

Samberg responded, “As he might have mentioned, [Mack] called here looking for you. Cuz of our breakfast I remembered you were in Vail and gave him your number. Glad this is moving along, and thrilled at the \$5m number.” On the next trading day, July 2, 2001, Samberg began aggressively acquiring as much Heller stock as possible without driving up the price. Aguirre theorized that John Mack might have first tipped Arthur Samberg about the GE acquisition of Heller during that June 29, 2001 telephone call.

Aguirre explained the significance of Mack’s interest in Fresh Start in his December 5, 2006, written testimony before the Judiciary Committee:

Mack was admitted directly into special PCM deals. One key deal went by the code name “Fresh Start,” a Lucent spin-off which PCM got into extremely cheap. Mack was promised a \$5 million piece of Fresh Start the same night in which he was suspected of giving Samberg the Heller tip. Just nine days earlier, according to a Samberg email, Mack was “beating [Samberg’s] chops” to get into Fresh Start. Neither the PCM principals nor Samberg’s son seemed happy about Mack getting into Fresh Start. SEC filings indicate Mack did extremely well on his \$5 million investment.⁹²

Although Hanson testified that the SEC did not independently verify how well Mack’s money performed in this private Pequot deal, Aguirre provided more information in his written testimony:

Fresh Start became Celiant Corporation. It was initially co-owned by PCM and Lucent. Mack bought 3,333,333 shares of preferred stock directly from Celiant for \$5 million (See page 21, Andrew Corp Form 8-K/A for the period ending June 4, 2002), the same terms and conditions under which PCM acquired its 33,333,333 shares. On February 19, 2002, Andrews Corp filed an 8-K with the SEC stating that it would buy all

outstanding Celient stock for \$469.8 million: \$203.1 million in cash and \$266.6 million in stock. The merger agreement provided that Celient preferred shareholders, such as Mack and PCM, would split \$119.6 million in cash and the 16.28 million shares of Andrew Corp. common stock. Mack owned 4.26% of the outstanding preferred stock. Hence, under the terms announced in the February 19, 2002, and the June 4, 2002, Form 8-K/A, the value of Mack's interest would have been approximately \$16.43 million [or, *over three times his \$5 million investment*]. However, the stock would not be issued until June 2002 and would not be registered until September 2002. (See Andrew[s] Corp Form 424B3).⁹³

That Samberg allowed Mack to invest right around the time that Samberg began trading in Heller creates an appearance of a potential *quid pro quo* worthy of thorough investigation. Mack and Samberg were decidedly close to one another. Mack was also an investor in various Pequot funds. Mack had significant informational sources both from his former and prospective employers: Morgan Stanley and Credit Suisse First Boston. Both investment banks were advising GE and Heller in the deal. For these reasons, Aguirre and the investigators working with him believed that Mack fit the profile of a potential tipper.

Aguirre continued to explain this theory in a series of e-mails he sent to his supervisors. On June 27, 2005, in an e-mail to Hanson that copied Kreitman and Ribelin, Aguirre suggested Mack was a potential tipper because Mack "likely had the GE-HF info sources, he had contacts with Samberg during the period, there was *quid pro quo*, mutual trust existed, and Samberg needed a huge favor."⁹⁴ On June 28, 2005, in his "proposed next steps" e-mail memorandum to his superiors, Aguirre suggested that the SEC pursue the Pequot insider trading investigation by (1) pursuing "Documents-Testimony from the five investment [banks] (CSFB, Morgan Stanley, JP Morgan, Lehman and Merrill Lynch) or the two principals (GE and HF)"⁹⁵ and (2) taking "Mack's testimony [to] simply nail down whether he will admit that he knew about the GE/HF acquisition from any source."⁹⁶

The memorandum reminded Aguirre's superiors that Mack "could have learned this at either CSFB or MS" presumably because he had just left Morgan Stanley in March 2001 and was being wooed by Credit Suisse First Boston at the time Samberg began trading in GE/HF.⁹⁷ Aguirre received substantial push-back from Hanson, Kreitman and Berger. They delayed Mack's testimony indefinitely, eventually taking it under public pressure almost a year after they fired Aguirre. Paul Berger left the SEC before Mack's testimony was eventually taken. Both Hanson and Kreitman continued to oppose the idea even in the summer of 2006. However, they were overruled by more senior SEC Enforcement Division officials who understood the lack of a downside to taking Mack's testimony and the high cost in public confidence by failing to take it.

2. *Others Concur in Aguirre's Request to Take John Mack's Testimony*

Aguirre was not alone in thinking the SEC should take John Mack's testimony in the summer of 2005. He was joined in this belief by at least three other senior SEC officials, including Hilton Foster, Joseph Cella, and Eric Ribelin. Hilton Foster retired shortly before Aguirre was fired. Foster's 30 years of experience in insider trading investigations were apparently valued by the SEC since Foster conducted training on a contract basis for new SEC attorneys even after retirement. As a strategic matter, Foster believed it was imperative to take John Mack's testimony "sooner rather than later."⁹⁸ He said, "As the SEC expert on insider trading, if people had asked me, 'When do you take [John Mack's] testimony,' I would have said take it yesterday."⁹⁹ Foster explained that, "As an investigator, you want to lock people in as soon as possible[.] . . . I always said you want to take testimony from these people sooner rather than later because you lock them in."¹⁰⁰

Eric Ribelin is a Branch Chief in the Office of Market Surveillance within the SEC's Division of Enforcement. He has worked there for at least 18 years.¹⁰¹ Ribelin was one of the few staff members involved in the Pequot investigation from the beginning. He spent about 20 percent of his time on the investigation and was in daily contact with Aguirre. Ribelin's Market Surveillance branch assists the Enforcement Division by providing technical advice in the areas of stock manipulation and insider trading, helping analyze trading patterns, deciphering activities of stock brokers and traders, and analyzing trading positions or derivative securities.¹⁰²

When asked about SEC Enforcement Division managers' refusal to take Mack's testimony, Ribelin said, "the impression that I had from Berger, especially—he seemed dismissive of investigative ideas. [He] seemed disinterested in the idea of moving aggressively and assertively."¹⁰³ With respect to taking Mack's testimony, Ribelin recalled Hanson saying that, "Mack has connections, or he has stature, or something to that effect, and that because of that, we—that, you know, we have to be careful about taking his testimony."¹⁰⁴ After Aguirre's termination, Ribelin sent Hanson an e-mail concerning his frustrations, indicating that in his view, "something smells rotten" about the course of the investigation.¹⁰⁵ Ribelin then attempted to withdraw from the case.¹⁰⁶ He said that Paul Berger made the decision not to interview John Mack and that it came down as a "*fait accompli*."¹⁰⁷ Ribelin agreed with Aguirre that the SEC should have taken Mack's testimony sooner rather than later but conceded that "maybe reasonable minds could have disagreed" about the precise timing.¹⁰⁸

Joseph J. Cella, III, the Chief of the SEC Enforcement Division's Market Surveillance branch, supervised Branch Chief Eric Ribelin.¹⁰⁹ Cella has worked with Ribelin since 1992 and described him as conscientious and honest.¹¹⁰ After Aguirre was fired, Ribelin requested that he be removed from the investigation and assigned to another case. According to Cella, this was the first time that Ribelin ever asked to be removed from an investigation.¹¹¹ When asked about his own opinion of the propriety of taking Mack's testimony, Cella said, "I didn't think that there was anything wrong with bringing Mack in."¹¹² When pressed further,

Cella said, “It seemed to me that it was a reasonable thing to do to bring Mack in and have him testify.”¹¹³ According to Cella, Bob Hanson and Mark Kreitman objected to questioning Mack.¹¹⁴ As to whether he thought there was any downside to taking Mack’s testimony, Cella said, “In my mind there was no downside, correct.”¹¹⁵ Cella said he had a “strictly professional” relationship with Aguirre and that he could not recall them ever having any disputes.¹¹⁶ Cella had never heard “anyone with the SEC” describe Aguirre as a “substandard employee” prior to Aguirre’s termination.¹¹⁷ He was, nonetheless, “skeptical” that the SEC would give Mack a pass based upon his or Samberg’s “political connections.”¹¹⁸

3. *Morgan Stanley’s Investigation and Contacts with the SEC*

a. *Planning a Response to Outside Inquiries*

Given that Aguirre and the others working on the case day-to-day wanted to question John Mack, why did Aguirre’s supervisors resist? This question is especially perplexing in light of their initial support for Aguirre’s theory. Aguirre points to a particular day on which he claims their attitudes abruptly changed, June 23, 2005. Aguirre testified:

I received a phone call from Morgan Stanley on June 23rd, from the head of their compliance [Eric Dinallo]. He had this question: ‘Are you going to proceed against Mack? Because if you proceed against Mack, we are going to have a problem in having him step in as CEO. We do not want him to step in as CEO if there is going to be a securities case brought against him by the SEC.’ Until that point, this case was, as I said, supported by everyone.¹¹⁹

Aguirre alleges that on June 23, “in a face-to-face meeting, Hanson told me that it would be very difficult to obtain authorization for issuance of these subpoenas *because Mack had very powerful political connections* and Assistant Director Kreitman ‘would have to make the call.’”¹²⁰ After this encounter with Hanson, Aguirre went to Kreitman. Aguirre reported Dinallo’s call to Kreitman who, in turn, called Dinallo on the speakerphone with Aguirre in the room.¹²¹ Kreitman confirmed Dinallo’s question to Aguirre and terminated the call before responding. After hanging up, Kreitman told Aguirre, “I think we have got to let them know we probably will [proceed against Mack].” According to Aguirre, Kreitman followed up with, “But, first, I am going to call Associate Director Paul Berger and let him know.”¹²²

Thereafter, according to Aguirre’s account, Kreitman called Berger and said, “Paul, this case is coming along pretty well now. We got this phone call from Morgan Stanley, and I think they want to know whether we are serious about it. I think we are going to go on this, and I think we ought to say something now.” Aguirre testified that Berger responded, “I don’t think we are, and we shouldn’t say anything.”¹²³ Kreitman and Berger disputed some aspects of Aguirre’s account of these conversations but, in essence, agreed on two key points, that: (1) Kreitman suggested warning Morgan Stanley about the SEC’s interest in Mack and (2) Berger

insisted on saying nothing to Morgan Stanley while the investigation remained pending.¹²⁴

b. Debevoise & Plimpton Contacts

Around the same time that Dinallo called Aguirre, a former United States Attorney for the SDNY called and e-mailed Linda Thomsen. The Morgan Stanley Board of Directors hired Debevoise & Plimpton to conduct a due diligence investigation to vet John Mack before extending an offer for him to rejoin Morgan Stanley. Mary Jo White, co-chair of the litigation section at Debevoise, was responsible for conducting the inquiry as quickly as possible. She spoke to lawyers for Morgan Stanley, Pequot, and CSFB.¹²⁵ The SEC had recently subpoenaed both Morgan Stanley and CSFB for e-mails between Mack and Samberg.¹²⁶ White indicated she was trying “to learn whatever I could within a rather short time frame.”¹²⁷

Only two days after being retained, White did what the SEC did not do until more than a year later. She questioned John Mack:

The other thing that I did for the board to gather what information I could on that time frame was to interview John Mack himself.

* * *

[C]learly everybody went into full gear on this. You know, we worked over the weekend . . . [W]e interviewed him. I basically caused John Mack to be summoned back from wherever he was in London so we could interview him. And, you know, we accelerated getting e-mails, reviewed them, [and] looked at the other e-mails at Pequot. . . .¹²⁸

That evening, Sunday, June 26, 2005, White sent Thomsen an e-mail message marked “URGENT” and asked that Thomsen return the call “this evening.”¹²⁹ Aguirre complained that the next day White delivered the e-mails that he had subpoenaed from Morgan Stanley directly to Linda Thomsen:

On June 27, I learned that Mack-Samberg emails, which I had subpoenaed from Morgan Stanley, had been delivered directly to the Director of Enforcement, Linda Thomsen (Thomsen). Neither I nor other staff had heard of this happening before. Indeed, the subpoena explicitly stated that the documents were to be delivered to me.¹³⁰

White indicated that she had the e-mails delivered to Thomsen for the purpose of determining whether the SEC could comment on whether the e-mails changed their view of Mack’s role:

So I asked whether Ms. Thomsen would be willing to have her staff, you know, look at those [e-mails used in White’s questioning of Mack] and, frankly, any of the others that had been subpoenaed and give us, you know, some kind of statement, if they could, about what they considered his status to be in the investigation.

* * *

Her response to that was, you know, send them down, you know, we'll see what we can do, taking a look at them, and then we'll see what, if anything, you know, we can say. I think I asked in that—it would have been in that call that I said, “Where should I send them?” And she said send them to her.¹³¹

For Thomsen to comment on the significance of the e-mails without first learning what the lead staff attorney's opinion of their significance would be rather unusual. However, it appears that is what she did.

c. Thomsen and Berger Respond to Inquiries

Thomsen said that after checking with Paul Berger (who had also not discussed the significance of the e-mails with Aguirre)¹³² to see what, if anything she could say, that she told White she could not comment:

I told her that I didn't know whether I could tell her anything, that, as I sat there, I didn't know enough one way or another to even know whether there was anything I could tell her if I could tell her and that I'll get back to her.

* * *

After I got off the phone I talked to Mr. Berger and learned that we just didn't have enough information one way or the other with respect to Mr. Mack . . . [W]e didn't have anything to indicate that he had engaged in any illegal or improper behavior, . . . [but] we weren't at a stage to be confident that he hadn't . . . [W]e weren't likely to be at that stage any time soon . . . I then got back to Ms. White and said I can't tell you anything.¹³³

Likewise, Berger described his conversation with Dinallo as consistent with his position that the SEC could not comment on the investigation.

Berger had opposed Kreitman's proposal to signal Morgan Stanley that the SEC was serious about investigating Mack. In his interviews with Committee staff, Berger left the impression that he provided Dinallo with no substantive information:

Question: After the conversation with Mr. Kreitman in which you said, “No. I'll call Mr. Dinallo,” or words to that effect, you called Mr. Dinallo back. What precisely did he ask you?

Mr. Berger: . . . [He] identified the fact that the Board of Directors of Morgan Stanley was considering hiring John Mack, and they were concerned about whether or not he had any issues with the SEC and its investigation.

* * *

I don't recall saying anything with respect to Mr. Mack, other than . . . I told him that it was premature for us to evaluate. We were roughly in the middle of our investigation. I didn't

know where it was going to go. I think I said something to the effect, “Like any other insider trading investigation, we don’t know where it’s going to go until we’ve finished it.”

* * *

[T]he point of my phone call was to adhere to the Commission policy by not disclosing any information about an investigation[.]¹³⁴

However, in the course of our investigation, we obtained documentary evidence inconsistent with Thomsen’s and Berger’s accounts.

Debevoise & Plimpton provided a set of talking points used to brief Morgan Stanley’s Board of Directors on its efforts. Those talking points provide a record of what Dinallo reported to White about his conversation with Berger. The pertinent paragraph reads:

You will recall that last Friday, after Morgan Stanley had been subpoenaed for Mr. Mack’s e-mails with Samberg, Eric Dinallo spoke to Paul Berger, a senior supervisor in the SEC’s Enforcement Division, and asked him whether the SEC had any evidence of issues for Mr. Mack in their insider trading investigation of Pequot. The response was that the SEC was looking at Mr. Mack, among others, as part of their investigation, *primarily based on what they had seen in e-mail traffic*, but implied that *they did not presently have evidence of any wrongdoing* by Mr. Mack.¹³⁵

This description of the conversation differs from Berger’s. Rather than “not disclosing any information,” this document suggests that, in fact, Berger disclosed the specific type of evidence (i.e., e-mail traffic) on which the SEC’s interest in Mack was “primarily based.” Moreover, it suggests that Berger signaled that the SEC “did not presently have evidence” of wrongdoing. It is particularly troubling that Berger would provide that sort of detail about what the SEC knew to someone so closely aligned with the interests of a potential defendant.

The talking points also provide a more detailed account of Linda Thomsen’s conversation with Mary Jo White:

Thomsen called me late on Tuesday after she and her staff had reviewed those emails and confirmed that *the emails did not change their view of Mr. Mack*. It was still “too early” in the investigation to tell whether Mr. Mack had any issues. She added that there is “smoke there”—but that there was “*surely not fire*.” She said they are weeks away from knowing more and could give us no more comfort. She commented that the “Board will have to trust him.”¹³⁶

According to this account, Thomsen provided White with more detail than simply, “I can’t tell you anything.” She told White what SEC staff thought about the e-mails that Morgan Stanley had just produced, indicating that the documents “didn’t change their view.” She also indicated that, though there was smoke, there was “surely not fire.” Whether referencing the particular set of e-mails or the investigation as a whole, these statements go beyond a simple “no comment.”

After Aguirre's termination, Kreitman told the Office of Inspector General that direct contacts like these with senior SEC officials were a bit unusual but not unprecedented: "Kreitman also said that it is a little out of the ordinary for Mary Jo White to contact Linda Thomsen directly, but that White is very prestigious and it is not uncommon for someone prominent to have someone intervene on their behalf."¹³⁷ That is precisely the problem. By providing prominent individuals selective access to senior SEC officials, the SEC allowed bits of information about its non-public investigation of Pequot to leak to a potential defendant's prospective employer.

4. Supervisors Deny Requests to Question John Mack

On June 23, Kreitman's initial reaction to inquiries from Morgan Stanley about John Mack's exposure was to tell Berger, "Paul, this case is coming along pretty well now."¹³⁸ However after contact between Morgan Stanley's representatives and the Director and Associate Director of Enforcement, Kreitman's attitude changed markedly. He denied Aguirre's request to authorize a subpoena for Mack's testimony and failed to respond to e-mails from Aguirre on the subject.¹³⁹

a. "Not Premature, but Prerequisite"

Aguirre's supervisors gave conflicting explanations for why they would not approve of questioning Mack. Mark Kreitman's initial explanation was that it wasn't necessary to "lock-in" Mack. When asked whether SEC investigators normally bring in potential tip-pers early on in an investigation to nail down their testimony, as Hilton Foster had described, Kreitman disagreed:

In some cases, there is an advantage to nailing somebody's testimony down. . . . [I]t is different in this case when we were investigating in 2005 conduct that occurred in 2001. The chance that we benefited nailing down some of these stories when it is so remote from the events is very limited.¹⁴⁰

While the trades occurred years earlier, they had only come under scrutiny by the SEC in the proceeding months. Interest in Mack's role was only a few weeks old, and document production was just under way. Accordingly, Kreitman's distinction misses the mark by failing to recognize that some benefits of "locking-in" a witness come at the beginning of the investigation, not just at the beginning of the events being examined. Moreover, pointing to the time that had passed since the trades can hardly be an argument for waiting even longer before questioning witnesses. That strategy merely ensures that fading memories continue to fade even further.

Kreitman eventually made it clear that he would not authorize taking Mack's testimony without definitive proof that Mack had foreknowledge of the GE acquisition of Heller in time to tip Pequot, which he referred to as being "over the wall."¹⁴¹ Kreitman said that establishing the date that Mack learned of the acquisition was, "the necessary pre-requisite to [issue] a subpoena to Mack."¹⁴²

Of course, Kreitman's view ignored the possibility that interviewing Mack might itself be an appropriate method of determining whether he had foreknowledge of the acquisition. Moreover, SEC

management did not generally impose any such hurdle to taking investigative testimony in other insider trading cases. Hilton Foster, a 30-year SEC veteran, was unaware of any such pre-requisite:

Question: [I]n your experience at the Commission, in all the insider trading cases that you have worked on before, has it ever been described to you that there should be a necessary prerequisite that you establish that a potential tipper had access to material non-public information before you take that potential tipper's testimony?

Mr. H. Foster: Well, no. But in this case that misses the point, because I think it was clear that Mack was in a position to know. Whether he did know or did not know, I don't know. But he was a player.

* * *

[Y]ou're not going to prove your case and then go talk to these people. I don't understand the justification for waiting.¹⁴³

Indeed, waiting until staff has established the date on which a potential tipper learned the non-public information before questioning that person might mean waiting forever, if the date is never established. Kreitman simply imposed an arbitrary requirement, which (1) was not required by any SEC policy; (2) was not endorsed by the Senior Attorney who conducted training on insider trading investigations; (3) created an artificially high bar for obtaining Mack's testimony; and (4) delayed that testimony indefinitely.

After Aguirre's allegations were under investigation, however, SEC managers (including Kreitman) claimed that the issue was not about *whether* to take Mack's testimony, but *when* to take it.¹⁴⁴ In other words, it was merely a question of timing, and the decision to take Mack's testimony had already been made. For example, Associate Director Paul Berger said the issue "wasn't . . . whether we were going to take Mack's testimony or not, because we had pretty much decided we were going to take the testimony."¹⁴⁵ The "necessary pre-requisite" and "not whether, but when" rationales are mutually exclusive. In the months after Aguirre was fired, when virtually no Mack-related investigative activity occurred, the "necessary pre-requisite" position appeared to have triumphed.

Nearly a year later, when the SEC revived the Mack inquiry following the public airing of Aguirre's allegations, the conflict re-surfaced. In July 2006, when SEC management was re-considering whether to take Mack's testimony, Aguirre's replacement as lead staff attorney, James Eichner, forwarded Kreitman's "necessary pre-requisite" e-mail to Robert Hanson with the comment, "I assume Walter has this—not premature, but prerequisite."¹⁴⁶ When asked about the e-mail, Eichner explained that he was referring to Deputy Director of Enforcement Walter Ricciardi and that this e-mail was in response to Ricciardi's view that Mack's testimony should be taken:

Walter had written a memo . . . about this issue, and he had said that it had been decided during Gary [Aguirre]'s tenure that taking Mack's testimony was premature. . . . [T]o him,

premature meant we were going to do it eventually and we just hadn't done it yet.

* * *

And so he felt like one reason to take Mack's testimony was that . . . he had written this memo . . . [that said] it was premature and . . . suggested we were going to take it. And so that . . . was an argument in favor of actually going ahead and taking testimony.

* * *

The others of us, myself, Bob Hanson, and Mark Kreitman, said, no, it wasn't. . . . [O]ur recollection was that it wasn't definitely decided it was premature, but that we decided we weren't going to do it unless and until we had evidence that Mack knew about the deal.¹⁴⁷

This directly contradicts what the OIG reported. According to the OIG's closing memo, "Hanson, Kreitman, Berger and Thomsen all said that the issue was not whether to take Mack's testimony, but when to take it, because they believed that it was premature to take Mack's testimony at the time Aguirre wanted to take it."¹⁴⁸

b. Mack's Testimony Should Have Been Taken Earlier

Two days after Morgan Stanley's Board of Directors hired Debevoise & Plimpton to vet John Mack, Debevoise partner Mary Jo White "summoned" John Mack from London on June 26, 2005, to answer questions on a Sunday. Gary Aguirre's supervisors at the SEC failed to ask Mack any questions until more than a year later. When asked by then-Chairman Specter why it took so long, Hanson asserted that Mack was questioned as soon as possible:

Sen. Specter: [W]hy did you wait until after the statute of limitations had expired to take Mr. Mack's testimony?

Mr. Hanson: We took Mr. Mack's testimony, as I described in my written statement, which I will ask to be made part of the record.

Sen. Specter: But that does not tell us why you waited until after the statute of limitations had expired.

Mr. Hanson: We got to it as soon as we could. The predicate to trying to figure out whether to take Mr. Mack's testimony or not was whether he had the information.¹⁴⁹

It simply isn't believable that the SEC questioned Mack, "as soon as [it] could." Were it not for the Kreitman-imposed pre-requisite of proving that he knew about the GE-Heller deal before Pequot began buying Heller on July 2, 2001, Mack's testimony could have been taken much earlier. Indeed, Kreitman was eventually overruled by more senior SEC officials. Given that his pre-requisite has no objective basis in law or practice, what then is the actual reason the SEC waited so long?

When Aguirre suggested questioning John Mack in the summer of 2005, Kreitman said that he and Aguirre's other supervisors "in-

structed him of the need for proper foundation to invoke compulsory process and that premature testimony would likely be fruitless because Mr. Mack could simply deny any illegal activity.”¹⁵⁰ Kreitman’s statement begs the question. What is the proper foundation for the SEC to require a witness to answer questions under oath? The purpose of investigative testimony is to gather information—not, as Kreitman claimed, to confront witnesses with evidence of wrongdoing. Therefore, the necessary pre-requisite for taking testimony is a reasonable basis to believe the witness has relevant information—not whether the SEC can prove that the witness violated the law. Seeking testimony is not an accusation.

Hanson and Kreitman implicitly admitted this basic truth by their practice in approving subpoenas issued for other witness testimony in the Pequot investigation. For example, on one occasion, Aguirre provided a list of proposed subpoenas for 27 witnesses. According to Aguirre, his supervisors did not ask for evidence that the 27 individuals had access to material, non-public information.¹⁵¹

However, when it came to Mack, Aguirre’s supervisors required a much higher hurdle. There were extensive questions and deliberations. Aguirre was required to write memo after memo laying out the reasons that Mack should be questioned. This requirement appears to be extremely rare. For example, Hilton Foster couldn’t recall it ever occurring:

Question: In your time with the SEC, how many subpoenas have you been involved in issuing? Thousands?

Mr. H. Foster: Hundreds. Thousands. A whole bunch.

Question: And of all those subpoenas, how frequently—what percentage of those do you think you required that there be a memo drafted to justify—and I’m talking about document subpoenas and subpoenas for testimony. That you required there be a memo drafted by the staff to justify the reason for issuing the subpoena that would go up the chain of command to managers at the SEC?

Mr. H. Foster: I can’t remember any.

Question: Never?

Mr. H. Foster: That’s make-work. I mean, if you have—if somebody wants to know why you need the subpoena, you go and you sit down and you talk to them. I need it because of this, this, and this.¹⁵²

When Paul Berger was asked if he had ever required a memorandum to justify a subpoena for witness testimony, he could recall an example from another case, but it had something in common with the Mack request, which Berger noted in his answer:

Question: So you don’t recall whether [a memo was required] in order to get permission to issue a testimonial subpoena?

Mr. Berger: Well, we were talking about taking some testimony from individuals fairly prominent, a Senator or a former Senator, and some other individuals, and we wanted to see what we had. So I think that—I remember reading something in ad-

vance of the testimony that would support—that supported taking their testimony.

Question: You mentioned prominence just now.

Mr. Berger: Uh-huh.

Question: Is it the case that you're more likely to require a memo such as this in a case where the proposed testimony is of someone prominent?

Mr. Berger: No, I don't think so. We've done this, we've done memos in advance of people that no one would know.

Question: Can you give us an example?

Mr. Berger: Not off the top of my head.

Question: Can you get back to us on that?

Mr. Berger: I can think about it. I mean, I was there for 14 years. I was probably involved in maybe a thousand investigations, brought 400 or so investigations. I mean, that's a lot of people.

Question: Why did you mention prominence just now, though?

Mr. Berger: I don't know why I mentioned prominence.¹⁵³

Subsequent to his interview, Berger failed to provide any examples where he required staff to draft a memo to justify taking the testimony of a non-prominent witness.

c. Political Clout or Prominence?

On several occasions, Gary Aguirre cited Mack's campaign contributions when discussing how he interpreted Hanson's statement about Mack's "powerful political connections." For example, in his written submission to the Judiciary Committee, Aguirre included a footnote extensively documenting Mack's fundraising for President Bush.¹⁵⁴ Aguirre pointed to Mack's status as a "Bush' Ranger, meaning he raised at least \$200,000 for the President during the 2004 presidential campaign."¹⁵⁵ The implication that Mack's fundraising for Republicans was somehow related to the decision to block the SEC from taking Mack's testimony permeated the press coverage of Aguirre's allegations.

However, in our investigation, we found no evidence that such an explicitly partisan consideration played any role in the resistance to questioning Mack. Aguirre's supervisors testified that they were unaware of Mack's political contributions until the press published stories about Aguirre's allegations, and none of the documents we examined contradicted that testimony. While Mack has primarily donated to Republicans, he has contributed to Democrats as well. For example, over the last five years, he reportedly gave "\$10,000 to four Democratic congressional hopefuls, including [Hillary] Clinton."¹⁵⁶ Mack is now raising money for Senator Clinton's presidential campaign. Just recently, Mack invited senior staff to a Clinton fundraiser "on the 41st floor of Morgan Stanley's headquarters in Times Square" and urged them to give \$4,600 each, "the maximum for the 2008 presidential campaign."¹⁵⁷

Evidence we reviewed suggests that the reluctance to question Mack represents a much more subtle and pervasive problem than an individual partisan political favor. SEC officials were overly deferential to Mack—not because of his politics—but because he was an “industry captain” who could hire influential counsel to represent him. Aguirre wrote to Hanson in August 2005, “You told me that Mack was ‘an industry captain,’ that he had powerful contacts, that [Former U.S. Attorney] Mary Jo White, [Former Enforcement Director] Gary Lynch, and others would be representing him, that Mary Jo White could contact a number of powerful individuals, any of whom could call [Enforcement Director] Linda [Thomsen] about the examination.”¹⁵⁸ Hanson’s e-mails confirm that he was concerned about direct contacts between senior SEC officials and influential outside counsel. He wrote to Aguirre, “Mack’s counsel will have ‘juice’ as I described last night—meaning that they will reach out to Paul [Berger] and Linda [Thomsen] (and possibly others).”¹⁵⁹

Mack’s Wall Street prominence and ability to hire prestigious counsel appears to have been the driving force behind treating him with undue deference. However, we found no evidence that Mack himself had a hand in preventing or delaying his testimony. The SEC has a duty to conduct a vigorous investigation and to treat prospective witnesses equally under the law. The evidence suggests that the bar for taking other testimony in the Pequot investigation was considerably lower than it was for Mack. If he were a mid-level trader instead of the head of Morgan Stanley, it seems likely that a subpoena would have issued in short order with little or no interference from Aguirre’s supervisors. Unfortunately, we have received anecdotal reports that the sort of deference Mack received is not uncommon. It is reportedly driven by a perception within the SEC, which Hanson alluded to in his e-mail, that investigations involving prominent individuals can be slowed or halted by contacts from outsiders with direct access to the most senior SEC officials. By allowing the perception that “going over the head” of SEC staff attorneys yields results, the SEC undermines public confidence the integrity of its investigations and exacerbates the problems associated with “regulatory capture.”¹⁶⁰

5. The SEC Fires its Lead Investigator

On August 24, 2005, while Aguirre was away on vacation, Kreitman sent Paul Berger an e-mail suggesting that the SEC terminate Aguirre’s employment. Kreitman captioned the e-mail, “Gary and Pequot.” This e-mail was appended to a series of Aguirre’s earlier e-mails labeled, “Mack Testimony.”¹⁶¹

Approximately one week later, in a memorandum dated September 1, 2005, the SEC terminated Gary Aguirre’s employment.¹⁶² The termination became effective at the close of business on September 2, 2005—a mere five days shy of the end of Aguirre’s one-year probationary period. According to the memorandum, the termination was based upon Aguirre’s “demonstrated inability to work effectively with other staff members and [his] unwillingness to operate within the Securities and Exchange Commission (SEC) process.”¹⁶³ Though the memorandum represents that it is from Enforcement Director Linda Thomsen, it is initialed by Paul Berger.

D. The Investigation Shifts Focus

1. Attempts to Identify other Potential Tippers/Tippees

After Aguirre's supervisors interfered with his efforts to take John Mack's testimony and fired him, the investigation changed focus. James Eichner, a staff attorney in the Enforcement Division newly assigned to the Pequot case, suggested "broadening our focus from Samberg to Pequot as a whole."¹⁶⁴ Eichner recommended searching for a potential recipient of the inside information (or tippee) other than Samberg, even though Samberg testified that he directed the trades without consulting anyone else. Eichner recommended three steps: (1) have each person who knew about the deal at the five investment banks and GE-Heller identify who they knew at Pequot at the time of the deal, (2) search all Pequot e-mail to everyone at the five investment banks and GE-Heller, and (3) try to identify anyone at Pequot who got promoted soon after the GE-Heller deal. These proposed steps failed to identify any leads suggesting other likely recipients or sources of information about the acquisition.

In addition to searching for other possible tippees, the SEC also began looking for other possible tippers. Even before Aguirre left, he drafted a subpoena to CSFB aimed at identifying other potential tippers. The SEC issued the subpoena on September 1, 2005, just as Aguirre was being fired. On October 6, 2005, the SEC issued another subpoena to Pequot, also aimed, as Eichner explained, at identifying potential sources of inside information other than John Mack:

The purpose of that subpoena was we had started to get into the Microsoft transaction, and the person who we believed was the tipper in that was David Zilkha, and he had gone from Microsoft to Pequot. . . . [W]e had a theory that Samberg was wooing Zilkha to get information from him about Microsoft. And so it seemed that maybe there had been a similar dynamic in play in regard to GE/Heller or other companies . . . that Samberg was trying to hire people who had information about companies they came from . . . then used those to get inside information. And so we subpoenaed Pequot for all of its new hires for some period, . . . and we looked hard at the people whose names were identified to see if we could find a potential tipper for GE/Heller.¹⁶⁵

As with Eichner's other proposals, this effort produced no significant leads:

Question: Did you ever take any of the testimony of any of those people, that is, suspected tippers?

Mr. Eichner: We didn't take the testimony because we couldn't find enough of a connection, but we actually—I spent a fair amount of time working up those leads and trying to find connections between those people and the entities—the entities that were involved in the deal and Pequot. . . . [W]e couldn't find anyone who—we couldn't place them with the information, and we couldn't find anything that suggested that they had provided the information. So, unfortunately, it seemed like a good idea,

and I spent a fair amount of time on it, but it didn't pan out.¹⁶⁶

These unsuccessful efforts in the fall of 2005 appear to be the end of any serious SEC attempt to pursue Pequot's suspicious trading in advance of the GE-Heller acquisition.

2. *Dropping the Microsoft Trades*

When we initially asked the SEC in early 2006 whether it was pursuing the GE-Heller aspects of the Pequot investigation after having fired Gary Aguirre, the SEC said that the investigation had shifted to focus on the Microsoft trades as more likely to lead to an enforcement action.¹⁶⁷ Given this statement and the draft Wells notice, the SEC appeared to be on the verge of an enforcement action. Eichner wanted to share the draft Wells notice with prospective defendants for the purpose of extracting an agreement to extend the statute of limitations.¹⁶⁸ The SEC, Pequot, Samberg, and Zilkha agreed to extend the statute of limitations for any SEC enforcement action.¹⁶⁹

However, the SEC never filed an enforcement action. Therefore, we sought to determine what changed and why. When asked why the Microsoft case never progressed, SEC Enforcement Assistant Director Mark Kreitman said the case weakened because of two factors: (1) Zilkha was an unreliable witness, and (2) Goldman Sachs had provided some of the same information to Pequot that Zilkha had, before publishing it in an analyst report.¹⁷⁰ According to Kreitman, these two reasons served to dampen what had previously been pretty significant interest by the U.S. Attorney in the Microsoft trading:

They lost interest as soon as they got a taste of Zilkha, unfortunately. They were very enthusiastic at first, and that's what Gary [Aguirre] got the big Perry [Mason award] for, his presentation to the U.S. Attorney, getting them interested in Microsoft. . . . So, we lost the support of the U.S. Attorney in the case, and I think rightfully so. I think it became a civil case you couldn't try, much less a criminal case.¹⁷¹

Moreover, Kreitman suggested that Eichner's draft Wells notice was premature and suggested that Eichner's plan to use the draft to encourage defendants to enter an agreement as to the statute of limitations was somehow inappropriate.¹⁷²

E. The Universe Shifted: Returning to the GE-Heller Trades

1. *The Decision to Finally Question John Mack*

After firing Aguirre, the Enforcement Division appeared to lose interest in John Mack until the Pequot investigation became public. With the exception of a single subpoena issued on the effective date of Aguirre's termination, the SEC did virtually nothing to investigate John Mack as the potential tipper in Pequot's GE and Heller Financial trading. Only after the *New York Times* printed Aguirre's allegations and he testified before the Senate Judiciary Committee did the SEC begin to re-evaluate Mack as the potential tipper in June 2006.¹⁷³

As it became clear that the SEC would have to answer more detailed questions about its handling of the case, it took the testimony of two CSFB executives who had recruited John Mack. Taking their testimony was the SEC's first step toward preparing to take Mack's testimony in the nine months since Aguirre was fired. As Eichner described it:

Mr. Eichner: [I]n June the *Times* article came out about all of this. And so after that, there was a discussion—I mean, *the universe sort of shifted* a little bit, and so after that there were discussions about sort of . . . what more needed to be done on the case and what should be done[.]

* * *

Question: And so was that testimony [of CSFB executives] in preparation—the purpose of that testimony was to prepare for the John Mack testimony?

Mr. Eichner: It was a precursor. I mean, it was supposed to be—yes, it was supposed to help us. . . . So that was the sole purpose of those two gentlemen, was sort of to explore this issue about whether Mack got the information in their recruitment period.

The way in which the SEC approached the testimony of these CSFB executives does not suggest that it was taken very seriously. For example, Mark Kreitman did not assign an attorney to take the testimonies until less than two days before they were scheduled.

On Monday, July 24, 2006, Kreitman asked Staff Attorney Liban Jama to take the testimonies, which were scheduled for following Thursday, July 27, 2006. Jama was uncomfortable with the request and sent a carefully worded e-mail to Kreitman around noon on July 24, asking that someone else be assigned to the task:

[G]iven the critical nature of the testimony that is to be taken, the lack of preparatory time for the testimony . . . and my lack [of] specific knowledge of the record regarding this portion of the investigation, I would not feel comfortable taking the testimony this Thursday. . . . [I]f I was given a sufficient period of time to familiarize myself with the documents . . . and sufficient preparatory time . . . I would be willing to pitch in. My goal, as always, is to do [a] complete and thorough job on any matter.¹⁷⁴

In his interview with Senate staff, Jama described his conversations with his colleagues about the request:

I don't remember who I spoke to. I know I talked to other folks just to say, in general . . . I got a request to take some testimony and I have . . . a day-and-a-half. . . . I do remember saying, "Is a day and a half enough time, in your opinion, if you haven't been involved?" "No" was the universal response.¹⁷⁵

By contrast to his colleagues, Jama described Kreitman's attitude toward taking this "critical" testimony as oddly nonchalant:

He said, “You don’t need to prepare that much for it,” which I found to be strange, and I relayed that to folks. So, yeah, he didn’t feel like I needed to be prepped, . . . which I thought was unusual in my mind.

* * *

I just thought it was an unusual request to make of me—and, quite frankly, unfair. I thought he put me in a difficult position.¹⁷⁶

Following Jama’s e-mail, Kreitman re-assigned the duty to James Eichner. Eichner took the testimony of the two CSFB executives and, on August 1, 2006, he took John Mack’s testimony.

When asked why the Enforcement staff failed to pursue investigative leads on Mack sooner, Eichner, stated:

After the events of the previous fall, we hadn’t really focused on him as—we had not focused on him as a tipper or as a potential tipper. We were focusing on other things. So there was a—once there was a lack of evidence that he had information, he ceased to be a primary focus of the investigation.¹⁷⁷

The five-year statute of limitations for any Department of Justice criminal enforcement action against Pequot, Samberg, and Mack expired on or around July 27, 2006, leaving only the potential for the SEC to obtain other remedies such as disgorgement.¹⁷⁸ When the SEC finally did take Mack’s testimony on August 1, 2006, it did so five days *after* the statute of limitations period applicable to civil and criminal penalties expired.

2. *Unasked Questions: The Mack Transcript*

During the interview with the SEC, Mack, among other things, denied having any foreknowledge of the GE acquisition of Heller until after he began working at Credit Suisse First Boston on or around July 13, 2001—nearly two weeks after Samberg began purchasing large volumes of Heller stock, and about two weeks before the public announcement of the deal.

During his August 1, 2006 testimony, Mack claimed that Samberg had asked him to invest in an opportunity called “Fresh Start” because Pequot could not invest anymore than it already had.¹⁷⁹ However, e-mail exchanges between Samberg and others at Pequot suggest that the courtship was in the other direction. In short, according to Pequot e-mails, Mack was “busting chops” to invest in Fresh Start and some were unhappy that Samberg allowed him to do so. Eichner did not inquire about this apparent contradiction, nor did the SEC seriously test the Aguirre’s theory that investment in Fresh Start was a reward for inside information. For example, the SEC did not determine whether Mack’s participation in Fresh Start diluted Pequot’s profits or whether Pequot faced some limitation on the amount it could invest in the deal and genuinely needed additional capital from Mack. Although Mack testified to the SEC that he “doubled” his money in the Fresh Start deal,¹⁸⁰ it appears more accurate that he more than tripled his \$5 million investment. None of the SEC investigators who testified before the Judiciary Committee or in interviews with staff have refuted this

fact which tends to suggest a potential motive for Mack to tip Samberg about the GE acquisition of Heller.

F. The SEC's Case Closing Report

On November 30, 2006, the SEC Division of Enforcement issued a Case Closing Report ("Report") in the Pequot investigation.¹⁸¹ The seven-page Report describes the SEC's findings related to: (1) insider trading ahead of the GE acquisition of Heller, (2) insider trading in Microsoft, (3) insider trading in AstraZeneca and Par Pharmaceutical, (4) Pequot's Private Investment in Public Equities ("PIPES"), and (5) concerns about potential market manipulation through wash sales.

1. GE-Heller

The SEC investigation into Pequot's GE-Heller trades had three primary phases: (1) summer of 2005, (2) September 2005 through December 2005, and (3) June 2006 until the investigation was closed on November 30, 2006. During the period from December 2005 through June 2006, "the focus of the insider trading case shifted to Microsoft, where it remained until June 2006."

Aguirre was the lead SEC investigator on the case during the first period. The closing memo describes this period as follows:

Emails . . . suggest that Mack spoke by telephone with Samberg about a potential investment the night of Friday, June 29, 2001, the business day before Pequot began purchasing Heller, but that the conversation related to an unrelated non-public company.^[182] Credit Suisse First Boston . . . an investment adviser to Heller in the transaction, hired Mack as its CEO on July 12, 2001, ten days after Pequot began to buy Heller stock. However, counsel for CSFB advised the staff that the CFO of CSFB who met with Mack before Mack joined CSFB did not have deal information on specific pending deals on which CSFB was working.¹⁸³

The Report indicates that Mack could not have learned about the deal from the Chief Financial Officer of CSFB and leaves the impression that the CFO was his only potential source of information. In fact, there were other potential sources of information whom the SEC never interviewed and whom the Report never mentions.

In the months after Aguirre was fired, SEC Enforcement staff took no testimony concerning the GE-Heller trades. After Aguirre's allegations were publicized in June 2006, however, the SEC Enforcement staff reversed course. Beginning in late July, "the staff took the testimony of two CSFB employees, a former CFO and a company lawyer, who were both involved in recruiting Mack."¹⁸⁴ Both witnesses denied knowing about the GE acquisition of Heller before it was publicly announced and both denied telling Mack anything about it.¹⁸⁵ On August 1, 2006, SEC staff took John Mack's testimony. Mack "denied knowing about the merger before he became CSFB's CEO in mid-July 2001 and denied having any discussions with Samberg or anyone else at Pequot about the merger before it was announced."¹⁸⁶ Finally, on September 8, 2006, SEC Enforcement staff "took the testimony of an analyst at a brokerage

firm who provided . . . coverage on Heller during the relevant time period, appeared to have met with Pequot in June 2001 shortly before Samberg started buying Heller, and went to work at Pequot in early 2002.”¹⁸⁷ Once more, the witness denied having any inside information and the SEC found nothing to contradict him.

The case closing report concludes its analysis of the GE-Heller trades by finding, among other things, that “it is extremely unlikely that Mack tipped Samberg about the merger between GE and Heller, having found no evidence that Mack knew about the merger before Samberg started purchasing Heller stock.”¹⁸⁸ How hard did the SEC look for such evidence? Significantly, the case closing report fails to mention Mack’s trip to Switzerland on June 26-28, 2001, to meet with Credit Suisse officials about the prospect of Mack accepting a position as CEO of CSFB. This was the period just before he spoke with Samberg and was let in on the Fresh Start deal. During his August 1, 2006, testimony, Mack confirmed that a copy of his Swiss trip itinerary indicated that he met with other Credit Suisse personnel who may have had knowledge of the GE-Heller deal.¹⁸⁹ During the Judiciary Committee’s December 5, 2006, hearing, then-Chairman Specter asked Mr. Hanson about Mack’s trip to Switzerland:

Sen. Specter: Was Mr. Mack questioned about that, Mr. Hanson?

Mr. Hanson: Of course.

Sen. Specter: And what did he say?

Mr. Hanson: That the information that Mr. Aguirre alleged or speculated that Mr. Mack may have had was so far down in the weeds for Mr. Mack.

Sen. Specter: So far down in the weeds?

Mr. Hanson: It was so far removed from what he was doing with respect to negotiating with CS First Boston [sic] that it had no relevance to him. Not only that, but the people from CS First Boston that we talked to and received e-mails from said that there is no possible way that they had the information, let alone passed it on to Mr. Mack.

However, the SEC did not question the individuals from Credit Suisse who met with Mack during that trip. While on the trip, Mack met with numerous Credit Suisse officials and discussed various management issues.¹⁹⁰ Mack denied receiving any information concerning the GE-Heller deal during any of the many meetings with named Credit Suisse representatives. However, at one point during Mack’s testimony he was asked the following question and gave the following answer:

Question: During that trip to Switzerland in 2001 or any of the contacts you had with representatives of Credit Suisse or First Boston, up until the time you began work, did anyone convey any information to you about a transaction involving GE and Heller?

Mr. Mack: Not that I remember.¹⁹¹

Mack was hired as the CEO of CSFB during the second week of July 2001. Shortly thereafter, Mack believes a CSFB banker named Bob Clymer must have told him about the upcoming GE-Heller deal.¹⁹² When asked whether he knew of the deal prior to its public announcement on July 30, 2001, Mack testified, "I'm sure I knew about the trade; yes."¹⁹³

The most significant aspect of the Mack testimony is his acknowledgement that he went to Switzerland to discuss becoming CSFB's CEO from July 26-28, 2001. While there, Mack met with senior representatives of Credit Suisse—CSFB's parent company. In view of the fact that Mack also spoke with Samberg immediately upon his return to the United States on July 29, 2001, the trading day before Samberg began heavily betting on Heller Financial stock, and on the same night Mack was permitted into a lucrative deal, there was more than a sufficient basis to justify taking Mack's testimony in the summer of 2005.

2. *Microsoft*

Despite the evidence, the SEC closed the Microsoft investigation and discounted the trades as unworthy of an enforcement action. Among other things, the SEC cited the unreliability of Zilkha as a witness. It is unclear, however, why a case would be harder to make rather than easier if one of the potential defendants lacked credibility. The SEC also cited the fact that other Microsoft-related information was in the marketplace and could theoretically have spurred Samberg's trades and the fact that Goldman Sachs provided Pequot early access to information on Microsoft that it later published in an analyst's report, which may have been the basis of Pequot's trading rather than information from Zilkha. Nevertheless, James Eichner indicated just before the SEC issued its Case Closing Report his continued belief that Pequot had done something improper if not technically illegal in its Microsoft trading:

[M]y opinion was certainly that Samberg thought he was getting inside information and trading on it. That was my opinion and continues to be my opinion. . . . I think Samberg thought he was committing insider trading, but it's not clear that he was, in fact, committing insider trading.

* * *

[A]t the end, you know, when I was trying to get my ducks in a row on materiality and a couple other things, it kind of fell apart. But then we thought, well, they got this Goldman stuff, too, and that looks bad so let's look at that. Maybe they traded based on both the Zilkha tip and the Goldman thing. So then we did the Goldman piece, and then that turns out not to be—you know, it turns out to be Goldman policy [to provide certain clients advanced access information in unpublished analyst reports] and not illegal.

* * *

[I]t seems terribly unfair to me[.] . . . [W]hat I learned from this whole thing is that, you know, people at Pequot, they get a lot of good information from a lot of sources that allows them

to make money. And, you know, it's no wonder a lot of these hedge funds do really well. I mean, they give Goldman tons of money in brokerage commissions, and Goldman gives them the best information, and the poor schmoe out there, that is a tough hurdle, but, you know, it's not against the law, and that's the limit of our authority. . . . I don't speak for the SEC on this, but, I mean, I think Samberg committed insider trading on Microsoft[.]

* * *

I mean, I came to agree at the end that—what I'm saying is I think if you asked me in my heart of hearts, hold a gun to my head, did he do it or not, I would say yes. But I don't—I mean, I don't think we could try this case. You know, I don't think we could win the case[.]¹⁹⁴

If Eichner's assessment is accurate, then perhaps these circumstances illustrate a need to consider whether changes in the law are necessary to ensure a more even playing field in our public markets. In any event, given the apparently inculpatory e-mails from Samberg telling Zilkha, (e.g. "I shouldn't say this, but you have probably paid for yourself already!") it is difficult to understand why the SEC would not, at bare minimum, invite Pequot, Samberg and Zilkha to respond to a Wells notice.

3. *AstraZeneca and Par Pharmaceutical*

In its closing memo, the SEC described its reasoning for ultimately deciding not to pursue further investigation into the AstraZeneca and Par Pharmaceutical trades: "It seems unlikely that Pequot had inside information about the court decision because it made investment decisions contrary to that information in the weeks leading up to the decision."¹⁹⁵ Specifically, the SEC contends that Pequot bought Par after it bought AstraZeneca, which it would not have done had it been tipped about the outcome of the patent case.

However, this contention ignores the information included in the SEC's own formal order memorandum that there were two potential insider trading events rather than just one: (1) a September earnings announcement, that caused Par stock to rise suddenly, and (2) the October court decision which caused Par stock to fall suddenly. The analysis in the SEC's closing memo neither addresses nor acknowledges the first event. Instead, the memo claims that, "staff's initial inquiry presented an incomplete and *misleading* picture of Pequot's trading in the stocks of Astra and Par."¹⁹⁶ While the description of the trades in the formal order of investigation adopted by the SEC may have been incomplete, as one would expect at the outset of an investigation, we found no evidence that the description was misleading. In fact, one could argue that the SEC's closing memo was itself misleading in its use of Pequot's September purchases of Par to excuse the October sales. The SEC does not reference the fact that the September purchase preceded a positive earning report or that it was a separate instance of potential insider trading for investigation. Nor does the SEC explain

why it presumably concluded that the September purchases were not themselves insider trading.

G. Conclusion

The investigation of Pequot Capital Management could have been an ideal opportunity for the SEC to develop expertise and visibility into the operations of a major hedge fund while deterring institutional insider trading and market manipulation through vigorous enforcement. Instead, the SEC squandered this opportunity through a series of missteps, including (1) unnecessary delays, (2) understaffing, (3) excluding many of the suspicious transactions, (4) allowing inadequate and untimely document production, (5) disclosing case information to John Mack's prospective employer, Morgan Stanley, and (6) preventing the staff from questioning Mack until after the statute of limitations had expired.

As will be discussed in the next section, Associate Director Paul Berger contacted Debevoise & Plimpton about potential employment just days after he initialed Aguirre's termination notice. Even though Debevoise had represented Mack's employer, Morgan Stanley, Berger did not recuse himself until four months later, in early 2006. Although Robert Hanson testified that the SEC took Mack's testimony, "as soon as we could," it appears that the SEC did very little to investigate Mack's potential role in the period between Aguirre's firing in September 2005 and Berger leaving the Commission in the spring of 2006.

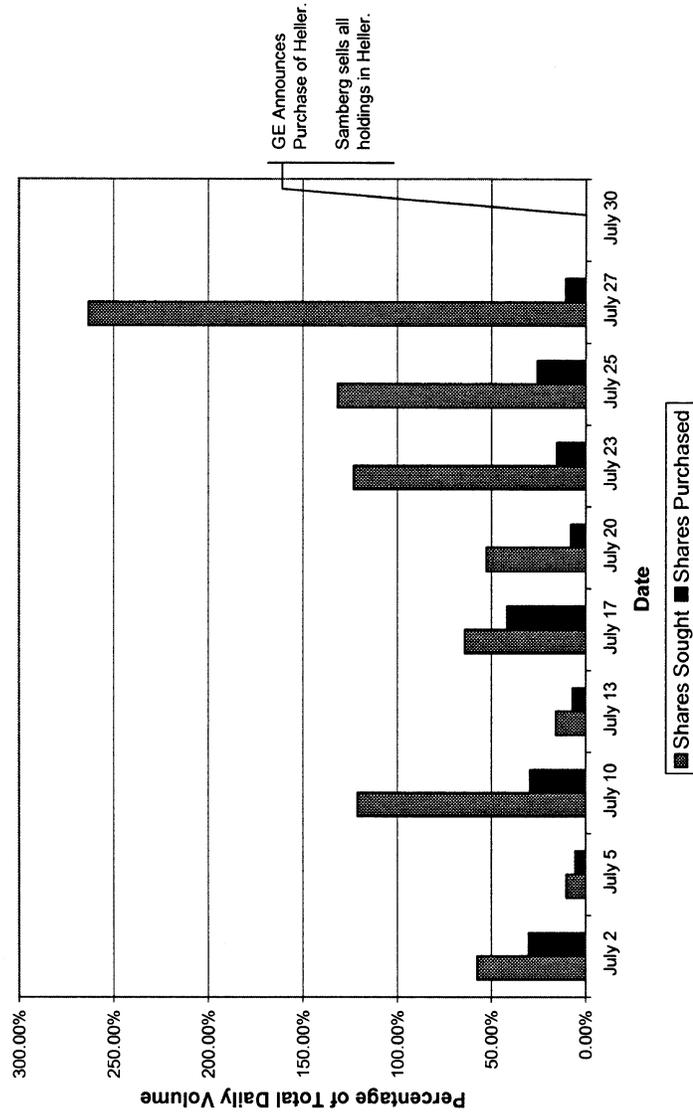
Figure 1

Date	Buy Heller or Short GE	Shares Sought	Shares Purchased	Daily Total Volume	Shares Sought as % of Daily Volume	Shares Purchased as % of Daily Volume
July 2	Buy Heller	223,700	118,000	388,900	57.52%	30.34%
July 3	Buy Heller	101,100	77,200	271,800	37.20%	28.40%
July 5	Buy Heller	18,100	10,000	175,400	10.32%	5.70%
July 9	Buy Heller	15,000	15,000	149,000	10.07%	10.07%
July 10	Buy Heller	455,300	110,900	375,600	121.22%	29.53%
July 11	Buy Heller	336,500	91,400	158,200	212.71%	57.77%
July 12	Buy Heller	242,300	101,300	485,100	49.95%	20.88%
July 13	Buy Heller	111,900	50,000	709,900	15.76%	7.04%
July 17	Buy Heller	287,500	187,500	448,300	64.13%	41.82%
July 18	Buy Heller	90,100	50,000	174,600	51.60%	28.64%
July 19	Buy Heller	55,600	30,000	264,700	21.00%	11.33%
July 20	Buy Heller	508,100*	75,000	963,700	52.72%	7.78%
July 23	Buy Heller	480,400	60,400	389,800	123.24%	15.50%
July 24	Buy Heller	418,500	38,500	221,600	188.85%	17.37%
July 25	Buy Heller	373,300	73,000	283,600	131.63%	25.74%
July 25	Short GE	766,600				
July 26	Buy Heller	302,900	50,000	416,600	72.71%	12.00%
July 26	Short GE	385,200				
July 27	Buy Heller	243,900	10,000	92,700	263.11%	10.79%
July 27	Short GE	385,500	20,000			
July 30	GE announces purchase of Heller Financial.					
July 30	Samberg sells all holdings—1,148,200 shares—of Heller Financial.					
August 1	Samberg covers his short sells of GE.					

* Likely value. Trader notes were somewhat unclear.

Figure 2

Samberg's Trades in Heller in July 2001



ENDNOTES

1. SEC 7209, Arthur Samberg, Chief Executive Officer, Pequot Capital Management, Inc., testimony (May 3, 2005) (Exhibit 1).
2. *Id.* at SEC 7242.
3. *Id.* at SEC 7245-46, 7249.
4. *Id.* at SEC 7250.
5. *Id.* at SEC 7272.
6. Nikhil Deogun, *GE Capital to Acquire Heller Financial*, WALL ST. J., July 30, 2001, at A3.
7. “Short selling” or “shorting” is a way to profit from the decline in price of a security. Usually, investors “go long” on an investment, meaning they purchase shares in hopes that the price will rise. To profit from the stock price going down, short sellers borrow a security and sell it, expecting that it will decrease in value so that they can buy it back at a lower price and keep the difference.
8. SEC 7267, Samberg testimony (May 3, 2005) (Exhibit 1).
9. *Id.* at SEC 7272.
10. Memorandum from Walter G. Ricciardi to file (June 15, 2006) (Exhibit 2).
11. SEC 7159-62, NYSE Advisory Memorandum to the SEC (Jan. 30, 2002) (Exhibit 3).
12. SEC 7266, Samberg testimony (May 3, 2005) (Exhibit 1).
13. *Id.* at 7268-69 (describing Heller’s ten percent growth rate, “the attractiveness of the franchise,” and several other factors).
14. *Id.* at 7269.
15. *Id.* at 7272.
16. *Id.* at 7274.
17. Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity, 2006: Hearing Before the Senate Comm. on the Judiciary, S. HRG. 109-898, at 708 (Dec. 5, 2006) (hereinafter “S. HRG. 109-898”).
18. SEC 7159-62, NYSE Advisory Memorandum to the SEC (Jan. 30, 2002) (Exhibit 3).
19. S. HRG. 109-898, at 966 (Foster Tr.).
20. *Id.* at 544 n.182.
21. *Id.* at, at 1103-04 (Ribelin Tr.).
22. Transcribed Interview with Paul Berger, Associate Director of Enforcement Division, SEC, at 74-75 (Nov. 2, 2006) (Exhibit 4) (hereinafter “Berger transcript (Nov. 2, 2006)”; Transcribed Interview with Mark Kreitman, Assistant Director, Division of Enforcement, SEC, at 17-18 (Sept. 6, 2006) (Exhibit 5) (hereinafter “Kreitman transcript (Sept. 6, 2006)”).
23. S. HRG. 109-898, at 193, 314 (May 9, 2005 e-mail from Gary Aguirre, May 3, 2005 e-mail from Eric Ribelin: “It’s my strong belief that gary needs the assistance of another attorney. Hilton is on his way out fast and gary is absolutely swarmed under”).
24. See, General Accounting Office, *SEC Operations: Increased Workload Creates Challenges*, GAO 02-302 (Mar. 2002).
25. See, S. HRG. 109-898 at 337 (SEC Case Closing Report n.12) (noting, *inter alia*, “Section 9(a)(1) of the Exchange Act prohibits certain manipulative practices, including wash sales and matched orders, when such transactions are done for the purpose of creating the false or misleading appearance of active trading in a security listed on a national securities exchange, or a false or misleading appearance with respect to the market for any such security”).
26. S. HRG. 109-898 at 337 (SEC Case Closing Report at 5) (emphasis added).
27. See S. HRG. 109-898, at 337 (SEC Case Closing Report at 5).
28. Transcribed Interview with Robert Hanson, Branch Chief, Division of Enforcement, SEC, at 132-34 (Nov. 9, 2006) (hereinafter “Hanson transcript (Nov. 9, 2006)”) (Exhibit 6).
29. SEC 0753, Memorandum from Tom Conroy to file (Aug. 3, 2005) (Exhibit 7).
30. An “agency cross” is a trade that has only one agent acting for both the buyer and the seller.
31. SEC 0753, Conroy memo (Aug. 3, 2005) (Exhibit 7).
32. SEC 0753, Conroy memo (Aug. 3, 2005) (Exhibit 7).
33. *Id.* (emphasis added).
34. SEC 4919-23, Memorandum from Craig Miller, Tom Conroy, and Eric Ribelin to file (Nov. 14, 2005) (Exhibit 8).
35. SEC 4919-23, Miller, Conroy, and Ribelin memo (Nov. 14, 2005) (Exhibit 8).
36. *Id.* at 4919.
37. *Id.*

38. *Id.* (emphasis added).
39. *Id.*
40. *Id.* at 4920.
41. *Id.* at 4923.
42. *Id.*
43. SEC 4924, E-mail from Joseph Cella to Larry Bergmann and James Brigagliano (Nov. 4, 2005) (Exhibit 9).
44. *Id.*
45. *Court Finds that two Prilosec® Formulation Patents are Valid—3 of 4 Defendants Found to Infringe*, PR NEWSWIRE ASSOCIATION, Oct. 14, 2002.
46. S. HRG. 109-898, at 336 (SEC closing memo, Nov. 30, 2006).
47. Memorandum from the Division of Enforcement to the Commission (Dec. 16, 2004) (Exhibit 10).
48. S. HRG. 109-898, at 336 (SEC closing memo, Nov. 30, 2006).
49. E-mail from Gary Aguirre to Richard Grime and Charles Cain (Nov. 1, 2004), e-mail from Gary Aguirre to Hilton Foster (Nov. 2, 2004) (Exhibit 11).
50. E-mail from Charles Cain to Aguirre (Nov. 1, 2004) (Exhibit 11).
51. S. HRG. 109-898, at 336 (SEC closing memo, Nov. 30, 2006).
52. Transcribed Interview with James Eichner, Attorney, Division of Enforcement, SEC, at 48-53 (Nov. 14, 2006) (hereinafter “Eichner transcript (Nov. 14, 2006)”) (Exhibit 12).
53. See SEC 2868-76 (Exhibit 13). According to one authority, “[t]he ‘Wells submission’ process represents a critical phase in SEC investigations. These submissions provide prospective defendants the opportunity to dissuade the SEC from bringing formal actions against them; likewise, the Commission and its staff rely upon the arguments contained in these submissions when making their charging decisions.” Joshua A. Naftalis, *Wells Submissions’ to the SEC as Offers of Settlement Under Federal Rules of Evidence 408 and their Protection from Third-Party Discovery*, 102 COLUM. L. REV. 1912, 1912 (2002).
54. See Transcribed Interview with Mark Kreitman, Assistant Director, Division of Enforcement, SEC, at 81 (Nov. 15, 2006) (hereinafter “Kreitman transcript (Nov. 15, 2006)”) (Exhibit 14).
55. Eichner transcript, at 48-49 (Nov. 14, 2006) (Exhibit 12); Kreitman transcript, at 65-66 (Nov. 15, 2006) (Exhibit 14).
56. Eichner transcript, at 51 (Nov. 14, 2006) (Exhibit 12) (noting his “opinion was certainly that Samberg thought he was getting inside information and trading on it. That was my opinion and continues to be my opinion.”).
57. SEC 2868-69 (internal numbering omitted) (Exhibit 13).
58. *Id.* at SEC 2871 (emphasis added, internal numbering omitted).
59. S. HRG. 109-898, at 601.
60. *Id.* at 562, 601. See also SEC 3875 (Exhibit 16).
61. S. HRG. 109-898, at 266. See, 15 U.S.C. 78q(b).
62. SEC 5653-57, e-mail to Eric Ribelin (Feb. 25, 2005) (Exhibit 15)
63. SEC 3875 (Exhibit 16).
64. S. HRG. 109-898, at 579.
65. *Id.* at 562.
66. *Id.* at 601.
67. SEC 3875 (Exhibit 16).
68. *Id.*
69. Berger transcript, at 71-73 (Nov. 2, 2006) (Exhibit 4); see also Kreitman transcript, at 56 (Sept. 6, 2006) (Exhibit 5).
70. Kreitman transcript, at 56 (Sept. 6, 2006) (Exhibit 5).
71. *Id.* at 60-61.
72. S. HRG. 109-898, at 30, 33.
73. Kreitman transcript, at 61-63 (Sept. 6, 2006) (Exhibit 5).
74. SEC/OIG Document Production at 0323 (Exhibit 17).
75. Kreitman transcript, at 63 (Sept. 6, 2006) (Exhibit 5); S. HRG. 109-898, at 71 n.158.
76. Kreitman transcript, at 65 (Sept. 6, 2006) (Exhibit 5); see also, SEC 6765-67, letter from James Eichner to Audrey Strauss (Oct. 20, 2005) (Exhibit 18).
77. S. HRG. 109-898, at 1112.
78. *Id.* at 645.
79. SEC 7267-70, Samberg testimony (May 3, 2005) (Exhibit 1).
80. SEC 7579-83, Arthur Samberg, Chief Executive Officer, Pequot Capital Management, Inc., testimony (June 7, 2005) (Exhibit 19).
81. Transcribed Interview with James Eichner, Attorney, Division of Enforcement, SEC, at 61-64 (Sept. 1, 2006) (hereinafter “Eichner transcript (Sept. 1, 2006)”) (Exhibit 20). Hilton Foster, a retired SEC attorney who has “trained thou-

- sands of people” on how to conduct insider trading investigations, told us that he decided to use this section of Aguirre’s Samberg examination in his training sessions. S. HRG. 109-898, at 1010, 1024-1025 (Foster Tr.). See SEC 7553-83, Samberg testimony (June 7, 2005) (Exhibit 1).
82. Berger transcript, at 75-76 (Nov. 2, 2006) (Exhibit 4).
 83. 15 U.S.C. § 78u(d).
 84. See *United States v. Moses*, 2005 U.S. Dist. LEXIS 40187 (Aug. 31, 2005), aff’d, 2007 U.S. App. LEXIS 178 (11th Cir. Jan. 5, 2007).
 85. See Senate Committee Report on Foreign Corrupt Practices Act, S. Rep. No. 114, 95th Congress, 1st Session 12 (1977).
 86. Kreitman transcript, at 73 (Nov. 15, 2006) (Exhibit 14). Kreitman explained to Aguirre that he typically gave three versions of the award, each of which was a different size photo to signify different levels of achievement. “The Big Perry” was the largest of the three. S. HRG. 109-898, at 548-49.
 87. S. HRG. 109-898, at 602-611 (SEC 871-80).
 88. *Id.* at 659 (SEC 3770).
 89. SEC 3742 (note: capitalization has been corrected when quoting e-mails) (Exhibit 21).
 90. SEC 3764 (Exhibit 22).
 91. S. HRG. 109-898, at 659 (SEC 3770).
 92. *Id.* at 529 (Aguirre’s Written Testimony) (modification in original).
 93. *Id.* at 529 n.116.
 94. *Id.* at 611 (SEC 0880).
 95. *Id.* at 612 (SEC 0907).
 96. *Id.* at 613 (SEC 0908).
 97. *Id.*
 98. *Id.* at 1002.
 99. *Id.* at 986.
 100. *Id.* at 1008.
 101. *Id.* at 1088-89.
 102. *Id.* at 1089-90.
 103. *Id.* at 1102.
 104. *Id.* at 1118.
 105. *Id.* at 1201.
 106. *Id.* at 1118.
 107. *Id.* at 1127.
 108. *Id.* at 1125-27.
 109. Transcribed Interview with Joseph Cella, Chief, Office of Market Surveillance, SEC, at 4 (Sept. 7, 2006) (hereinafter “Cella transcript (Sept. 7, 2006)”) (Exhibit 23).
 110. *Id.* at 20.
 111. *Id.*
 112. *Id.* at 24.
 113. *Id.* at 29.
 114. *Id.*
 115. *Id.* at 30.
 116. *Id.* at 38.
 117. *Id.* at 40.
 118. *Id.* at 50-52.
 119. Hedge Funds and Independent Analysts: How Independent are Their Relationships?, 2006 Hearing before the Senate Comm. on the Judiciary, S. HRG. 109-696, at 34 (June 28, 2006) (hereinafter “S. HRG. 109-696”).
 120. *Id.* at 36 (“When I brought up the possibility of issuing a subpoena with [my branch chief, Hanson], he told me that Mack—that this would be very difficult, Mack had very powerful political connections. He would not authorize it and I would have to speak with Kreitman.”).
 121. *Id.* at 93.
 122. *Id.*
 123. *Id.* at 35.
 124. Compare Kreitman transcript, at 76-77 (Sept. 6, 2006) (Exhibit 5) with Berger transcript, at 103-104 (Nov. 2, 2006) (Exhibit 4).
 125. Transcribed Interview with Mary Jo White, Partner, Debevoise & Plimpton, at 9-10 (Sept. 25, 2006) (hereinafter “White transcript (Sept. 25, 2006)”) (Exhibit 24).
 126. *Id.* at 10.
 127. *Id.* at 9.
 128. *Id.* at 9-10, 22.
 129. SEC 3702 (Exhibit 25).

130. S. HRG. 109-898, at 534.
131. White transcript, at 12, 15 (Sept. 25, 2006) (Exhibit 24).
132. S. HRG. 109-898, at 535-36 (Aguirre: "Had Thomsen or Berger directed Kreitman to block the Mack subpoena based on e-mails White had delivered to Thomsen? If so, why was Thomsen making decisions that could unravel the investigation without a complete briefing?").
133. Transcribed Interview with Linda Thomsen, Director, Division of Enforcement, SEC, at 86 (Sept. 8, 2006) (hereinafter "Thomsen transcript (Sept. 8, 2006)") (Exhibit 26).
134. Transcribed Interview with Paul Berger, Associate Director of Enforcement Division, SEC, at 25, 31 (Nov. 7, 2006) (hereinafter "Berger transcript (Nov. 7, 2006)") (Exhibit 27).
135. S. HRG. 109-898, at 944-52 (emphasis added).
136. *Id.*
137. SEC/OIG Document Production at 0444 (Exhibit 28).
138. S. HRG. 109-696, at 35.
139. See Section VII.B, *infra*.
140. Kreitman transcript, at 107-1-08 (Sept. 6, 2006) (Exhibit 5).
141. S. HRG. 109-898, at 331.
142. *Id.*; see also *id.* at 242 (Kreitman indicating "I have indicated repeatedly that concrete evidence of when Mack obtained access to material nonpublic information re the GE/Heller deal is the *sine qua non* for focused investigation of Mack").
143. S. HRG. 109-898, at 1008-09 (Foster Tr., emphasis added).
144. SEC/OIG Document Production at 0002 (Exhibit 29).
145. Berger transcript, at 97-98 (Nov. 7, 2006) (Exhibit 27).
146. SEC 2989 (Exhibit 30).
147. Eichner transcript, at 128-1-29 (Nov. 14, 2006) (Exhibit 12); see also Memorandum from Walter G. Ricciardi to file (June 15, 2006) (Exhibit 2).
148. SEC/OIG Document Production at 0002 (Exhibit 29).
149. S. HRG. 109-898, at 29.
150. *Id.* at 20.
151. *Id.* at 455.
152. *Id.* at 1001-02 (Foster Tr.).
153. Berger transcript, at 53-54 (Nov. 7, 2006) (Exhibit 27).
154. S. HRG. 109-898, at 510 n.3.
155. *Id.*
156. Emily Thornton and Richard S. Dunham, *John Mack Backs Clinton*, BUS. WEEK, May 7, 2007, at 13.
157. Ben White, *Ex-Bush Donor Hosts Clinton Fundraiser*, FIN. TIMES, July 16, 2007, at 5.
158. S. HRG. 109-898, at 662-66 (SEC 5749)
159. *Id.* at 662-63 (SEC 5748).
160. See, Mark Jickling, Congressional Research Service, *Barriers to Corporate Fraud: How They Work, Why They Fail*, at 37 (Dec. 27, 2004).
161. S. HRG. 109-898, at 830-34 (SEC/OIG 0367-74).
162. *Id.* at 828-29 (SEC 001243-121243-45).
163. *Id.* at 828 (SEC 1243).
164. SEC 3641 (Exhibit 31).
165. Eichner transcript, at 16-17 (Nov. 14, 2006) (Exhibit 12).
166. *Id.* at 17-18.
167. Memorandum from Walter G. Ricciardi to file (June 15, 2006) (Exhibit 2).
168. See Eichner transcript, at 46-47, 50 (Nov. 14, 2006) (Exhibit 12).
169. See, e.g., unsigned tolling agreements at SEC 2888-91 (Exhibit 32).
170. Kreitman transcript, at 65-66 (Nov. 15, 2006) (Exhibit 14.); S. HRG. 109-898, at 335 (According to the SEC's Case Closing Report: "To examine whether Goldman's actions were themselves improper, the staff obtained information from Goldman and in early June took the testimony of two Goldman employees. Both told the staff that during this time they regularly provided research information to Goldman customers [such as Pequot] in advance of publishing this information, and that Goldman policy explicitly allowed this practice.).
171. Kreitman transcript, at 73-74 (Nov. 15, 2006) (Exhibit 14).
172. *Id.* at 95-96, 98 (emphasis added).
173. Walt Bogdanich and Gretchen Morgenson, *S.E.C. is Reported to be Examining a Big Hedge Fund*, N.Y. TIMES, June 23, 2006, at A1.
174. SEC 2877 (Exhibit 33).

175. Transcribed Interview with Liban Jama, Attorney, Division of Enforcement, SEC, at 90 (Oct. 11, 2006) (hereinafter “Jama transcript (Oct. 11, 2006)”) (Exhibit 34).
176. Jama transcript, at 94-95 (Oct. 11, 2006) (Exhibit 34).
177. Eichner transcript, at 39-40 (Nov. 14, 2006) (Exhibit 12).
178. See *United States v. O’Hagan*, 139 F.3d 641 (8th Cir. 1998) (citing 18 U.S.C. § 3282 for relevant criminal statute of limitations). Similarly, the SEC’s ability to bring a case for civil penalties pursuant to 15 U.S.C. § 78u-1 was also extinguished on this date.
179. SEC 1919, John Mack, Chief Executive Officer, Morgan Stanley, testimony (Aug. 1, 2006) (Exhibit 35).
180. *Id.* at SEC 1921, Mack testimony (Aug. 1, 2006) (Exhibit 35).
181. See S. HRG. 109-898, at 333-38 (SEC Case Closing Report, Nov. 30, 2006).
182. The “unrelated non-public company” was Fresh Start—an investment in which, according to Aguirre’s testimony, Mack more than tripled his \$5 million investment.
183. S. HRG. 109-898, at 334 (SEC closing memo, Nov. 30, 2006) (internal notes omitted).
184. *Id.*
185. See *id.*
186. *Id.*
187. *Id.*
188. S. HRG. 109-898, at 335 (SEC closing memo, Nov. 30, 2006)
189. See SEC 1845-46, Mack testimony (Aug. 1, 2006) (Exhibit 35).
190. See generally SEC 1845-64, Mack testimony (Aug. 1, 2006) (discussing Mack’s meetings with Lukas Muhlemann, Walter Kielholz, Daniel Vasella, Thomas Wellauer, Oswald Grubel, Peter Brabeck, and Aziz Syriani—all Credit Suisse managers, directors or board members) (Exhibit 35).
191. SEC 1869, Mack testimony (Aug. 1, 2006) (Exhibit 35).
192. *Id.* at SEC 1870.
193. *Id.*
194. Eichner transcript, at 51-65 (Nov. 14, 2006) (Exhibit 12)
195. S. HRG. 109-898, at 336 (SEC closing memo, Nov. 30, 2006).
196. *Id.* (emphasis added).

VII. Gary Aguirre's Employment at the SEC

A. Background

Prior to his application for employment with the SEC, Gary Aguirre enjoyed a long and successful career in both the public and private sectors. After earning his law degree from the University of California, Berkley in 1968, Aguirre served as a public defender in San Diego, California for several years before entering private practice. During his private sector career, Aguirre successfully argued 95 consecutive complex cases worth more than \$200 million in total awards including three securities fraud class actions.¹ In the majority of these cases, he served as lead counsel.² During this time, Aguirre also published widely and made numerous presentations on civil litigation and advocacy law.³ Having earned substantial sums as a partner at Aguirre & Eckmann, he later retired.⁴

Wanting to re-enter public service, at age 61, Aguirre enrolled in the Georgetown University Law Center in 2001.⁵ While a student at Georgetown, Aguirre focused on financial regulation and securities law. He received numerous honors while at Georgetown, including the second place prize in a prestigious national writing competition and the top grade in his Financial Reporting and Accounting class. He was described by Professor Mark Kreitman, who later became Aguirre's supervisor at the SEC, as the "best student he had ever had."⁶ After two years of study, Aguirre received an LLM with distinction, concentrating in securities regulation and international law. He then applied for employment at the SEC.

1. Applications for Employment and EEO Claim

The SEC rejected Aguirre's first 23 applications for employment. During his application processes, Aguirre received top ratings in the categories of reasoning ability, writing ability, relevant work experience, enthusiasm for SEC, and knowledge of securities law. He also received the next-highest rating in the category of "poise-maturity." Another interviewer noted Aguirre to be "one of the most qualified candidates [he'd] interviewed."⁷ Nevertheless the SEC declined repeatedly to hire him. Aguirre then filed a complaint with the EEO office of the SEC charging discrimination.⁸

Immediately following Aguirre's EEO complaint, the SEC contacted him to set up an interview and offered to hire him as a "superior qualifications appointment."⁹ Despite being hired, Aguirre did not withdraw his complaint. On June 14, 2006, an administrative law judge entered an Order and Judgment in favor of the SEC on Mr. Aguirre's age discrimination claims after evaluating the claims in a 19-page decision.¹⁰

2. *Transfer to another Branch Chief*

Gary Aguirre began employment at the SEC's Division of Enforcement on September 7, 2004, as a general attorney. He initially worked under Charles Cain and Richard Grimes, the branch chief and assistant director of his branch. Soon after starting, he was assigned to work on allegations of insider trading by the hedge fund Pequot Capital Management, Inc.

In October 2004, Aguirre was asked to prepare a draft formal order memorandum regarding the Pequot insider trading investigation. A formal order is the procedure by which the SEC authorizes staff to conduct a full-fledged investigation. In the prepared draft submitted to Cain on October 6, Aguirre included the language, "over the past two years, SROs have referred or 'highlighted' at least six matters involving possible insider trading by the Pequot Management and one or more of Pequot Funds to the Division of Enforcement."¹¹ The following day, Cain delivered revisions to Aguirre, removing the sentence and replacing it with, "subsequent investigation by the staff identified at least six transactions involving possible insider trading by the Pequot Management and one or more Pequot Funds." In a subsequent interview, Berger described that he understood this exchange to be over "a rather routine memorandum to the Commission on a relatively ministerial matter."¹²

Aguirre explains the issue quite differently. Aguirre recalled, "I told Cain that the revision about SRO referrals . . . was not accurate because it suggested that I had uncovered six insider trading matters, when in fact those had been discovered by SROs and had been referred to the SEC."¹³ According to Aguirre, Cain responded that "the memorandum was not going to state that Joe Cella [The Director of Market Surveillance] had been informed but had failed to act" on the SRO referrals. The following morning, on October 8, 2004, Aguirre explained his concerns in an e-mail to Cain and Grimes:

The proposed revisions . . . [are] unsupportable. Neither I nor anyone on the staff has discovered an insider trading transaction involving Pequot. Yes, I have prepared a spreadsheet of suspected Pequot insider trading activity since 1999 . . . in each one of those 11 cases, an *SRO identified* the transaction and referred it to Enforcement (Market Surveillance), where it stopped. Under these circumstances, the quoted revision is not merely unsupportable; it could be the source of embarrassment or worse for each of us.¹⁴

Grimes subsequently agreed to Aguirre's changes, yet the incident contributed to Aguirre's decision to request a branch transfer two months later.

On January 10, 2005, Aguirre wrote a letter to Associate Director Paul Berger formally asking to be transferred to another branch. He requested that he be transferred to another branch.¹⁵ Telling Berger that he would prefer to be in his former Georgetown professor's section, Aguirre wrote, "I understand that there will be an opening in Mark Kreitman's section in the near future and I would appreciate being transferred there if possible."¹⁶

After running a draft response by SEC personnel officials, Berger replied to Aguirre's request in an e-mail on January 13, writing "Mark Kreitman's assistant director does not have an opening right now."¹⁷ Aguirre was transferred to Kreitman's section on January 18, 2005, notwithstanding Berger's January 13 e-mail suggesting the absence of an opening.

3. Positive Performance Evaluations

On June 1, 2005, Aguirre received a performance evaluation from Mark Kreitman. The evaluation covered Aguirre's performance from October 2004 to April 2005, and rated performance in four critical elements: knowledge of field or occupation, planning and organizing work, execution of duties, and communications. In each category, the rating official had the option of rating an employee "acceptable," or "unacceptable." On Aguirre's June 1 evaluation, his performance was rated "acceptable" in each of the four categories.¹⁸ However, Kreitman claimed to Senate staff that "'acceptable' is a pretty low threshold . . ." and checking "unacceptable" would have been "too heavy a hammer at that point . . ."¹⁹

Having been evaluated at an "acceptable level," Aguirre qualified for a merit pay increase. On June 29, 2005, Robert Hanson transmitted an evaluation of Aguirre to the Enforcement Division's Compensation Committee.²⁰ On the cover sheet, the supervisor is given four options in making recommendations: (1) made contributions of the highest quality, (2) made contributions of high quality, (3) made contributions of quality, and (4) made no significant contribution beyond an acceptable level of performance. In the June 29 evaluation, Hanson checked "made contributions of high quality," and attached an evaluative narrative praising Aguirre's work ethic and performance:

Gary worked extremely hard on one investigation during his time in the group, a significant matter involving the trading by Pequot Capital, one of the nation's largest hedge funds. Gary has an unmatched dedication to this case (often working well beyond normal work hours) and his efforts have uncovered evidence of potential insider trading and possible manipulative trading by the fund and its principals. He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation. Gary worked closely with the Office of Compliance Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads. He has consistently gone the extra mile, and then some.²¹

Hanson also offered a critique of Aguirre, saying that he "can work on presenting information in a clearer and more concise manner to enhance effectiveness. . . ."²² The evaluation recommending Aguirre for a merit pay increase was then transmitted to the Compensation Committee.

4. Merit Pay Increase

The decision whether to grant a merit pay increase is decided by the Compensation Committee, which consists of all the associate directors, the chief counsel, the head of regional operations, the chief

litigation counsel, and the deputy litigation counsel.²³ The Compensation Committee met on July 18, 2005. While SEC witnesses were unable to recall details of the process leading up to Aguirre's merit pay increase, the SEC has confirmed that the Compensation Committee gave its recommendations to Linda Thomsen on July 19, 2005.²⁴ Then, on July 27, Thomsen completed the merit pay process for the Enforcement Division, which then transmitted the final results to the Office of Human Resources on August 1, 2005. On August 21, 2005, the Associate Executive Director of the Office of Human Resources approved a Form 50-B Notification of Personnel Action raising Aguirre's total salary from \$130,257 to \$134,110.²⁵

B. Objections to Blocking Mack Testimony

For the reasons explained earlier, at least three experienced SEC officials believed in the summer of 2005 that questioning John Mack was an appropriate next step in the Pequot Investigation.²⁶ These officials included Director of Market Surveillance Joseph Cella, Market Surveillance Branch Chief Eric Ribelin, and a former Branch Chief responsible for training SEC staff attorneys on how to conduct insider trading investigations, Hilton Foster. However, none of these officials were in Aguirre's direct line of supervision. Aguirre's direct supervisor was Robert Hanson. Hanson reported to Mark Kreitman, and Kreitman reported to Paul Berger.

At first, Aguirre's supervisors did not seem overly deferential to John Mack. For example, after Aguirre's initial June 3, 2005 e-mail suggesting Mack as a potential tipper in Pequot's GE-Heller transactions, Robert Hanson replied that he believed Mack was "another bad guy in my view."²⁷ Two weeks later, on June 14, Aguirre briefed his supervisors on his progress in the investigation, including the aspects relating to John Mack.²⁸ Mark Kreitman gave Aguirre a "Perry Mason Award" in recognition of his work on the case and then instructed him to brief criminal authorities in the Southern District of New York. Following Aguirre's presentation, authorities in the Southern District opened their own investigations. On the evening of June 20, Robert Hanson again expressed approval of Aguirre's pursuit of the theory that Mack may have tipped Arthur Samberg about the GE-Heller acquisition. In an e-mail with the subject line, "Pequot: Connecting the dots with the CSFB-Mack-Samberg-theory," Hanson wrote to Aguirre, "Okay Gary you've given me the bug. I'm starting to think about the case during my non-work hours."²⁹

However, his supervisors' attitudes shifted dramatically, beginning on June 23, 2005. That is the date when officials from Morgan Stanley began contacting the SEC to learn about the potential impact of the investigation on its prospective CEO, John Mack.³⁰ According to Aguirre, June 23 was also the date that his direct supervisor, Robert Hanson, first said it would be difficult to subpoena John Mack because of his "powerful political connections."

1. Supervisor's Reference to Mack's "Powerful Political Connections"

As discussed earlier, it appears that the driving force behind the reluctance to question John Mack was not a partisan consideration. Rather, Aguirre's supervisors cited his prominent position on Wall

Street and the ability of his counsel to appeal directly to very senior SEC officials, bypassing staff attorneys.³¹ However, in order to assess the reasonableness of Aguirre's reaction to the controversy over Mack, it is necessary to examine whether Aguirre's supervisor actually used the word "political" when referring to Mack's clout and connections. If so, then one might view Aguirre's reactions to be more reasonable.

An apparent admission of such a blatantly partisan political favor by the SEC might, in the view of some people, justify a more drastic reaction than indications of a more subtle form of deference to prominent witnesses. For example, Aguirre initially resigned, but later withdrew his resignation in order to resist his supervisors' decision regarding Mack. If no one told Aguirre that decisions were being made based on Mack's "politics," then his resignation and withdrawal could arguably be viewed as a sign of instability. However, if someone did refer to Mack's politics, then his resignation and withdrawal should arguably be viewed in a more favorable light.

Aguirre alleged that Robert Hanson referred to Mack's political connections in several conversations about taking his testimony. Regardless of what Hanson may have meant, there is evidence suggesting he said that his concerns about questioning Mack were "political." The first instance occurred on June 23. Aguirre said that "in a face-to-face meeting" that day, Hanson said it would be very difficult to get permission to question Mack because of Mack's "powerful political connections."³²

Aguirre reported Hanson's June 23 "political connections" comment to Hanson's supervisors, Paul Berger and Mark Kreitman in a July 27, 2005 e-mail, marked urgent:

I sent two e-mails to Bob during the week of June 20 (see attachments 3 and 8) proposing that we proceed with the Mack testimony and broaden the CSFB subpoena. When I did not hear back from Bob, I spoke with him directly about these proposals. Bob told me (1) that these decisions were for Mark to make and (2) *it would be an uphill battle because Mack had powerful political connections*. Bob also mentioned this concern during a meeting with Mark and me.³³

When asked about this e-mail by Senate investigators in 2006, Hanson claimed not to remember making the comment:

Question: And what about number two, "it would be an uphill battle because Mack had powerful political connections?"

Mr. Hanson: That doesn't sound like something I would say.

Question: So you don't think you said that?

Mr. Hanson: I don't think so, no.

Question: You don't recall saying that?

Mr. Hanson: I do not.

* * *

Question: So you never told him at any time that it would be an uphill battle to subpoena Mr. Mack?

Mr. Hanson: That doesn't sound like something I would say. It's possible, but it doesn't sound like something I would say.

Question: You don't recall saying it?

Mr. Hanson: I do not.³⁴

He denied the comment more directly when questioned by the SEC Office of Inspector General in 2005.³⁵

Later, in August 2005, the evidence suggests Hanson again referred to Mack's political connections during conversations about taking his testimony. For example, on the evening of Wednesday, August 3, 2005, Aguirre and Hanson discussed the issue at some length. Their e-mails the following morning provide a near contemporaneous account of what was said. Aguirre described the conversation in his August 4 e-mail as follows:

I came to your office last night to discuss Pequot because, as I told you, I realized we would not be seeing each other for the next month.

* * *

I told you that Mark was not listening to the rationales for the steps I had proposed in the Pequot investigation, that this represented a major shift that occurred overnight in our relationship, that we had an excellent relationship before, [and] that I believe other people at the Commission were involved in Mark's sudden shift[.]

* * *

Second, I told you that the decision not to take Mack's testimony because of his powerful political connections was the event that triggered my decision [to resign]. We then discussed at some length what standard had to be met to take Mack's testimony. You told me that Mack was "an industry captain," that he had powerful contacts, that [Former U.S. Attorney] Mary Jo White, [Former SEC Director of Enforcement] Gary Lynch, and others would be representing him, that Mary Jo White could contact a number of powerful individuals, any of whom could call [Director of Enforcement] Linda [Thomsen] about the examination. I told you I did not believe we should set a higher standard for a political captain than anyone else.

* * *

You also mentioned, *as you did last night*, that Mack's testimony would be difficult because Mack had *powerful political connections*. For that reason, the political hurdle, I spent a big chunk of my weekend preparing two lengthy memos . . . suggesting that we focus on [Mack] to eliminate him or establish it was in fact him.³⁶

In Hanson's reply, he explained that part of his reticence to take Mack's testimony had to do with the ability of Mack's counsel to bypass staff attorneys at his level and appeal directly to senior SEC management:

As a general matter I try to alert folk above me about significant developments in investigations that may trigger calls and the like so that they are not caught flat footed. I also think that Paul [Berger] and Linda [Thomsen] would want to know if and when we are planning to take Mack's testimony so that they can anticipate the response, which may include press calls that will likely follow. Mack's counsel will have "juice" as I described last night—meaning that they will reach out to Paul and Linda (and possibly others).³⁷

It seems clear that Hanson was more reluctant to take the testimony of someone whose counsel could get the ear of the Director of Enforcement than he would be of someone whose counsel did not have that kind of "juice." However, it is not clear why a discussion about the merits of taking Mack's testimony would turn on the question of keeping supervisors informed. When asked why he responded to Aguirre's concerns about improper political influence by referring to the need to keep supervisors informed, Hanson provided no clear rationale.³⁸

On a third occasion, just before he was fired, Aguirre wrote to Hanson alleging that Hanson had spoken of Mack's "political clout." On the morning of August 24, 2005, Aguirre's supervisors began sending e-mails about firing him.³⁹ With no knowledge of those e-mails, Aguirre wrote to Hanson later that day, "before and after the Mack decision, you have told [me] several times that the problem in taking Mack's exam is his political clout, e.g., all the people that Mary Jo White can contact with a phone call."⁴⁰ Hanson's reply appeared to admit using the phrase and then, again, attempted to explain what he meant by it:

Most importantly *the political clout I mentioned to you* was a reason to keep Paul and possibly Linda in the loop on the testimony. As far as I know politics are never involved in determining whether to take someone's testimony. I've not seen it done at this agency. It does make sense though to have all your ducks in a row before approaching a significant witness like Mack. Hence, the reason to try and figure out a number of things about him before scheduling him up, not least of which is whether he knew about the deal.⁴¹

Before sending this e-mail in which he admits using the phrase, Hanson drafted a shorter, much different reply: "My recollection is different about a couple of things. Most importantly I have not said that the problem is Mack's political clout."⁴² However, there is no indication that Hanson ever sent this reply, as it was recovered from his "drafts" folder.

When asked about the e-mail he did send, Hanson indicated he did not recall using the phrase:

Question: [M]y question is: do you recall using the phrase "political clout" in a conversation with Gary Aguirre?

Mr. Hanson: I don't. It's possible I used it, but it just doesn't sound like something I would say.

* * *

Question: So why did you use the term "political clout" in your response to Mr. Aguirre?

Mr. Hanson: I'm responding to his use of that term. If you look at, he responds and says political clout meaning all the people that Mary Jo White could contact with a phone call.

* * *

Question: You don't think that you independently said it previous to his using the term?

Mr. Hanson: It's possible, but it doesn't sound like something I would say. It is possible. Again, as far as I know, politics aren't involved in the decision to take someone's testimony.⁴³

By contrast, in his written testimony submitted at the Judiciary Committee's December 5, 2006, hearing, Hanson reversed himself and again appears to admit using the phrase:

Accordingly, consistent with my general practice, I made Mr. Kreitman aware that we were considering taking Mr. Mack's testimony. I explained this practice to Mr. Aguirre, perhaps inartfully *choosing the words "juice" and "political clout"* to describe the fact that any influential counsel Mr. Mack chose could easily pick up the phone and call my supervisors about the case and I wanted them to be fully aware of the facts before answering any calls.⁴⁴

Hanson's equivocation and inconsistent statements are unconvincing. His only clear denials that he referred to Mack's political connections occurred (1) in an e-mail which was drafted, but never sent, in response to Aguirre's third written objection, and (2) in his interview with the OIG during their investigation. If Hanson did talk about Mack's political clout in connection with his testimony, then Aguirre would be justified in resisting that sort of special treatment and refusing to take part in it.

The weight of this evidence suggests that Hanson likely referenced Mack's "political connections," "political clout," or words to that effect. The evidence suggests Hanson did so on multiple occasions in conversations about taking Mack's testimony during the summer of 2005, beginning around the same time as Morgan Stanley's inquiries about the SEC's interest in Mack on June 23. However, the evidence also suggests Hanson was not referring to partisan political considerations, but rather to his prominence and his ability to hire counsel with direct access to senior SEC officials.

2. Notice and Withdrawal of Resignation

In late June, Aguirre saw his supervisors suddenly reverse themselves, putting the brakes on the Pequot investigation just after Morgan Stanley contacted senior SEC officials to inquire about John Mack's exposure. Aguirre saw himself and others involved in

the day-to-day aspects of the investigation excluded from more senior SEC contacts with Morgan Stanley. Aguirre also heard his direct supervisor explicitly state that it would be hard to take Mack's testimony because of his political connections. Aguirre's initial reaction to these circumstances was to resign on principle.

On Monday, June 27, Aguirre sent an e-mail summarizing the Pequot investigation and his reasons for suspecting that Arthur Samberg acted on material non-public information in the GE-Heller trades and that the tipper may have been John Mack.⁴⁵ On the morning of Tuesday, June 28, he sent a more detailed e-mail outlining five areas for further investigation of how Samberg may have learned information about the pending GE-Heller acquisition. The e-mail included proposed steps aimed at testing his theory that Mack may have been the tipper, as well as exploring Samberg's other possible sources of information.⁴⁶ On Tuesday, June 28, Aguirre and Kreitman had a "heated discussion" about Kreitman's refusal to authorize Aguirre to take John Mack's testimony.⁴⁷ Aguirre returned to his office and drafted an e-mail to Kreitman explaining specifically why he believed that taking testimony from Mack would be the next logical step. The e-mail confirms that Kreitman had denied not only Aguirre's request to take Mack's testimony, but also his request to issue a subpoena to obtain documents from CSFB:

Your refusal to permit this testimony, along with other limitations, has significantly affected this investigation.

* * *

I have proposed that we obtain the documents from CSFB that would show when Mack obtained information about GE-HF. . . . Evidence that Mack learned near or on Friday June 29, [2001] the night of his call to Samberg, would tend to focus the matter more on Mack. Evidence that he did not learn until July 3 or never learned would eliminate him.

* * *

I understand you have denied my request to proceed with the CSFB and Mack subpoenas.⁴⁸

Kreitman did not reply to this e-mail until nearly four weeks later. After sending the e-mail, Aguirre met with Associate Director Paul Berger. He had sent Berger an e-mail the previous day asking if Berger had an "open door policy" and requested a meeting.⁴⁹ At the meeting, Aguirre expressed his concerns about being prevented from taking Mack's testimony and told Berger of his intention to resign after completing the Pequot investigation. However, Aguirre did not specifically refer to Hanson's statements about Mack's political connections.⁵⁰ The next morning, Thursday, June 30, Aguirre verbally tendered his resignation notice to Paul Berger. That same day, Morgan Stanley announced it had hired John Mack. In response to requests from his supervisors for a certain departure date, Aguirre agreed to stay at the Commission through the end of September. Aguirre sent an e-mail to assure Berger that he would not neglect his duties during his remaining time at the SEC.

Aguirre wrote, "I just want to assure you that Pequot will get 110% between now and September 30th."⁵¹

Aguirre continued to work on the case during the first few weeks of July and continued to find evidence pointing to the need to question John Mack. During these weeks, Eric Ribelin encouraged Aguirre to withdraw his resignation and help pursue the investigation.⁵² By late July, Aguirre had decided to stay and challenge his supervisors to follow the investigation wherever the facts led. On or around July 21, 2005, Aguirre had another conversation with Berger about the roadblocks to questioning John Mack. According to Aguirre, he "met with Berger and told him that Hanson had informed me the Mack subpoena had been blocked because of Mack's powerful political connections."⁵³

As Aguirre describes the conversation, Berger took personal offense at the suggestion that political influence was a factor in the decision about Mack's testimony. Aguirre told Berger that the reason he was concerned about improper political influence was because he had specifically been told that Mack's political connections were an issue. Berger replied, "Who told you that?" Aguirre answered, "Bob [Hanson]."⁵⁴ However, when asked about this conversation, Berger claimed not to recall Aguirre informing him of Hanson's comments:

I had two conversations that I can remember with Gary where he mentioned Mack's influence, neither one I think he mentioned political influence. Gary presented it in terms of we were afraid to take his testimony,

* * *

I don't remember him talking about Bob Hanson or what Bob Hanson said, but I do remember him saying that, you know, he felt that Mark and Bob were afraid to take this guy's testimony, and I think he used the word "afraid," and that Mack had a lot of influence.⁵⁵

If the conversation occurred as Aguirre claimed, it seems unlikely that Berger would not recall an allegation as serious as the one against Hanson. Nor is it likely that he would fail to recall his own offense at the suggestion or his question about who gave Aguirre the idea that Mack's political clout was an issue. However, as was Aguirre's usual practice, he documented his allegation in an e-mail shortly thereafter.⁵⁶

On Monday of the following week, July 25, 2005, Mark Kreitman finally replied to Aguirre's June 29 e-mail on proposed subpoenas to Mack and CSFB. On the heels of Aguirre's second, more pointed confrontation with Paul Berger over the Mack issue, Kreitman's belated reply asked Aguirre for "greater specificity." Kreitman also claimed that he did not deny permission to subpoena CSFB:

The fact of Mack's transfer from Morgan-Stanley to CSFB, without information about when he was over the wall, is insufficient justification for compelled testimony and intrusive subpoenas at this point, in my view. . . . The evidence of motive you cite may have substance, but it's too vague as articulated to be meaningful. . . . I have at no time "denied [your] request

to proceed with the CSFB . . . subpoena.” To the contrary, I have indicated repeatedly that concrete evidence of when Mack obtained access to material nonpublic information re the GE-Heller deal is the *sine qua non* for focused investigation of Mack.⁵⁷

If Kreitman had not denied Aguirre’s request to subpoena CSFB for documents on July 29—when he denied the request to subpoena Mack for testimony⁵⁸—then it is difficult to understand why he waited nearly four weeks before correcting Aguirre on that point. The most charitable conclusion from these circumstances is that Kreitman’s failure to communicate in a clear and timely manner caused inordinate delay in a case where the statute of limitations would soon become a problem.⁵⁹ Another view is that the timing of Kreitman’s reply was prompted by Aguirre’s conversation with Berger.

Not surprisingly, Kreitman’s e-mail prompted Aguirre to respond. On the morning of Wednesday, July 27, 2005, Aguirre sent an e-mail to Berger rescinding his previous resignation.⁶⁰ Then Aguirre sent a comprehensive e-mail to Berger and Kreitman. It replied to Kreitman point-by-point and supplied a comprehensive set of supporting documents. His e-mail also provided formal, written notice of his claims about what Hanson had said about Mack’s political influence:

I also believe Mack’s testimony should have been taken promptly for the same reason that staff normally takes early testimony of suspected participants in an insider trading investigation—to pin them down. This is particularly true here because CFSB and Morgan Stanley are still producing e-mails. . . . Further delay allows Mack to concoct a story that is consistent with the information contained in the e-mails. On the other hand, if he did not provide information, that also may become clear. As discussed in my June 28 e-mail to Mark . . . this would allow us to focus on other possible sources for the tip.

I had different and more troubling input why it was difficult to move ahead with the second CSFB subpoena and the Mack testimony. I sent two e-mails to Bob during the week of June 20 . . . proposing that we proceed with the Mack testimony and broaden the CSFB subpoena. When I did not hear back from Bob, I spoke with him directly about these proposals. Bob told me (1) that these decisions were for Mark to make and (2) *it would be an uphill battle because Mack had powerful political connections*. Bob also mentioned this concern during a meeting with Mark and me. . . . Bob also met privately with Paul about the investigation I was handling. Likewise, Mark and Bob did not invite me to participate in the meeting on June 27 when they discussed Mack’s possible testimony. *This combination of events suggests to me that the issue whether Mack’s testimony would be taken was being handled differently than the same issue for other witnesses in this investigation* and different from the same issue in other investigations. Further, I do not believe that treating Mack differently is consistent with the Commission’s mission, at least as I understand it.⁶¹

When asked about this e-mail and what he did after receiving it, Berger's responses indicate that he failed to take the allegations seriously. Essentially, Berger did nothing to ensure that the allegations were thoroughly and independently reviewed:

Question: In your mind, does this constitute an allegation of wrongdoing?

Mr. Berger: If someone was preventing someone from taking testimony because of certain influence where we thought it was appropriate to take the testimony, I think it's something that is of concern, yes. But as I said, you know, I talked with Gary about it, and I talked with Mark about it. We all, you know, concluded that that's not what was happening and, in fact, we were going to take the testimony.

* * *

Question: And my question to you is: Do you believe that's an allegation of wrongdoing that needed to be brought to someone else's attention? And what, if anything, did you do to bring it to anyone else's attention?

Mr. Berger: Well, I think I've told you now several times what I did is I had a conversation with Gary about this. We talked about it.

* * *

What I did subsequent to that was I talked with Mark [Kreitman] about this again. I had more than one conversation with Mark about the influence issue. And, you know, Mark assured me there is nothing about influence that was preventing us from taking testimony.

* * *

Question: Did you forward this e-mail to Linda Thomsen?

Mr. Berger: I don't remember if I did or not.

* * *

Question: Did you refer it to the Inspector General?

Mr. Berger: No.

Question: Did you consider referring it to the Inspector General?

Mr. Berger: No.

Question: Why not?

Mr. Berger: Because I took the actions that I thought were appropriate.⁶²

Apparently, Berger did not advise Hanson to stop talking about Mack's political clout because Hanson did it again just a few days later on August 3, 2005.⁶³

C. Terminating Gary Aguirre

It is unclear when the SEC supervisors first gave consideration to terminating Gary Aguirre. His decision to stay at the SEC and challenge what he believed to be inappropriate special treatment for John Mack was certainly followed by a rapid deterioration of the relationship with his supervisors. Through the month of August, Aguirre continued to make the case for taking Mack's testimony and responding to his supervisors' arguments and objections, although the pace of the investigation generally slowed because of overlapping annual leave taken that month by various staff, including Aguirre. The first record of anyone suggesting his termination is an August 24, 2005 e-mail from Kreitman to Burger. Aguirre was fired on September 2, while on vacation.

1. Accusations of a "Coup," August 1, 2005

Just a few days after Aguirre withdrew his resignation and sent his comprehensive July 27 e-mail, Robert Hanson and Paul Berger had a conversation that would lead to an attempt to undo Aguirre's positive performance evaluations, which had already been submitted and approved by the Compensation Committee. On August 1, his supervisors drafted a negative re-evaluation of Aguirre and one other employee: John Smith.⁶⁴ Aguirre and Smith had one thing in common: they had both complained about the way Mark Kreitman managed his group. Aguirre had just complained by e-mail on July 27 about Hanson and Kreitman blocking Mack's testimony. Smith had complained on July 21 about another case in an e-mail to his supervisor, Dave Fielder (who, like Hanson, reported to Mark Kreitman). Smith wrote to Fielder regarding a matter apparently related to a mutual fund market timing investigation involving Mario Gabelli. Smith indicated that he believed a contact may have occurred between Gabelli's counsel, Vince DiBlasi, and Director of Enforcement Linda Thomsen:

Could you quietly find out from Mark why he over-reacted . . . last night?

My sense is Vince DiBlasi—because Mario Gabelli is mad he has to answer questions—called . . . Linda [Thomsen] with some misrepresentations, which went to Paul [Berger.] . . . Since you have the e-mail, I suspect you can find out innocently. You should know that Mario Gabelli is mad because . . . he doesn't think he should have to answer our questions—even though we have e-mails showing he approved timing arrangements, involving quid pro quo exchange for timing capacity, with . . . two of the leading groups caught by Spitzer . . . and the staff isn't getting adequate support. We should be unified here, not questioning one another from within.

Mark's reaction fed into DiBlasi's strategy, since it left us feeling undermined. That [is] a recurring problem here, but I want to make sure I have the right facts in this particular instance before drawing any conclusions. If it is DiBlasi he should be put in his place, not treated solicitously (for reasons we can discuss). If not, I am somewhat troubled by Mark's way of handling this. If this were the first, or the second, or the tenth

time, I wouldn't write. Who wants to? I have better things to do, as I'm sure you do.

* * *

In any event, the staff just [did] not get the kind of support it needs here. [*Redacted names*], Aguirre, and perhaps others, have all become disturbed at their treatment. I do not want my name used in this breath, but it's not any fun to come to work. It's sad, because it could be a great place.⁶⁵

Smith's complaints in this e-mail seem remarkably similar to Aguirre's. Just as in the Pequot case, it appears as if someone outside the Commission went over the staff attorney's head and contacted the Director of Enforcement. Just as in the Pequot case, the outside contact to senior SEC officials was followed by a disagreement between Kreitman and a staff attorney. And just as in the Pequot investigation, the staff attorney who objected received a negative re-evaluation shortly thereafter. Despite Smith's request to keep his concerns confidential, Fielder forwarded Smith's e-mail to Mark Kreitman at 3:42 p.m. on Monday, August 1, 2005.⁶⁶

Paul Berger also knew about Smith's concerns. Earlier that morning, he asked Robert Hanson about them. As Hanson explained to Committee investigators:

I met with Paul Berger that morning of August 1st. He called me probably about 8:30 or so in the morning, called me down to his office, so I went down to his office.

He said I'd like to talk to you about Mark Kreitman. He said, I have heard some complaints about Mark Kreitman, his management style or something to that effect. I want you to keep this on a confidential basis, but I feel as though I need to look into this. So tell me about Mark Kreitman, what is your view on him?

I said, before you go any further, I'd like to just say that there [are] two employees whose input you should heavily discount. I mentioned Gary and this other individual that also had gotten a supplemental review.

We talked about, Paul and I probably talked for a half hour to 45 minutes, somewhere in that range. We talked about those individuals. Paul asked about them and he asked what their ratings were, or what I had given them for ratings. I told him, and he said— . . . I told him I gave them the second from the top.⁶⁷

In this narrative, Hanson describes a discussion that began as an attempt to investigate complaints about a manager, which Berger quickly shifted toward a discussion about the performance evaluations of the individuals who had lodged the complaints. Hanson then went on to describe Aguirre and Smith as disloyal employees, criticizing and plotting against Mark Kreitman:

Question: What did you tell him about them as to why he should discount their input?

Mr. Hanson: At that point, which was August 1st, Gary was no longer talking to Mark, and [Smith] or . . . the other individual, excuse me, was looking to raise trouble in my view with——

Question: Is the other individual [John Smith]?

Mr. Hanson: Yes, it is. He was also clearly at odds with Mark and Mark's management style. From my vantage, it might look like they were meeting together and talking about things. I just thought it was improper that they would be *doing a coup* against Mark. I thought both of their work was not so great, and expressed those kinds of views to Paul. He asked what I evaluated them as, and I told him that it was the second from the top. . . . He said, you're [not] doing them any favors or you're not doing the Commission any favors by giving them those ratings. I agreed, and actually apologized to Paul a number of times because I agreed that my evaluations were somewhat inflated with respect to those two individuals. He suggested that we write a supplemental evaluation that was more candid than what was written in the evaluations that I had told him. That day, Mark and I drafted supplemental evaluations for those two individuals.

Question: What do you mean by "a *coup*?"

Mr. Hanson: I think they were trying to do damage to Mark or have Mark removed as a manager, or something to that effect.

Question: Did they have complaints about him, is that what you mean? Did they have complaints about any misconduct on his part? Or what do you mean?

Mr. Hanson: I could see them, well, particularly one of the individuals, I could see him talking with other people and complaining about Mark. He complained a lot about Mark.

Question: Just to clarify, is that Mr. Aguirre, or [Mr. Smith]?

Mr. Hanson: [Mr. Smith]. I could see them in the hallways talking a lot about things, and what I suspected.

Question: About what things?

Mr. Hanson: I don't know what they were talking about, but they were certainly very vocal in their criticisms of Mr. Kreitman. . . . So in terms of the time of August, it was clear that the relationships were very poor between Mark and Gary. [Mr. Smith] was also very critical of Mr. Kreitman.⁶⁸

Being critical of a manager or a manager's decision, however, is not necessarily the same thing as poor job performance.

The Compensation Committee had already met nearly two weeks before the conversation between Hanson and Berger. It had reviewed employee evaluations and made merit pay decisions.⁶⁹ Berger was on that Committee. He had already seen and approved merit pay decisions based on the evaluations of Aguirre and Smith. It is difficult to imagine a legitimate need at that point to re-evalu-

ate *only* these two employees. For Berger to ask about the performance evaluations of these two employees in this context is disturbing. When coupled with Hanson’s allegations of a “coup” and their negative re-evaluations later that day, the retaliatory purpose of the re-evaluations appears evident.

2. *The Negative Re-Evaluations*

a. *Timing*

Shortly after Berger’s and Hanson’s confidential early morning meeting, Mark Kreitman apparently learned of Berger’s desire for negative re-evaluations to be prepared. He began drafting them at 10:54 a.m., sent a first draft to Robert Hanson at 12:13 p.m., and received comments back from Hanson at 1:13 p.m.⁷⁰ A few hours later, Dave Fielder forwarded Kreitman a copy of Smith’s confidential July 21 e-mail complaining about Kreitman undermining staff attorneys following outside contacts with senior officials such as Thomsen and Berger.⁷¹ At 6:17 p.m., Kreitman sent his draft re-evaluations to Fielder. He wrote, “Paul has asked for supplementation of these two evaluations.”⁷² One minute later, Kreitman sent the negative re-evaluations to Berger. He wrote, “My draft, Bob’s comments included. Will have [Dave Fielder’s], if any, tomorrow morning.”⁷³ It is unclear whether Fielder provided any comments. Just 13 minutes later, Kreitman sent the following e-mail to Paul Berger:

Though I emphasize that I don’t discount, indeed welcome, constructive criticism regardless of the source, my inquiries of Bob and Dave concerning their sense of the morale of the group lead me to believe that it continues to be strong, with the obvious exception of [John Smith] and Gary [Aguirre.]

* * *

I will of course continue to monitor the group for signs or expressions of dissatisfaction with their work environment, including but not limited to the style and substance of my management.⁷⁴

When asked if he learned of Aguirre’s and Smith’s complaints directly from Berger, Kreitman said, “I think so. I don’t specifically recall, but I would assume that’s the case because I addressed this e-mail to Paul [Berger].”⁷⁵ The close connections between the complaints by the employees and the negative re-evaluations that followed strongly suggests that the motivation for the latter was retaliation for the former—not a legitimate attempt to objectively assess job performance.

The re-evaluations were not an authorized part of the SEC’s evaluation process.⁷⁶ SEC officials could not recall other instances of such “supplemental evaluations” ever being drafted for other employees.⁷⁷ Although Kreitman transmitted it to Berger on August 1, the evaluation was not immediately placed in Aguirre’s personnel file. In late September, about four weeks after Aguirre was fired, Kreitman e-mailed a copy to Human Resources. However, the version he sent to Human Resources appears to be his first draft rather than the version he sent to Berger, incorporating Hanson’s

comments.⁷⁸ At the time it was drafted, Berger and Kreitman had just recently learned of the complaints by Aguirre and Smith. Berger and Hanson had their “confidential” conversation on the morning of August 1 about the problems Aguirre and Smith were having with Kreitman. Kreitman received Smith’s confidential e-mail to Fielder that afternoon. These events were intricately intertwined with the process of drafting the supplemental evaluations. Under these circumstances, the re-evaluations appear to be improper and retaliatory because of their timing. Therefore, it is necessary to evaluate the content of the re-evaluations as well.

b. Content of Supplemental Evaluation

Aguirre’s negative re-evaluation began by briefly acknowledging that Aguirre “works very hard, puts in long hours,” and “is willing to go the extra mile.” However, Kreitman and Hanson then claimed that Aguirre (1) was resistant to supervision; (2) was insufficiently aware of institutional protocol; (3) failed to fully and openly share information with others; (4) had difficulty explaining the significance of evidence in a clear and well-organized manner; and (5) expressed resentment at perceived attempts by supervisors to thwart his success.⁷⁹

(1) Resistance to Supervision: Kreitman and Hanson did not cite any examples for their first contention, that Aguirre was “resistant to supervision.” Moreover, in the course of this investigation, we did not find evidence suggesting that Aguirre’s “resistance” to his supervisors was inappropriately insubordinate. While he did voice strong disagreements with his supervisor’s decisions on occasion, we found no convincing evidence that he did so unprofessionally or inappropriately. Moreover, in examining those disagreements in detail, we find no evidence that he acted in contravention of his supervisor’s instructions, even when he offered persuasive arguments that they were wrong.

(2) Unaware of Institutional Protocol: For the second contention, that Aguirre was unaware of institutional protocol, Kreitman and Hanson cited two examples. The first example was that Aguirre retracted two of the subpoenas he had issued “to avoid violating privacy statutes.”⁸⁰ The second example was that he “inaccurately stated Commission policy in communication with defense counsel.”⁸¹

Regarding the subpoenas, Aguirre drafted subpoenas seeking e-mail and instant message traffic for Arthur Samberg around the time of his trading of Heller. Aguirre sent the drafts to Hanson early on the morning of May 23.⁸² According to Aguirre, Hanson was not responsive:

By the afternoon of May 24, I had not received a response from Hanson to any of the emails I had sent to him on the prior day. I sent him two emails regarding the same subpoenas. In one email, I pasted the text of the document description in the body of the email; its subject was “Urgent, Samberg subpoena.” Hanson responded to that email. I also sent him all of the subpoenas in a second email with this text: “These are the subpoenas that I forwarded Monday that still have not gone out.”

Hanson did not respond to this email. Later that afternoon, I went to Hanson's office to speak with Hanson about another matter. He casually mentioned there could be "some privacy concerns" with the subpoenas that had gone to Bloomberg and Reuters, but he did not specify what the problem was or offer any guidance how to correct it.⁸³

Aguirre quickly discovered that the subpoena did not contain a notice to the recipient that the SEC intended to comply with a statute requiring that the subscriber (i.e., Samberg) be notified of the subpoena. An example of the appropriate paragraph can be found in one of Aguirre's corrected subpoena cover letters, dated May 31, 2005:

Certain of the records called for by the subpoena may constitute "contents of electronic communications" within the meaning of the Electronic Communications Privacy Act of 1986 [18 U.S.C. 2510, et. seq.] (the "ECPA"). Pursuant to Section 2703(b) of the ECPA [18 U.S.C. 2703(b)], you may not release these records to us until I have provided the "subscriber" or "customer" with prior notice of this request. I will send you confirmation that the customer notice requirement has been complied with in approximately 14 days.⁸⁴

Contrary to claims by Aguirre's supervisors after his firing, failure to include this paragraph in the cover letter to a subpoena does not make mere issuance of the subpoena "illegal." Moreover, we found no contemporaneous documents suggesting that his supervisors thought this was a serious error when it occurred in May 2005. That contention did not arise until after Aguirre withdrew his resignation and challenged their decision not to question John Mack.

Regarding Kreitman's second example—the claim that Aguirre inaccurately described Commission policy to defense counsel—the re-evaluation does not go into detail. However, Robert Hanson later told the OIG that "former Enforcement Director Gary Lynch called [him] about an improper request Aguirre had made to Lynch to keep information confidential, which violates Enforcement policy."⁸⁵ While the SEC cannot require third parties to keep information about its investigative activities confidential, there is nothing inappropriate about merely requesting they do so. According to Aguirre, this conversation with Lynch occurred around June 8, 2005,⁸⁶ shortly before he faxed a subpoena to CSFB, where Lynch was General Counsel. According to Aguirre, the call began as an attempt to arrange for another CSFB attorney, Patrick Patalino, to accept service of the subpoena:

During the call, I also requested Patalino to treat the issuance of the subpoena confidentially, as I had heard other staff do in similar situations before. Patalino replied that CSFB also desired that the matter be treated confidentially and then left the line for a moment. When he returned, Lynch was patched into the call. Lynch asked aggressively: Are you saying that I should keep this matter confidential from John Mack? I responded politely: "No, I am just requesting that you keep the matter confidential." Lynch asked the same question two more times and I gave the same answer. On the fourth occasion that

Lynch asked the same question, I replied: I have answered the question three times.” Lynch promptly left the call.

Kreitman came to my office about an hour later, said that Lynch had called Berger, and asked what happened during the call. I told him and he seemed satisfied. He never indicated that I mishandled the call in any way. He later told me that he had discussed the matter with Berger and he was fine with the manner in which I handled the call.⁸⁷

Aguirre later e-mailed Hanson about Lynch’s close ties to John Mack, pointing to evidence that Lynch had advised Mack on investing in Pequot, as a possible explanation for Lynch’s call to Paul Berger.⁸⁸ As with the issue of the retracted subpoenas, there is no contemporaneous e-mail or document suggesting that his supervisors were concerned about Aguirre’s interactions with Lynch at the time. The first documentation is a vague reference in the negative re-evaluation, followed by more detail in his supervisor’s interviews with the OIG after his termination.

(3) Failure to Share Information: Hanson and Kreitman cited no example to support the claim that Aguirre failed to share information about the Pequot investigation. In interviewing staff who worked with Aguirre on the day-to-day aspects of the investigation, such as Hilton Foster, Eric Ribelin, and Liban Jama, we found that none of them described having an issue with Aguirre’s willingness to share information. To the contrary, Jama told us:

So any documents that I would need he would usually provide to me either a hard copy or an electronic e-mail. . . . Gary answered my questions. Whenever I asked him a question, he would answer the question for me. So I did not have really at that time [have] a high level of frustration.⁸⁹

Eric Ribelin also contradicted the claim that Aguirre was unwilling to share information:

Question: Did [Aguirre] keep individuals informed about his thinking?

Mr. Ribelin: Yes.

Question: Did he—so he was not an individual who would surprise people.

Mr. Ribelin: No.

Question: So he kept everyone fully advised.

Mr. Ribelin: I—I think so. Yeah. I mean, he was frequently talking to Mark and talking to Bob and sending e-mails, and talking to me and sending e-mails. . . . I believe that he was keeping people fully informed.⁹⁰

Moreover, a review of the documents produced to the Committees generally confirms that Aguirre provided frequent and detailed updates on the progress of the investigation via e-mail. In fact, on occasion his supervisors complained about being “bombarded” with too many e-mails from Aguirre.⁹¹

(4) Difficulty Explaining the Significance of Evidence: The fourth contention in the negative re-evaluation, that Aguirre had difficulty explaining the significance of evidence, is vague and subjective. Again, Hanson and Kreitman cited no specific examples of miscommunication. It is unclear whether they are referring to written, oral communication skills, or both. However, the criticism seems inconsistent with Kreitman’s statement that when he taught Aguirre at Georgetown Law, “He was the best student in the class.”⁹² As a general matter, in the course of our investigation, we found that Aguirre had no trouble explaining the significance of evidence. Judging from his contemporaneous e-mails as well as submissions to the Committees and his testimony before the Judiciary Committee, his communications were generally clear, convincing, and responsive.

(5) Resentment at Perceived Attempts to Thwart his Success: The fifth contention in the negative re-evaluation—that Aguirre “expressed resentment” at his supervisors’ “perceived attempts to thwart his success”—appears to be merely a reference to his objection to blocking John Mack’s testimony. There is no doubt that Aguirre voiced intense opposition to his supervisor’s decision, and the stated reason for it (i.e., Mack’s powerful political connections). That is not a sign of poor job performance. However, it does appear to be the primary motivation for drafting his negative re-evaluation.

The content of the re-evaluation does not withstand scrutiny. For those portions that are specific enough to judge against the documentary evidence, the negative comments are unsupported. Viewed in light of the suspicious timing discussed earlier and the lack of substantiation for its claims, we find that the re-evaluation appears both improper and retaliatory.

3. The Merit Pay Calendar and Aguirre’s Raise

Despite this negative re-evaluation, Aguirre received a merit pay increase just before he was terminated on September 2, 2005.⁹³ Obviously, employees who receive a negative evaluation and are about to be terminated do not ordinarily receive merit pay raises. However, this unusual outcome can be better understood by comparing the timing of the SEC’s merit pay process⁹⁴ to the sequence of events in the confrontation between Aguirre and his supervisors over John Mack’s testimony.

Figure 3: Key Events in Merit Pay Calendar

- June 29, 2005—Hanson writes positive evaluation of Aguirre.
- June 30, 2005—Aguirre tenders his resignation because of the Mack issue, but does not report Hanson’s “political connections” comment.
- July 18, 2005—SEC Compensation Committee Meets; Recommends two-step merit pay increase for Aguirre.
- July 19, 2005—Linda Thomsen receives Compensation Committee Recommendations.

July 27, 2005—Merit Pay package is completed. Aguirre withdraws resignation and sends lengthy e-mail to Paul Berger complaining about roadblocks in the investigation, including Hanson’s “political connections” comment.

August 1, 2005—Thomsen transmits the final merit pay results to Human Resources. Berger has Hanson and Kreitman draft negative re-evaluation.

On June 29, Robert Hanson drafted a positive evaluation of Aguirre’s performance. On June 30, Aguirre tendered his resignation, effective September 30, because of his supervisors’ decision to block the questioning of John Mack. The SEC’s Compensation Committee met on July 18. As a member of the Compensation Committee, Berger reviewed Hanson’s positive evaluation of Aguirre at that time, concurred, and recommended a two-step merit pay increase.⁹⁵ When Berger made this recommendation, he believed that Aguirre was leaving the Commission at the end of September. So, although they had already clashed about Mack’s testimony, Aguirre had essentially accepted Berger’s decision by deciding to leave the Commission on principle rather than stay and fight it.

Director of Enforcement Linda Thomsen received the Compensation Committee Recommendations on July 19 and completed the merit pay process for the Division of Enforcement on July 27. That same day, Aguirre withdrew his resignation and signaled his intent to challenge his supervisors by sending a comprehensive e-mail on the need to take John Mack’s testimony. For the first time, his e-mail contained written documentation of his allegation about Hanson’s reference to Mack’s powerful political connections.

However, Thomsen did not transmit the final merit pay results to Human Resources until August 1, the same day that Aguirre’s negative re-evaluation was drafted. When asked about the timing of the re-evaluation in connection with the transmittal of the final package to Human Resources, Berger claimed not to remember whether that was a factor, but admitted that it might have been:

Question: [W]hen you were discussing the supplemental evaluations with Mr. Kreitman and Mr. Hanson, was it in your mind that you were trying to get this done by August 1st so that it could be transmitted to the Office of Human Resources along with the other evaluations?

Mr. Berger: I don’t remember. I remember that we—I don’t remember.

Question: Do you remember there being any sort of time pressure to get the supplemental evaluations—

Mr. Berger: Yeah, it’s possible that there was. I just—Mark would be—would know better.⁹⁶

At 2:28 p.m. on August 1, Berger sent an e-mail saying, “I need to make another change to the merit pay schedule.”⁹⁷ In response, he was told that unless it was merely a typo, he would have to circulate the change to all members of the Compensation Committee for approval.⁹⁸ Berger indicated that it was “not a typo.”⁹⁹ It is unclear whether the change he wanted to make was to reverse the

merit pay increase he had recommended for Aguirre on July 18. When asked, Berger said his e-mail was unrelated to Aguirre, “as far as I can recall[.]”¹⁰⁰ He then explained that evaluations should not contain words such as “highest” and “high” and that he, “was trying to contact . . . the coordinator for the Division’s Compensation Committee, to ask whether [his] changes had been incorporated into the written evaluations.” This explanation is inconsistent with the language of the e-mail in question, which speaks of a “need to make another change,” not a desire to double-check changes already made. Moreover, the SEC’s own forms ask supervisors to rate employees on the quality of their contributions with check boxes for quality, high quality, and highest quality, so it is unclear what Berger’s explanation refers to or why the words “high” and “highest” would need to be removed from evaluations.¹⁰¹

None of Aguirre’s supervisors transmitted the negative re-evaluation to the Offices of Human Resources until after Aguirre was terminated. Berger could not have shared it with the rest of the Compensation Committee as required by internal SEC procedures, because the Committee had already met and did not meet again after August 1. Moreover, there is no record that he circulated it by e-mail. The merit pay process essentially ended on August 1 with transmittal of the final results from the Director’s Office to Human Resources. Given these circumstances, the negative re-evaluation could have been part of an aborted attempt to reverse Aguirre’s pay increase. That increase had been approved before he withdrew his resignation and documented Hanson’s comments about Mack’s political connections. Perhaps when it became clear that such a change could not be made without alerting the rest of Compensation Committee, the idea was abandoned. This would explain why the re-evaluation was not placed in the file until after Aguirre was terminated.

4. The Director of Enforcement and the Termination Notice

Because Aguirre was in his initial one-year probationary period, the SEC took the position that it needed no cause to fire him. In fact, the SEC took the unusual step of terminating his employment over the phone while he was on vacation. Had they waited until his return, his probationary year might have expired. Then, it might have been necessary to show cause for their action. The irregular process in drafting the negative re-evaluation and the SEC’s failure to place it in his personnel file would have made it difficult for the SEC to show cause for his termination. The SEC would also have had difficulty showing cause in light of Aguirre’s positive evaluation on June 29 and the approval of his pay increase on July 27.

Even though the SEC saw no requirement to show cause, his termination notice, like the re-evaluation, listed various allegations about negative aspects of Aguirre’s performance and conduct.¹⁰² The notice was sent on Thursday, September 1, 2005. The notice listed as reasons for termination included (1) Aguirre’s “inability to work effectively with other staff,” (2) his “unwillingness to operate within the [SEC’s] process,” (3) his “conduct was inappropriate” on several occasions, (4) that he “ignored the chain of command,” and (5) that he indicated he was “uninterested in participating” in the Pequot case beyond the investigatory stage.

As with the allegations in the negative re-evaluation, each of these contentions is supported only by the claims of his supervisors. The claims lack contemporaneous documentation and many of them are contradicted by other SEC employees. In particular, Eric Ribelin, Hilton Foster, and Liban Jama did not indicate that Aguirre was incapable of working effectively with them. In fact, at his retirement party, Hilton Foster made a point to introduce Aguirre to Director of Enforcement Linda Thomsen. Foster said: "Linda, this is Gary. I don't know if you know him or not, but he's working on what I consider to be one of the most significant cases I've seen at the Commission, and he's doing a hell of a job."¹⁰³ Foster also told us, "I found him easy to work with. . . . [H]e's obviously a smart guy, but he's willing to listen, and he would listen to what I said."¹⁰⁴ Eric Ribelin told us, "I think Gary Aguirre is one of the smartest, most tenacious, intelligent, thoughtful lawyers that I had worked with in 18 years, and I thought he was aggressively, but appropriately, pursuing an investigation that was moving forward."¹⁰⁵ For a comprehensive reply to his supervisors' various allegations, see Aguirre's answers to questions for the record posed after the December 5, 2006, Judiciary Committee hearing.¹⁰⁶ His responses to those allegations are generally persuasive and rely heavily on documents to corroborate and reconstruct events in greater detail than that offered by his former supervisors.

More important than what was in the termination notice, however, is what was missing from it. Specifically, it contained no explanation of how the termination could be reconciled with the merit pay increase he had just received. During the process of drafting his termination notice, one SEC labor attorney suggested explicitly addressing that issue in the notice, "We have also discussed in our office the possibility of including in the letter a sentence explaining why he received a two step increase but is now being terminated."¹⁰⁷ Although Kreitman replied, indicating that the suggestion would be implemented, the notice contains no such sentence.

In approving his termination, Linda Thomsen accepted the claims of his supervisors and the representations in the termination at face value. She had no first-hand knowledge of the matters outlined in the termination notice, and relied principally upon representations from Berger, Kreitman, and Hanson.¹⁰⁸ She did not get Aguirre's side of the story from Aguirre or from any of the experienced SEC staff who worked directly with Aguirre and who might have disputed his supervisor's claims, such as Eric Ribelin, Joe Cella or Hilton Foster. She failed to consult them even though she knew that Aguirre and his supervisors had a dispute about whether and when to take John Mack's testimony and even though she knew that the decision to terminate Aguirre's employment was likely to be challenged:

Question: When Mr. Aguirre was terminated . . . you are aware that he was having a dispute about taking the testimony of Mr. Mack, correct?

Ms. Thomsen: I was aware of that, yes.

Question: Were you concerned that it might appear that his termination was related to that or in reprisal for his being adamant on that?

Ms. Thomsen: Yes. Yes. We all were.

* * *

[His supervisors] advised that they expected this to be potentially litigious given the fact that Mr. Aguirre had been litigating with us before, that he was unhappy about the Mack testimony issue.¹⁰⁹

Despite these concerns, Thomsen failed to solicit or consider any independent view of the facts from anyone other than his supervisors. She even rebuffed Aguirre's attempt to contact her directly and confidentially to express his concerns. On August 4, he sent her an e-mail asking if she had "an open door policy" and telling her that the Pequot case was "nearly killed 5 months ago and is now moving in circles."¹¹⁰ After forwarding Aguirre's e-mail to Paul Berger, Thomsen rejected his request for a chance to speak confidentially, "I would be happy to meet *with the team* working on the matter."¹¹¹

5. *The Connections between the Mack Dispute and the Decision to Fire Aguirre*

If Aguirre was fired for refusing to accept his supervisor's decision to prevent or delay Mack's testimony, then the propriety of the termination would turn on the merits of that decision. If it was reasonable to object to the decision, and Aguirre did so appropriately, then his termination would arguably be improper.¹¹² However, first it is necessary to examine whether he was fired because of the Mack dispute. The timing and circumstances of the events suggest that he was. If he had not disagreed with his supervisors over their refusal to question Mack and if he had not bristled at their references to Mack's political connections as the reason for their decision—it is unlikely that he would have received a negative re-evaluation and then a termination notice. The Mack dispute and Aguirre's firing are so intricately connected that it simply is not credible to assert, as his supervisors did, that the two are unrelated. The stated reasons for his termination simply do not hold up under close scrutiny, leaving the Mack dispute as the more persuasive explanation.

In addition to the timing and sequence of events already discussed in detail, two particular pieces of evidence point to a direct connection between the Mack dispute and the termination: (1) Kreitman's e-mail initially proposing termination, and (2) discussion of the Mack issue at the termination meeting.

a. The Termination Proposal

On Wednesday, August 24, 2005, Mark Kreitman sent an e-mail to Paul Berger and Robert Hanson, which appears to be the first recorded suggestion that Aguirre be fired.¹¹³ Kreitman wrote, "Bob and I both feel that it may be appropriate at this juncture, before Gary's probationary period elapses, to consider his termination."¹¹⁴

The subject line of Kreitman's e-mail is "Gary and Pequot." However, Kreitman's e-mail is actually a reply to one earlier that morning from Paul Berger, which forwarded an e-mail from Aguirre with the subject line, "Mack Testimony." The attached e-mails in the chain provide Aguirre's August 4th e-mail to Hanson outlining his reasons for wanting to take Mack's testimony.

By drafting his termination proposal as a reply to this e-mail and changing the subject line from "Mack Testimony" to "Gary and Pequot," Kreitman implicitly acknowledged that the two issues were linked. In the text of the e-mail, he does so more explicitly, "I fear Gary's view of things here is not a healthy element for the group."¹¹⁵ Aguirre's "view of things" on the "Mack testimony" was that it should not be delayed because of his prominence or his politics. While conflict between Aguirre and his supervisors on that issue may well have been disruptive, Aguirre should not bear sole responsibility for it. His supervisors bear much of the responsibility for that conflict because of their adamant resistance in the face of persuasive arguments for taking Mack's testimony.¹¹⁶

b. The Termination Decision Meeting

The merits of the Mack issue were discussed during the same meeting at which Linda Thomsen approved the proposal to terminate Aguirre. This is a tacit recognition that the Mack testimony was connected to the termination decision. Robert Hanson described the conversation this way:

Question: You said you talked to Linda Thomsen about it?

Mr. Hanson: Yes.

Question: Do you recall the conversation?

Mr. Hanson: I recall parts of it. I recall saying that [Aguirre] was the proverbial loose cannon in that meeting, and that I thought he was a net negative for the Commission.

I recall Linda asking, saying something that she had gotten an email from him awhile ago about the testimony of Mack.¹¹⁷ She said she had suggested that we all meet or something like that to discuss whether it made sense to take Mack's testimony. She said does it make sense to take Mack's testimony at this point?

I said something to the effect of it would be a pretty short session. There wouldn't be much to ask him, nor would there be anything to confront him with. She said something to the effect, well, don't we sometimes ask, you know, get people on the record right away.

Paul said, well, this investigation . . . is from 2001. It is not like it happened last week and we can call a bunch of people and get them on the record.

Mark said something that he had been saying for awhile, . . . that we have no information suggesting that Mack had the information to pass it onto Samberg, who is the head of Pequot.

Question: Are you describing one conversation?

Mr. Hanson: This was a meeting that we had.

Question: A meeting?

Mr. Hanson: Yes.

* * *

Question: This was in August when you were talking about the decision to fire him?

Mr. Hanson: Correct.¹¹⁸

A couple things are of note in this description of the conversation: Hanson's use of the term "loose cannon" to describe Aguirre, and the focus on the merits of the Mack decision in the context of deciding whether to fire Aguirre.

Hanson's use of the term "loose cannon," is troubling because it is often one of the phrases used to identify whistleblowers for retaliation. When someone is identified as a "loose cannon" or a "troublemaker" it can convey a warning to others in the organization that the individual is unwilling to look the other way when it comes to evidence of misconduct or mismanagement. These terms were applied to Aguirre on several occasions. For example, in May 2005, an SEC trial attorney named Kevin O'Rourke wrote an e-mail to Mark Kreitman saying that Aguirre, "has shown strong signs of being a loose cannon."¹¹⁹ This followed an exchange of e-mails where O'Rourke criticized Aguirre for language he had circulated in a draft letter to opposing counsel, and Aguirre responded to the criticism with a detailed explanation of the issue and how it had arisen.¹²⁰ Both the tone of O'Rourke's e-mail criticizing Aguirre and the "loose cannon" comment may be better understood in light of an e-mail O'Rourke sent nine days earlier.¹²¹ Unknown to Aguirre, O'Rourke had been assigned to defend the SEC against Aguirre's EEO complaint for age discrimination. In his e-mail, O'Rourke was asking another SEC official if it was okay for him to continue to work on the Pequot investigation without telling Aguirre that O'Rourke was on the opposite side in the EEO matter.¹²²

When asked about the connection between questioning Mack and Aguirre's termination, Paul Berger admitted that it played "some part" and also referred to Hanson's "loose cannon" comment at the termination meeting:

Question: Do you contend, as you sit here today, that Mr. Aguirre's repeated insistence upon taking Mr. Mack's testimony did not play a role in the decision to terminate him?

Mr. Berger: I think that his inability to listen to his supervisors and, you know, make decisions based on strategy and judgment and the experience that they had played a factor. And so I think that the fact that he simply wouldn't listen with respect to Mack must have played some part in Mark and Bob's assessment of his conduct. But that went to—the issue was—and it was the primary issue—his conduct. . . . The issue was

that he couldn't listen and he didn't want to listen, and he was, I think as you say, Bob who said it, a loose cannon.¹²³

In his interview with the OIG, Hanson also described a conversation with Berger in which he told Berger to discount certain complaints about Mark Kreitman, "if it were either Aguirre or another 'troublemaker' [Berger] should consider the source."¹²⁴ This is an apparent reference to the August 1 conversation during which Berger suggested that Hanson and Kreitman draft the negative re-evaluation of Aguirre.

Kreitman's e-mail, Hanson's comments, O'Rourke's e-mail, and Berger's admission all suggest that Aguirre would not have been terminated were it not for the Mack issue. Just as Aguirre's decision to stay at the SEC and press for Mack's testimony led directly to his negative re-evaluation, so too his continued efforts to obtain approval for questioning Mack led directly to Aguirre's termination. When combined with the circumstances reviewed earlier, the termination appears to be merely the culmination of the process of reprisal that began with the August 1 re-evaluation. Thus, in its totality, the evidence we reviewed suggests a retaliatory motive for Aguirre's dismissal.

The dangers of retaliation against good-faith efforts by employees to expose wrongdoing are clear. In this case, the actions taken against Aguirre by SEC management could very well create an atmosphere in which employees are overly averse to raising concerns regarding actions by the agency. In an effort to assist protecting against this concern, we have three suggestions.

First, the SEC should adopt clear, written whistleblower protections to safeguard all employees against adverse personnel actions in retaliation for reasonable good faith allegations or disclosures of perceived wrongdoing, even when done in the context of an employee's assigned duties. A fair hearing without fear of retaliation for internal complaints could not only increase morale and resolve disputes earlier—it could also assist the SEC in its mission by identifying problems that need attention and action from senior management.

Second, in this case, senior management's decision to terminate Aguirre was closely connected to the internal disagreement about whether to question John Mack. Before approving Aguirre's termination, Director of Enforcement Linda Thomsen relied solely on information from the supervisors who disagreed with Aguirre. When dealing with an investigator or attorney who is responsible for a major investigation, careful adherence to established procedures is necessary to ensure that the SEC considers all relevant information and avoids the appearance of impropriety. Even if the agency is not legally required to show cause for the action, as may be the case with a probationary employee or an employee who resigns, standard written procedures are needed to ensure public confidence in the integrity of the SEC's operations.

Finally, the SEC should adopt clear, written guidance establishing alternate, confidential channels of communication to resolve potential issues early and without public controversy. The SEC should encourage employees to use such procedures to raise serious issues that they cannot resolve with their managers. Complaints

should be taken seriously and considered independently, not merely referred back to the complainant's supervisor. In this case, Director of Enforcement Linda Thomsen responded to Aguirre's attempt to speak with her directly about the problems he was facing by agreeing to meet only with his supervisors present. When an employee seeks to appeal to someone other than his immediate supervisors, the employee should be given a fair and confidential opportunity to be heard.

6. *Paul Berger Leaves the SEC*

Nine months after Aguirre was fired, Paul Berger joined the law firm that contacted the SEC about John Mack on behalf of Morgan Stanley's Board of Directors. Mary Jo White, a former U.S. Attorney for the Southern District of New York and a partner at Debevoise & Plimpton, was one of the attorney's whose "juice" Hanson had cited as a concern in taking Mack's testimony. In June 2005, she led the effort by Debevoise to vet John Mack in advance of bringing him back to Morgan Stanley. In the course of the six days during which she represented the Morgan Stanley Board, White contacted Director of Enforcement Linda Thomsen about John Mack and produced e-mails directly to Thomsen.¹²⁵ Other representatives of Morgan Stanley also contacted Associate Director Paul Berger directly about the case.¹²⁶ However, when a friend asked Berger about Debevoise & Plimpton a few days after the termination, Berger expressed interest in working for Debevoise.

Although we found no evidence of a connection between Berger's role in the Mack controversy and his subsequent employment, Berger apparently: (1) failed to recuse himself from the Pequot investigation in a timely manner, and (2) gave incomplete answers to Senate staff when initially questioned.

a. The Initial Story

When the issue of Berger's employment and the appearance it created first arose, Senate staff contacted Berger by phone to question him about it, as well as other matters related to the Aguirre controversy. During the July 28, 2006, conversation, Berger said his last day at the Commission was May 31, 2006, and that he began working as a partner at Debevoise & Plimpton on June 2, 2006. When asked about why his biography was not yet on the firm's website nearly two months later, Berger said he had been on vacation and would continue to be on vacation until Labor Day. When asked when he "started the process of leaving the SEC," Berger stated he began reaching out to firms and they began reaching out to him in January 2006.¹²⁷ He went on to say, in reference to his current employment and his past work on the Pequot case, "one has nothing to do with the other."¹²⁸

In an effort to corroborate this version of events, Senate staff sought SEC records to determine whether and when Berger recused himself from the Pequot investigation and when he first began having discussions about employment with Debevoise & Plimpton. The SEC produced copies of e-mails in which Berger communicated his recusal on matters related to Debevoise. On January 9, 2006, Berger sent an e-mail to his immediate subordinates (four assistant directors) asking whether Debevoise had entered an

appearance in any of their matters.¹²⁹ On February 10, 2006, he sent another e-mail explicitly informing them that he was recused from any matters involving Debevoise.¹³⁰ When asked on the record about when he stopped working on the Pequot case, he said, “in January 2006, I think.”¹³¹

When Director of Enforcement Linda Thomsen was asked about Berger’s search for outside employment, she said she believed Berger likely began seeking outside employment sometime after the end of October 2005, after he was not selected for a deputy director position.¹³² SEC counsel also argued that this was circumstantial evidence as to when Berger’s first contacts with firms were likely made.¹³³

b. The Full Story

Although Berger and the SEC initially implied that he did not start discussing the possibility of employment at Debevoise until months after Aguirre’s termination, rumors circulated at the SEC that Berger’s search had begun much earlier. Further investigation led to confirmation that others at the SEC were talking about Berger leaving and working for Debevoise long before he recused himself from the Pequot case.¹³⁴ One SEC attorney indicated her impression that Berger was going to Debevoise and that she believed that he was looking to leave the Commission as early as the beginning of 2005.¹³⁵

Given this evidence, we continued to press the SEC to do more comprehensive e-mail searches. As early as September 8, 2006, the Committees formally requested records from the SEC relating to Berger’s recusal and potential employment with Debevoise. We then interviewed two witnesses on the record about e-mails discussing speculation regarding Berger’s eminent departure long before he recused himself.¹³⁶ Finally, on October 31, 2006, the SEC produced a key e-mail, which definitively established that Berger had expressed an interest in employment at Debevoise through an intermediary much earlier. Specifically, he communicated his interest indirectly through a friend to a partner at Debevoise just days after Aguirre was terminated. The e-mail was from Lawrence West, another SEC official who was in employment talks with Debevoise at the time. The e-mail was dated September 8, 2005 and addressed to Paul Berger with the subject line, “Debevoise.” The body of the message read, “Mary Jo [White] just called. I mentioned your interest.”¹³⁷

This raised a number of questions for staff, including why Berger failed to disclose this contact when questioned in July 2006. Berger described the events surrounding the September 8 e-mail from Lawrence West as follows:

[O]ne of my colleagues at the Commission, Larry West, who was an Associate Director, was looking for a position to leave the Commission. And he came to me—Larry and I were good friends, still are good friends—and said that he was looking for a position, that he wanted to—was it okay if he could share information with me about his looking and get my advice, bounce ideas off me, et cetera. I said sure.

At one point he came to me and he said, “You know, wouldn’t it be great if the two of us worked together someplace?” And I said, “Well, it would be great, but it’s never going to happen.” And he said, “Why?” And I said, “Because no firm is going to absorb two of us without any book of business, no matter what our experience is.” And I said, “That’s just not going to happen, Larry, so we’re going to have to get comfortable with that.”

And at some point he came to me and he said, “Well, would it be okay if I told Debevoise, who I’m talking with, that you’re interested in leaving?” And I said, “Okay. Sure.” You know, “It’s okay to go ahead and do that.” And then he went and did that.¹³⁸

West did not recall sending the e-mail or his conversation with Paul Berger.¹³⁹ However, in the September 8 e-mail, West appears to be reporting back on the results of the conversation Berger had authorized him to have with Debevoise. Berger said that he got “a little concerned” and contacted ethics counsel for advice on whether it was appropriate, given his work on the Pequot case.¹⁴⁰ According to Berger, the ethics counsel advised that if the intermediary acts “as an agent” then it is necessary for the job seeker to recuse himself from cases involving that potential employer.¹⁴¹

c. Berger’s Failure to Mention Pre-Recusal Contacts

During his on-the-record interview, Berger disclosed that in addition to this contact in September 2005 with Debevoise, Goodwin Procter approached him about employment in fall 2005.¹⁴² When asked about his earlier telephone interview and why he had not disclosed these contacts, Berger claimed alternatively that he either did not remember them or that that he did not consider the September 8 contact to be reaching out. We find it difficult to reconcile his initial statement that he began reaching out to firms and they began reaching out to him in January 2006 with the September 8 Debevoise contact and the fall 2005 Goodwin Procter contact. However, Berger argued that neither he nor Debevoise had “reached out” to one another and that his earlier statements were technically true:

Question: So did you tell [Senate staff] that you began reaching out to firms and they began reaching out to you in January of 2006?

Mr. Berger: I don’t remember. That would be true that I didn’t start reaching out until January, but I don’t remember.

Question: Well, you just told us about that Goodwin Procter reached out—

Mr. Berger: Right. They reached out.

Question: —prior to January.

Mr. Berger: They reached out to me prior to that, right.

Question: You didn’t tell [Senate staff] about that?

Mr. Berger: I don’t remember.¹⁴³

Regardless of whether Berger's initial statement was technically true, it caused the Committees and the SEC to expend unnecessary time and resources to discover the full story. We eventually learned from documents what Berger should have volunteered when first asked. In explaining why he was not more forthcoming, Berger claimed that he did not understand the SEC rules governing disclosure of non-public information and implied that the rules might prevent him from talking about his own efforts to seek outside employment:

Question: Do you have any explanation as to why you didn't tell [Senate staff] about those contacts during that call?

Mr. Berger: Well, primarily because I was very concerned about having any discussions without first talking with the SEC and getting authorization to discuss anything.

* * *

You know, I was concerned about having any kind of discussions with someone outside of the SEC at that point, and so I don't know if—you know, why I did or didn't say something. I mean, I really don't remember what I said.

* * *

Question: So do you think that you were completely honest and forthcoming with [Senate Staff] during that conversation?

Mr. Berger: Yes, I think I was completely honest.

Question: But not forthcoming?

Mr. Berger: I was concerned about providing any information without authorization from the Commission so that I would not violate any rules. . . .¹⁴⁴

Commission rules do not restrict former employees from discussing when or under what circumstances they began seeking outside employment. Perhaps Berger genuinely did not remember in July 2006 that he had authorized a friend to inquire about potential employment with Debevoise in September 2005. Or, perhaps he wanted to avoid the questions raised by a contact so far in advance of the date on which he recused himself and so close to Gary Aguirre's termination.

d. Berger's Failure to Recuse Himself Immediately from the Pequot Case

The Commission's ethics officer, Bill Lenox, did not recall the conversation with Berger about the September contact with Debevoise.¹⁴⁵ However, Lenox did tell us that during their 12 years together at the SEC, Berger frequently called to ask questions and was concerned not to violate ethics rules.¹⁴⁶ He also indicated that the advice Berger described is consistent with the advice he would normally give.¹⁴⁷

"Seeking employment" is defined in 5 C.F.R. 2635.603:

An employee has begun seeking employment if he has directly or indirectly:

- (i) Engaged in negotiations for employment with any person. . . . The term [negotiations] is not limited to discussions of specific terms and conditions of employment in a specific position;
- (ii) Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person[;] or
- (iii) Made a response other than rejection to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person.¹⁴⁸

By Berger's own version of events, in early September 2005, he engaged in indirect communications with Debevoise regarding possible employment through Lawrence West. Moreover, he authorized West to engage in the communications on his behalf, so West might be said to have been acting as his agent. According to West, however, he mentioned Berger's interest only to ensure that Debevoise would not be more interested in Berger than West if it learned of Berger's attempts to gain outside employment.¹⁴⁹ In any event, merely because Berger's efforts to seek employment did not progress beyond that initial contact until January 2006, does not necessarily mean that Berger should have continued to participate in the Pequot case for the next four months. According to a memo to all SEC staff from Ethics Counsel Bill Lenox:

The most common error is to assume that no restrictions apply to preliminary inquiries and that no consideration need be given to disqualifying oneself until actual negotiations begin. This is not correct. An employee *may not even begin* to seek employment with any entity that has a financial or other interest in a matter in which the employee is participating.¹⁵⁰

It appears Berger began seeking employment with Debevoise in early September when he authorized West to discuss Berger's employment prospects with one of the firm's partners. According to Lenox's memo, there are three options at that point: (1) recusal, (2) termination of attempts to seek employment, or (3) a waiver. Berger did not seek a waiver, and he did not recuse himself until four months later. According to the SEC's ethics counsel, discussions must be "terminated, not just suspended."¹⁵¹ It is unclear whether Debevoise communicated a rejection to Berger, or he to them, in September 2005. The SEC ethics counsel recommends that terminations of employment discussions be committed to writing.¹⁵² The SEC did not produce any such written termination.

However, even if Berger did not terminate employment discussions, did not have a waiver, and did not recuse himself, one might argue that given the limited duration of the Debevoise involvement in the case (June 24-30), the firm no longer had a "financial or other interest" in the investigation after June 2005. Under these circumstances and under the obligations described by the SEC's

ethics counsel, Berger may or may not have had an obligation to recuse himself in September 2005. However, even if he had no duty, the mere appearance of impropriety warranted a recusal if only on prudential grounds.

ENDNOTES

1. Memorandum from Stephen M. Cutler to Jayne Seidman (July 15, 2004) (Exhibit 36).
2. *Id.*
3. *Id.*
4. During his last three years as a partner with Aguirre & Eckman, Aguirre earned yearly income of \$2,330,000, \$1,961,000, and finally \$25,000 as the firm was closing down its operation. *Id.*
5. Complainant's Memorandum in Opposition to Summary Judgment (Exhibit 37).
6. *Id.*
7. *Id.*
8. *Id.*; SEC 0137, EEOC No. 100-2005-00413X Decision (June 14, 2006) (Exhibit 38).
9. Complainant's Memorandum in Opposition to Summary Judgment. The SEC claims to have previously interviewed Aguirre, chose someone else, then asked him to reapply, at which time they hired him. (Exhibit 37).
10. SEC 0135, 0137, 0145, 0155, Decision and Order Entering Judgment in *Aguirre v. Donaldson*, EEOC No. 100-2005-00413X, Agency No. 155120631-48 (Exhibit 38).
11. S. HRG. 109-898, at 118, Aguirre response to QFRs at 46.
12. *Id.* at 88, Berger testimony, Dec. 5, 2006, at 8.
13. *Id.* at 89, Aguirre response to questions for the record at 46.
14. *Id.* at 712, Ex 5 to Aguirre's responses to questions for the record.
15. Aguirre response to questions for the record at 46.
16. SEC 0393, Aguirre letter to Paul Berger (Jan. 10, 2005) (Exhibit 39).
17. SEC 0592, Berger e-mail to Aguirre (Jan. 13, 2005) (Exhibit 40).
18. S. HRG. 109-898, at 692-693 (SEC 0397).
19. Kreitman transcript, at 125-26 (Nov. 15, 2006) (Exhibit 14).
20. S. HRG. 109-898, at 825 (SEC 0036).
21. *Id.* at 809.
22. *Id.*
23. Berger transcript, at 213 (Nov. 2, 2006) (Exhibit 4).
24. S. HRG. 109-898, at 857 (SEC 4939).
25. *Id.* at 691.
26. *See* Section VI.C.1, *supra*.
27. S. HRG. 109-898, at 21-22, 1217 (SEC 5688).
28. *Id.* at 55.
29. *Id.* at 651.
30. *See* Section VI.B.2., "Morgan Stanley's Investigation and Contacts with the SEC," *supra*.
31. *See* Section VI.C.4.c., *supra*.
32. S. HRG. 109-696, at 36 ("When I brought up the possibility of issuing a subpoena with [my branch chief, Hanson], he told me that Mack—that this would be very difficult, Mack had very powerful political connections. He would not authorize it and I would have to speak with Kreitman.>").
33. S. HRG. 109-898, at 761 (SEC 1324) (emphasis added).
34. Transcribed Interview with Robert Hanson, Branch Chief, Division of Enforcement, SEC, at 131-33 (Sept. 5, 2006) (hereinafter "Hanson transcript (Sept. 5, 2006)") (Exhibit 41).
35. S. HRG. 109-898, at 898 (SEC/OIG 0087), 871 (SEC/OIG 1-7) (emphasis added).
36. *Id.* at 662-66 (SEC 5748).
37. *Id.* at 662-63 (SEC 5748).
38. Hanson transcript, at 158-64 (Sept. 5, 2006) (Exhibit 41).
39. S. HRG. 109-898, at 830 (SEC/OIG 0367).
40. *Id.* at 669.
41. *Id.* at 668 (emphasis added); *but see* SEC 5827 (Exhibit 42).
42. SEC 5827 (Exhibit 42).
43. Hanson transcript, at 181-85 (Sept. 5, 2006) (Exhibit 41).
44. S. HRG. 109-898, at 1254 (Hanson's written statement. Emphasis added).
45. *Id.* at 602.
46. *Id.* at 612.
47. *Id.* at 757. That same day, Robert Hanson signed Aguirre's positive performance evaluation. *See* Section VII.A.3., *supra*.
48. S. HRG. 109-898, at 677 (SEC 0032).
49. E-mail from Gary Aguirre to Paul Berger (Jun 28, 2005) (Exhibit 43).
50. Berger transcript, at 132:14, 134:34 (Nov. 2, 2006) (Exhibit 4).
51. SEC 3664 (Exhibit 44). This e-mail seems inconsistent with claims by Aguirre's supervisors that he refused to write an investigative summary of the case.

52. See S. HRG. 109-898, at 539, Aguirre's Prepared Hearing Testimony, p. 31.
53. S. HRG. 109-898, at 539.
54. Aguirre Fax to Committee, Oct. 19, 2006 (Exhibit 45); see also S. HRG. 109-898, at 539, Aguirre Hearing Testimony, at 33-34.
55. Berger transcript, at 68-70 (Nov. 7, 2006) (Exhibit 27).
56. S. HRG. 109-898, at 757-61 (SEC 3475).
57. *Id.* at 757-61.
58. See section VII.B.2.
59. See section VII.E.1.
60. (SEC 3669). See also, S. HRG. 109-898, at 61-62.
61. S. HRG. 109-898, at 760-61 (SEC 1324) (emphasis added).
62. Berger transcript, at 83-86 (Nov. 7, 2006) (Exhibit 27).
63. See section VII.B.1.
64. John Smith is not the employee's true name. We are using this pseudonym given the sensitive nature of the personnel information discussed and because the employee continues to be employed by the SEC.
65. E-mail from Dave Fielder to Mark Kreitman (Aug.1, 2005) (Exhibit 46).
66. *Id.*
67. Hanson transcript, at 35-36 (Sept. 5, 2006) (Exhibit 41).
68. *Id.* (emphasis added).
69. SEC 4939 (Exhibit 47).
70. SEC 5281 (Exhibit 48).
71. E-mail from Dave Fielder to Mark Kreitman (Aug.1, 2005) (Exhibit 46).
72. SEC 5571 (Exhibit 49). Berger's description is inconsistent with this contemporaneous record ("I think that I—I don't remember directing them to do it. You know, I rely on Bob and Mark on that, too, but my sense was I asked them to think about it[.]") Berger transcript, at 111 (Nov. 7, 2006) (Exhibit 27)).
73. S. HRG. 109-898, at 1209 (SEC 5529).
74. SEC 5568 (Exhibit 50).
75. Kreitman transcript, at 33 (Nov. 15, 2006) (Exhibit 14).
76. SEC/OIG, *Enforcement Performance Management*, Audit No. 423 (Feb. 8, 2007) (Exhibit 51).
77. S. HRG. 109-898, at 1209-10 (SEC 5529-30).
78. *Id.* at 824.
79. *Id.* at 1209-10.
80. *Id.* at 1210.
81. *Id.*
82. E-mail from Gary Aguirre to Robert Hanson (May 23, 2005) (Exhibit 52). This document was not produced to the Committees by the SEC, although it appears to be responsive to the Aug. 1, 2006, document request. It contradicts claims by Aguirre's supervisors that he failed to provide Robert Hanson with draft subpoenas for review. Berger transcript, at 51:10-14, 59:20-21 (Nov. 2, 2006) (Exhibit 4).
83. S. HRG. 109-898, at 91; see also SEC 3467 (Exhibit 53).
84. Letter from Gary Aguirre to Custodian of Records, Bloomberg L.P. (May 31, 2005) (Exhibit 54).
85. S. HRG. 109-898, at 876 (SEC/OIG 0007); see also Berger transcript, at 204:24, 209:3-9 (Nov. 2, 2006) (Exhibit 4); Berger transcript, at 102:11-13 (Nov. 7, 2006) (Exhibit 27). Lynch was General Counsel for Credit Suisse First Boston (CSFB), which had worked on the GE-Heller acquisition.
86. The rating period covered by the re-evaluation process ended on April 30, 2005. Therefore, even if the events occurred as Aguirre's supervisor's claimed, it would be inappropriate to reference them in this evaluation because they occurred after the rating period ended.
87. S. HRG. 109-898, at 58-59 (Aguirre's answers to questions for the record at 13-14).
88. *Id.* at 619-20 (SEC 0896).
89. Jama transcript, at 12-13 (Oct. 11, 2006) (Exhibit 34).
90. S. HRG. 109-898, at 1135-36.
91. SEC 2049 (Exhibit 55); Berger transcript, at 122:8-10 (Nov. 2, 2006) (Exhibit 4); Hanson transcript, at 125 (Sept. 5, 2006) (Exhibit 41) ("I tried to answer Gary's emails, but there were so many of them that it was almost a full-time job just answering his emails").
92. Kreitman transcript, at 10 (Sept. 6, 2006) (Exhibit 5).
93. See Section VII.A.4, *supra*.
94. S. HRG. 109-898, at 857 (SEC 4939).
95. Berger transcript, at 247 (Nov. 2, 2006) (Exhibit 4).
96. Berger transcript, at 234 (Nov. 2, 2006) (Exhibit 4).

97. S. HRG. 109-898, at 1208 (SEC 5333).
98. *Id.*
99. *Id.*
100. *Id.* at 445-46, Berger's answers to questions for the record.
101. *Id.* at 808.
102. Memorandum from Linda Thomsen to Gary Aguirre (Sept. 1, 2005) (Exhibit 56).
103. S. HRG. 109-898, at 978.
104. *Id.* at 984, 986.
105. *Id.* at 1101.
106. *Id.* at 44-92.
107. *Id.* at 864 (SEC 1291).
108. Thomsen transcript, at 120-24 (Sept. 8, 2006) (Exhibit 26).
109. *Id.* at 55, 118.
110. S. HRG. 109-898, at 684 (SEC 1421).
111. *Id.* at 685 (emphasis added).
112. See Section VI.C.3.a, *supra*.
113. S. HRG. 109-898, at 830 (SEC/OIG 0367).
114. *Id.*
115. *Id.*
116. See Section VI.C.4, *supra*.
117. S. HRG. 109-898, at 684 (SEC 1421) In fact, Aguirre's e-mail did not mention Mack's testimony, which suggests that Thomsen knew of the Mack controversy from another source.
118. Hanson transcript, at 59-61 (Sept. 5, 2006) (Exhibit 41).
119. SEC 1368 (Exhibit 57).
120. S. HRG. 109-898, at 69, 82-84.
121. SEC 5664 (Exhibit 58).
122. SEC 5664 (Exhibit 58). Again, a few days latter, O'Rourke sent an e-mail commenting on several employees describing Aguirre as "very dedicated and quite skilled, but is somewhat of a loose cannon that needs to be supervised." SEC 5686 (Exhibit 59).
123. Berger transcript, at 97-98 (Nov. 7, 2006) (Exhibit 27).
124. SEC/OIG Document Production at 0451 (Exhibit 60).
125. See Section VI.C.3.b, *supra*.
126. Judith Burns, *SEC Associate Director Stepping Down*, DOW JONES NEWSWIRES (May 18, 2006) (Exhibit 61).
127. Telephone Interview with Paul Berger, Associate Director of Enforcement Division, SEC, (July 28, 2006) (hereinafter "Berger interview (July 28, 2006)").
128. Berger interview (July 28, 2006).
129. S. HRG. 109-898, at 858 (SEC 1670).
130. *Id.* at 861.
131. Berger transcript, at 81 (Nov. 2, 2006) (Exhibit 4).
132. Thomsen transcript, at 92 (Sept. 8, 2006) (Exhibit 26).
133. *Id.* at 201:21-24.
134. SEC 4928 (Exhibit 62), SEC 4929 (Exhibit 63).
135. Transcribed Interview with Margaret Cain, Attorney, Division of Enforcement, SEC, at 7:13-19, 20-25, 33 (Oct. 13, 2006) (Exhibit 64).
136. SEC 4988-89, E-mail from Lawrence Renbaum to Timothy P. Peterson (Feb. 15, 2006) (Exhibit 65).
137. S. HRG. 109-898, at 863 (SEC 5007).
138. Berger transcript, at 83 (Nov. 2, 2006) (Exhibit 4).
139. Telephone Interview with Lawrence West, Partner, Latham & Watkins, (Nov. 14, 2006) (hereinafter "West interview (Nov. 14, 2006)").
140. Berger transcript, at 84 (Nov. 2, 2006) (Exhibit 4). The SEC's ethics officer, Bill Lenox, did not recall a specific conversation with Berger on this particular issue. Telephone Interview with William (Bill) Lenox, Ethics Counsel, Office of General Counsel, SEC, (Nov. 17, 2006) (hereinafter "Lenox interview (Nov. 17, 2006)").
141. Berger transcript, at 84 (Nov. 2, 2006) (Exhibit 4). Berger also described a subsequent conversation with West, in which he told West that he had spoken to the ethics counsel and decided that he should not mention his name again. However, West had no memory of such a conversation. West interview, (Nov. 14, 2006).
142. Berger transcript, at 17:3-10 (Nov. 7, 2006) (Exhibit 27).
143. *Id.* at 19-20.
144. *Id.*
145. Lenox interview, (Nov. 17, 2006).

- 146. *Id.*
- 147. *Id.*
- 148. SEC 1534 (emphasis added) (Exhibit 66).
- 149. West interview (Nov. 14, 2006)
- 150. SEC 1534 (emphasis added).
- 151. *Id.* at SEC 1537 (Exhibit 66).
- 152. *Id.*

VIII. The Inspector General's Investigation

A. Background

Inspectors General (IGs) enjoy a unique role in federal agencies. Created by the Inspector General Act of 1978,¹ IGs are tasked with (1) conducting audits and investigations, (2) promoting economy, efficiency, and effectiveness, and (3) detecting and preventing fraud and abuse in their agency's programs and operations.² While IGs receive general supervision from the heads of their respective agencies, the agency head may not prevent or prohibit the IG from initiating, carrying out, or completing any audit or investigation.³

The SEC established its Office of the Inspector General (SEC/OIG) in March 1989. Soon after, Walter Stachnik was appointed as the first SEC Inspector General, a position he continues to hold today. Prior to this appointment, Stachnik had served in a variety of positions throughout the government. His office is charged with conducting internal audits and investigations at the SEC.

B. SEC/OIG Investigation of Aguirre's Claims— A One-Sided Approach

On September 2, 2005, Aguirre wrote his first letter to SEC Chairman Christopher Cox detailing his allegations surrounding the Pequot case and his employment at the SEC.⁴ This letter formed the basis of his allegations and detailed his employment from mid-September 2004 through September 2005.⁵ Most notably, the letter contained the core allegation that Aguirre's request to interview John Mack was rebuffed by Branch Chief Robert Hanson due to Mack's "powerful political connections."⁶

The September 2, 2005 letter also outlined concerns Aguirre had with the Pequot investigation. The letter provided further support of his claim, including the names of other SEC employees who shared similar concerns regarding the suspect trades that made up the Pequot investigation. More specifically, Aguirre wrote, "[s]taff who worked on this matter from the beginning—Hilton Foster, Eric Ribelin, Thomas Conroy, and I—believe that PCM engages in an institutionalized form of insider trading that corrupts the financial markets."⁷ Further, the letter detailed irregularities Aguirre observed in the investigation, including outside counsel dealing directly with his superiors outside the normal course of business, and being excluded from meetings with supervisors.⁸

While this letter contained the basis of Aguirre's allegations, it was by no means a complete description of his allegations and the evidence supporting them. Aguirre specifically noted, "I state the facts briefly below, *though there is much more to be said.*"⁹ The Office of the Chairman forwarded the letter for review to the SEC Office of the Inspector General. The OIG ignored this admonition and

made no attempt to contact Aguirre for additional information. Aguirre sent a second letter to Chairman Cox on October 11, 2005.¹⁰ This second letter raised new allegations surrounding the key documents related to Aguirre's termination.¹¹

The OIG's investigation was riddled with inconsistencies and failed to address Aguirre's allegations thoroughly and objectively. During nearly every stage in the investigation, the OIG appeared to operate under a presumption that Aguirre's supervisors had acted appropriately, and thus, the OIG only sought evidence favorable to the agency. For example, the OIG simply accepted the assertions of Aguirre's supervisors at face value without even speaking to Aguirre for his side of the story. In this and other respects, the OIG failed to meet the most basic standards for conducting an impartial and independent review

1. Investigative Plan: Don't talk to the Complainant

The Investigative Plan lists the subjects of the investigation as, "Robert Hanson, Mark Kreitman, Linda Thompsen [sic], Paul Berger."¹² It also lists the allegations as, "abuse of discretionary authority."¹³ The stated goal of the investigation was to, "Determine whether Division of Enforcement management gave preferential treatment to person, thereby preventing proper and thorough investigation of matter."¹⁴ The allegations were categorized as "administrative" and the priority of the case was described as "medium."¹⁵

According to Kelly Andrews, Associate Counsel from the Office of General Counsel, it was her decision to label the investigation as "medium" priority, and Mary-Beth Sullivan, Assistant Inspector General for Investigations, concurred.¹⁶ Sullivan confirmed that she concurred with Andrews at the time that the investigation was "medium" priority.¹⁷ It remains unclear why the OIG did not consider serious allegations about political influence hindering an SEC Enforcement investigation a "high priority."

In the section of the Investigative Plan marked, "Planned Investigative Steps (In Order of Priority)," the first step listed is "interview subjects."¹⁸ Andrews explained that by "subjects," she meant those against whom the allegations had been made, namely "Robert Hanson, Mark Kreitman, Linda Thomsen, Paul Berger."¹⁹ Andrews explained that the priority to conduct the interviews before obtaining documents was to, "see what their story was" because the OIG tries "to interview them first, if it's not criminal."²⁰ Interviewing Aguirre at a later time was considered optional. The plan noted the potential to "possibly interview complainant for clarification of claims and/or additional information."²¹ However, the OIG eventually made an affirmative decision not to interview Aguirre at all.²²

The OIG had two reasons for failing to interview Aguirre: (1) that it was precluded by law, and (2) that it was unnecessary. Neither is persuasive.

a. The Privacy Act

First, the OIG claimed its decision was required by a provision of the Privacy Act.²³ In written response to questions from Senator

Grassley following the December 5, 2006 Senate Judiciary Committee hearing, Inspector General Stachnik replied that:

[B]ased upon the advice of OIG Counsel, that Section (e)(2) of the Privacy Act of 1974 requires the OIG, in non-criminal cases, to obtain information from the subjects of the investigation first before going to other sources to the greatest extent practicable.²⁴

The provision he referred to states:

Each agency that maintains a system of records shall . . . collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. . . .²⁵

The OIG claimed it was bound by a strict interpretation this provision and of the decision in *Dong v. Smithsonian*.²⁶ As described in *Dong*, "The Privacy Act requires '[e]ach agency that maintains a system of records' to gather information about a person directly from that person, to the greatest extent practicable."²⁷ It is unclear why this provision would not place an equal burden on the OIG to seek information directly from Aguirre as well as directly from his supervisors. In this context, the use of the term "subject" refers not to the subject of an OIG investigation, but rather to the subject of a record in a "system of records" as defined by the Act. Therefore, one could argue that Aguirre was himself the subject of records sought by the OIG. In its investigation, the OIG was gathering information about Aguirre just as much as it was gathering information about his supervisors. To the extent that it was storing that information in a system of records, the opposite of the OIG's claim is true. Rather than prohibiting an Aguirre interview, this Privacy Act provision arguably required one, imposing an equal duty to seek information directly from him first rather than other sources.

b. The Necessity of an Aguirre Interview

Second, the OIG claimed that "it had sufficient information from Aguirre's letters" to preclude an interview with Aguirre.²⁸ Andrews elaborated in an interview that the OIG, "thought that [Aguirre's] September 2nd and October 11th letters were very clear as to the allegations he was making so we didn't feel we needed clarification as to the allegations, and we had a lot of documents and e-mails."²⁹

This claim is simply untenable. First, Aguirre's initial letter states on the first page, "there is much more to be said."³⁰ Two short letters cannot begin to scratch the surface of the evidence relevant to Aguirre's claims, especially in light of Aguirre's indication that much more information was available and the thousands of pages of documents Aguirre actually possessed. Had the OIG contacted Aguirre, it would probably have had access to many of these documents before closing its first investigation, and perhaps, could have avoided drawing conclusions at odds with the documentary record. By deciding not to interview Aguirre, the OIG closed off arguably its most important source of information.

The fact that Aguirre did have supporting evidence and that the OIG closed its case without obtaining that evidence demonstrates

rather conclusively that contacting Aguirre was a necessary step toward obtaining all the relevant evidence. Yet, the OIG's office failed to take that necessary step and has offered no credible explanation as to why. Another possible explanation for not interviewing Aguirre is that the OIG simply wanted to close the case with as few complications as possible, based on a pre-judgment that the allegations were not credible. The OIG decided not to interview Aguirre or anyone likely to support Aguirre's allegations, despite the reference in his letter to three individuals who could corroborate his claims.

2. *Witness Interviews*

a. Hanson Denies Referring to Mack's "Political Connections"

Andrews conducted the first substantive interview on October 17. She spoke with Robert Hanson via telephone. Hanson outlined the investigation into Pequot Capital Management and the decision not to interview Mack, stating SEC staff agreed they should "get their ducks in a row" first and figure out Mack's motive before taking testimony.³¹ Hanson also described his conversation with Berger discussing complaints about Kreitman from Aguirre and another employee. Hanson said Berger should "consider the source."³² Berger told him to do a supplemental evaluation of Aguirre.³³ Oddly, Andrews' notes do not reflect any questions in this first interview about Aguirre's core allegation about Hanson's reference to Mack's political connections.

On October 21, 2005, Hanson called Andrews to clarify his previous interview with her, offering to expand upon the involvement Linda Thomsen had in relation to Aguirre's employment and the Pequot investigation, including contacts with counsel for Morgan Stanley about Mack's exposure in the investigation.³⁴ These communications are discussed at length earlier.³⁵ However, in this second interview, it appears that Andrews still did not ask about the "political connections" allegation. She did not do so until November 14. Both her handwritten notes and the OIG closing memo indicate that Hanson denied saying it would be difficult to obtain approval for Mack's testimony because of his powerful political connections.³⁶

b. Other Interviews

On October 19, 2005, Andrews spoke with Charles "Chuck" Staiger of the HR Department at SEC seeking a copy of Aguirre's personnel file.³⁷ Andrews then made a call to interview Linda Thomsen, on October 21, 2005.³⁸ During the telephone interview with Thomsen they discussed Aguirre's employment and the Pequot investigation, as well as her conversation with Mary Jo White.³⁹ Finally, Thomsen detailed a conversation in which she discussed Aguirre's termination with "Berger, Kreitman, and Hanson in her office."⁴⁰ This telephone interview was the only discussion between Thomsen and Andrews.

Andrews next contacted Paul Berger on October 21.⁴¹ First, Berger told her that he "received lots of e-mails from Aguirre, although he did not keep most of them."⁴² He also stated that he had a meeting with Hanson during the evaluation period⁴³ regarding

two employees, one of whom was Aguirre, and described the “supplemental evaluation” of Aguirre.⁴⁴ Berger stated that he was not sure if the separate evaluation was in the file sent to the Compensation Committee, on which he served. However, he claimed that he did see the statement “before the committee made any decision.”⁴⁵ Berger’s claim is doubtful, because the evaluation was created after the last date on which the committee met. Finally, Berger discussed the decision to terminate Aguirre indicating that Kreitman proposed the idea but that Berger left the decision to Kreitman and Hanson.⁴⁶ The termination was approved in a conversation between Berger and Thomsen.⁴⁷

On October 24, 2005 the OIG conducted a telephone interview of Mark Kreitman.⁴⁸ Kreitman’s interview focused on the supplemental evaluation of Aguirre stating that he created the supplemental evaluation on August 1, 2005, because he felt that “Hanson had not addressed problems.”⁴⁹ In fact, however, the evidence suggests that he created the negative re-evaluation at Berger’s suggestion, as relayed by Robert Hanson following the latter’s early morning meeting with Berger on August 1. Kreitman told OIG that he did not know if Aguirre received a copy of the supplemental rating because he was terminated by the time Kreitman would have met with staff attorneys to discuss evaluations.⁵⁰ Kreitman also discussed the Mary Jo White call, noting it was a little out of the ordinary for her to contact Thomsen directly, but not uncommon “for someone prominent” to have someone intervene on his behalf.⁵¹

c. Deference and Informality

The deference provided to the subjects of the OIG investigation created a serious problem. By conducting them informally, via telephone, and without transcription, the OIG squandered an important investigatory opportunity. Just as the Enforcement Division failed to “lock-in” a story from Mack, the OIG failed to “lock-in” a story from Aguirre’s supervisors. Moreover, by not being in the room with the witnesses, the OIG missed out on non-verbal cues that are essential to better assessing witness credibility. The OIG’s decision to conduct the interviews in such an informal manner contributes to the impression that the office did not investigate Aguirre’s allegations thoroughly.

3. The Failure to Obtain Key Documents

The investigative plan’s second step was to “review relevant case documents.”⁵² One of the key failures of the initial OIG investigation was its inability to obtain all the relevant documents. The OIG made none of its requests in writing and was incapable of describing the scope of its requests with any certainty. The OIG investigators did not attempt to obtain any documents from Aguirre until after the initial investigation was closed and the controversy became public. According to Andrews, she obtained documents merely by asking the subjects for whatever “relevant” documents they retained, apparently leaving it to Aguirre’s supervisors to determine for themselves what they believed to be relevant.⁵³ Andrews also obtained Aguirre’s official personnel file and conduct file.⁵⁴ These were the only clearly defined request in the investigation sought

Aguirre's official personnel file and the conduct file, which was requested in writing.⁵⁵

Informal and ill-defined document requests caused the OIG to miss critically important documents altogether. For example, after denying that he had referenced Mack's political connections, Hanson did not provide the OIG with a copy of an e-mail in which he admits to using the term "political clout" in a conversation with Aguirre about the difficulty of taking Mack's testimony.⁵⁶ Despite this written admission, Hanson denied to the OIG during his interview that he ever made such a statement verbally or in an e-mail.⁵⁷

In another example, Mark Kreitman failed to produce an e-mail to the OIG dated September 30, 2005, in which he responded to an inquiry from Charles Staiger in human resources. Staiger asked:

During the merit process earlier in the summer, was Gary [Aguirre] given a copy of Hanson's supervisory endorsement? If not in writing, was Gary verbally given Hanson's supervisory endorsement? Was the endorsement below [the August 1 re-evaluation] given to Gary either verbally or in writing?⁵⁸

Kreitman replied, "None of the above."⁵⁹ In other words, it appears Kreitman admitted to Staiger that he failed to transmit the substance of the negative re-evaluation to Aguirre. However, in his interview with OIG, Kreitman claimed that he responded to Staiger *verbally*, rather than by e-mail, and that he told Staiger he transmitted "the substance" of the supplemental evaluation to Aguirre on numerous occasions.⁶⁰ While the OIG did obtain Kreitman's "none of the above" e-mail from Staiger, its final report failed to note or analyze these apparent contradictions.

4. Failures of the Office of Information Technology

One of the problems with the OIG investigators' approach to obtaining documents was its inability to rely on the Office of Information Technology (OIT) at the SEC. Even though OIT could have obtained SEC employee e-mails directly from the servers and even recovered deleted e-mails from backup tapes, the OIG did not request such assistance. We sought to determine why not. Interviews with other staff investigators at OIG provide some insight as to one possible reason. Richard Woodford, a counsel with the OIG stated that it was not uncommon for OIT requests to be backlogged and delayed significantly. He said that he could remember at least one instance where an OIG investigation had to be closed because OIT never responded to the OIG's request.⁶¹ Due to incidents like this, the OIG staff apparently perceives assistance from OIT as an exercise in futility. That ought to be unacceptable to SEC management and the Inspector General. Because of this perception, it appears that Andrews gave no serious consideration to obtaining documents from OIT. When asked about her decision to obtain documents directly from the subjects of the investigation, she said "Who else was I going to get the documents from?"⁶²

As a result of the failure to request that OIT obtain relevant e-mails and documents directly from the computer servers at SEC, the OIG effectively ignored a crucial source of impartial information. For instance, we eventually obtained at least five different

versions of the August first re-evaluation. Despite the importance of the facts and circumstances surrounding the creation of that document, the OIG closed its investigation without access to all of the versions and without a clear understanding of the sequence of events on the day they were created.

5. Closing Memorandum

On November 29, 2005, the OIG issued its closing memorandum on the investigation into Aguirre's allegations.⁶³ The OIG deferred to Aguirre's supervisors' assertions that there were legitimate tactical reasons to delay John Mack's testimony. Its memo concludes, "There is *no evidence* that Enforcement did not want to take Mack's testimony because of his 'powerful political connections.'⁶⁴ That statement, and Robert Hanson's denials to the OIG on which it is based, is directly contradicted by Hanson's e-mail to Aguirre.⁶⁵ The OIG did not address Hanson's e-mail because it had not seen the e-mail.

The OIG concluded that "The evidence fails to show that [Mary Jo] White contacting Thomsen resulted in preferential treatment or affected any decision about taking Mack's testimony."⁶⁶ The OIG provides no analysis other than to restate the information about the call relayed from Thomsen herself and note that Kreitman and Hanson were aware that such a call took place. However, as outlined earlier, Aguirre's supervisors drastically changed their attitude and behavior after the Director of Enforcement was contacted about the case.

The most perplexing portion of the OIG's closing memorandum is its conclusion that Aguirre was not excluded from any meetings on the Pequot case. The memo states, "The evidence shows that Aguirre was involved in many, often lengthy, discussions about whether and when to take Mack's testimony."⁶⁷ As support, the OIG notes that "Aguirre would often work late and discuss the case with Kreitman" and that "Aguirre discussed the case with Berger at least four or five times and sent him e-mails regarding the case."⁶⁸ However, just because Aguirre was included in some meetings does not mean he was not excluded from others. Both Gary Aguirre and Eric Ribelin stated that they were excluded from a meeting with Berger just after Morgan Stanley counsel started seeking information from the SEC about its intentions toward Mack.⁶⁹ Had the OIG contacted Aguirre or Ribelin, it could have asked about the specific meeting from which they were excluded.

The OIG noted, "We found several irregularities with the supplemental evaluation."⁷⁰ However, while noting the irregularities, the OIG did not consider them related to Aguirre's allegations. Instead, OIG referred the matter to its audit staff as an issue for general review rather than to analyze its meaning with regard to Aguirre's specific case.

The last section of the closing memorandum addresses Aguirre's alleged unlawful termination. The OIG claimed, "The evidence failed to show that Aguirre's complaints about Mack's alleged preferential treatment had *anything* to do with his termination."⁷¹ To support this position, the OIG noted that Thomsen recalled discussing "Aguirre's termination with Berger, Kreitman, and Hanson in her office."⁷² Had the OIG probed deeper, it might have learned

that one topic discussed during the meeting was Aguirre's stance toward interviewing Mack.⁷³ Had OIG staff examined the e-mail which first suggested Aguirre's termination, they might have noted that it began as a chain of e-mails in which Aguirre was attempting to convince his supervisors to take Mack's testimony. Moreover, Berger admitted during Committee interviews that the two issues were connected. He said, "I think that the fact that he simply wouldn't listen with respect to Mack must have played some part" in the assessment of his conduct.⁷⁴ These facts contradict the OIG's finding.

6. "Irregularities" Deemed Merely an Audit Issue

While the OIG's closing memorandum purportedly exonerates Aguirre's supervisors, it also noted "deficiencies related to the performance evaluation documentation."⁷⁵ In particular, the OIG indicated:

We found several irregularities with the supplemental evaluation including: it was not dated or signed; it appears to have been created after the merit pay calendar deadline; it was not sent to, or considered by, the compensation committee; it was not in Aguirre's employee personnel file (EPF); and it was separate from the initial evaluation written by Aguirre's immediate supervisor, who should be the only one who prepares a summary on behalf of each employee, according to the merit pay process guidance. We are referring these issues to the audit staff.⁷⁶

These issues are integral to Aguirre's allegations. Aguirre's October 11, 2005, letter outlined concerns regarding the records contained in his personnel file including a cover memorandum stating that the negative re-evaluation of Aguirre "mistakenly did not go to the compensation committee. . . ."⁷⁷ Our investigation confirmed that the negative re-evaluation was prepared outside the regular process, after the Compensation Committee met, and referred to incidents outside the rating period. More importantly, we found that it was prepared at the same time and within the same document as John Smith's irregular re-evaluation. Why were they handled together? What did these two employees have in common? We learned that both had recently complained about roadblocks in their investigations following direct contacts between outside counsel and the Director of Enforcement. Determining why these two evaluations were prepared together, outside the normal processes is emphatically an investigative issue, not an audit issue.

Documents produced to the Committees show that on November 29, 2005, the same date as the closing memorandum, Andrews referred the irregularities in the personnel evaluation process to an OIG employee within the audit branch.⁷⁸ However, it was not until May 18, 2006, after we began our inquiry and sought briefings from the OIG about the case that Andrews checked to determine the status of the audit, which had not yet even begun.⁷⁹ Had the OIG addressed this matter in a timely fashion, it could have uncovered the problems with the personnel review system at SEC over six months in advance of when it finally issued the audit report. The lack of priority and urgency of this audit is illustrative of the

casual attitude toward the entire investigation and subsequent audit.

Moreover, one memo produced by the OIG details a conversation between audit staff, Inspector General Walter Stachnik, and Mary Beth Sullivan.⁸⁰ During the conversation, Stachnik and Sullivan concluded that the OIG audit staff should delete John Smith's evaluation from its sample because "Smith's memo was the same as Aguirre's memo and any questions . . . about the memo could inadvertently apply to Aguirre as well as [Smith]."⁸¹ The OIG's lack of investigative curiosity about those questions is disturbing.

C. Other OIG Investigations

During the course of our inquiry, several current and former SEC employees contacted us to report information about how the SEC's OIG had handled or mishandled other investigations. While we asked the OIG about them briefly, we did not conduct extensive inquiries as the issues were not directly related to the Pequot investigation or the firing of Gary Aguirre. However, we may seek additional information about the following cases in a continuing effort to monitor the effectiveness of the OIG.

1. *A More Vigorous OIG Investigation*

Not all investigations by the OIG are as lax and informal as the one of Aguirre's supervisors. The way the OIG handled another case in late 2003 provides a stark contrast. The SEC OIG received allegations that an employee had made "improper and inappropriate" comments to coworkers. These allegations were investigated much more thoroughly than Aguirre's allegations.

For example, the OIG did not contact the subject of the investigation first, as the OIG had claimed was legally necessary in the Aguirre context. Instead Mary Beth Sullivan began by interviewing the two complainants.⁸² So, unlike Aguirre, the complainants in this case had an opportunity to fully explain their view of the issues and provide additional corroborating information directly to the investigator. In her interview with Senate staff, Sullivan did not recall any discussion of the Privacy Act requirements before taking this action.⁸³ In fact, the OIG did not even inform the subject of the allegations against him until two months after the investigation was launched and a series of other witnesses had been interviewed.

Another way in which the investigation differed from Aguirre's was the more aggressive and confrontational procedures. For example, the way the subject says he learned of the investigation was that a senior SEC official summoned the subject to his office. Two armed guards stood watch while he was given a memorandum informing him of an investigation for unspecified "bad acts."⁸⁴ By contrast, the OIG simply called Aguirre's supervisors and interviewed them over the phone.

The number and type of witness interviews and the length of the investigative reports also differed dramatically. In all, the SEC OIG interviewed more than 18 employees during the course of this investigation, six of which were transcribed verbatim.⁸⁵ However, the OIG did not conduct as many interviews in the Aguirre matter, and it had none of them transcribed. While the closing memo in

Aguirre's case was only seven pages long, Sullivan drafted a "pretty long report" on the investigation with voluminous attachments.⁸⁶

This investigation provides a stark contrast to that undertaken in response to Aguirre's allegations against Hanson, Kreitman, and Berger. These contrasts are disturbing given the nature of the allegations in each case. On the one hand, the OIG spent considerable time and resources looking into a dispute between co-workers over alleged use of inappropriate language in the workplace. On the other, the OIG gave short shrift to an allegation that the integrity of the agency's mission was being compromised by improper political influence.

2. Geek Securities and Commissioner Cynthia Glassman

We also learned of an allegation that was referred to the OIG involving Commissioner Cynthia Glassman. It was related to a criminal investigation involving a company called Geek Securities.⁸⁷ One of the individuals involved in the case allegedly claimed that Commissioner Glassman was his cousin and that she had provided him with advanced warning of what was supposed to be a surprise SEC examination of Geek Securities books and records.⁸⁸ Nick Sichi, a chief witness in the criminal matter, told investigators that he learned about the alleged tip off at breakfast on the morning of the examination.⁸⁹

The OIG confirmed that it did conduct an investigation into the allegation.⁹⁰ When asked about the investigation, Mary Beth Sullivan indicated that she interviewed Commissioner Glassman, a Special Assistant U.S. Attorney, and an SEC employee who was at the interview where Sichi made the allegation. The OIG did not transcribe any of the interviews and did not interview the person claiming to be Commissioner Glassman's cousin. When asked how long the investigation took, Sullivan said, "I think I did it pretty quickly, but I'm not sure."⁹¹ Sullivan could not recall many additional details.⁹²

According to Sullivan, the OIG ultimately concluded that "there appeared to be insufficient evidence to support the allegation."⁹³

D. The Reopening of the Aguirre Investigation

On July 6, 2006, the SEC Chairman requested that the OIG reopen its investigation into Aguirre's allegations based on new information that was produced to various Committees of the United States Senate. The OIG officially reopened its investigation on the same day after it considered "all relevant factors."⁹⁴ These relevant factors appear to include the request of the Chairman of the SEC, new allegations that arose, and information learned from the Congressional inquiry.⁹⁵

1. Relationship to Congressional Investigations

The OIG stated clearly that the reopening of the investigation was based in part on the corresponding investigation being conducted by the Committees. The investigation conducted by Committee staff generated a significant volume of information that the OIG did not have in its original investigation.

As early as May 2006 when Committee staff first reviewed the closing memorandum at SEC Headquarters, the OIG was aware of

our concerns and questions. However, it wasn't until July 2006 that the investigation was formally reopened. Further, the OIG only reopened its investigation once it was requested by the SEC Chairman. The timing of the decision to reopen the investigation may have had more to do with an attempt to limit the production of documents to the Committees. OIG cited to Committee staff an opinion by the Department of Justice regarding the sharing of information related to ongoing investigations as justification for refusal to produce certain documents.⁹⁶

2. Attempt to Compel Disclosure of Confidential Communications with Congress

The most egregious problems caused by the OIG's reopened investigation involved a subpoena issued to Aguirre by the OIG on August 11, 2006. This subpoena was formally served upon Aguirre on August 14, 2006, and requested among other things confidential communications between Aguirre and Congressional committees.⁹⁷ On November 3, 2006, the Department of Justice filed a motion to show cause in the U.S. District Court for the District of Columbia seeking enforcement on behalf of the OIG.

The subpoena sought confidential communications between Aguirre and Congress. Following the issuance of the subpoena, Committee staff spoke with Mary Beth Sullivan, Counsel to the IG and inquired about the intent to obtain confidential communication from Aguirre. Sullivan affirmed that the OIG request included Aguirre's communications with Congress.

As a result of this statement, Committee staff began to prepare to litigate the issue should it arise. Through repeated negotiations, the OIG continued to state through the attorneys of the Federal Programs Branch at the Department of Justice that these documents were the subject of the subpoena and that the OIG would continue to seek these communications through judicial enforcement. It was not until after the December 5, 2006, public hearing on Aguirre's allegations raised questions about the OIG subpoena that the OIG finally agreed to a limited production from Aguirre, withholding his confidential communications with Congress.⁹⁸

E. Conclusion—Independence of the OIG

The OIG investigation into Aguirre's allegations was flawed from the beginning and hindered by missteps during the entire process. Every step seems to have been based on a desire to go through the motions and close the case. How the OIG could assess Aguirre's credibility without ever speaking to him remains a mystery.

One of the major problems with the OIG seems to be the perception within the SEC regarding the independence of the office and whether or not employees who approach the OIG are treated fairly. We interviewed a number of current and former SEC employees who indicated that the OIG is not well respected and that there is a general reluctance to approach the OIG with concerns. Aguirre was no exception. Aguirre told us that he took his concerns to the Chairman rather than the OIG for just that reason. The OIG's reputation is essential to completing its mission. The SEC needs to take immediate action to restore the independence, competence, and confidence in the OIG.

One area in need of attention is the OIG's independence from SEC management. The SEC/OIG's investigation of Aguirre's allegations was conducted by Kelly Andrews, who told Committee staff, "We don't second-guess management decisions." Indeed, the OIG's closing memo was based only on representations or explanations from Aguirre's supervisors and documents selectively forwarded to the OIG by those same individuals. Moreover, in its "second" investigation, the OIG attempted to subpoena records of Aguirre's communications with Congress and refused to explain this action at a Judiciary Committee hearing, allegedly based on instructions from the Justice Department. The IG also forwarded internal e-mails regarding Aguirre and the IG's investigation to Director of Enforcement, Linda Thomsen, a potential subject in the Committees' investigation. These facts and circumstances do not suggest a sufficient degree of independence.

Another concern of the committees is the competency of the SEC Office of Information Technology. SEC/OIG staff told us that the Office of Information Technology was extremely slow in providing e-mails requested in connection with its investigations. In fact, on at least one occasion, an investigation was closed because the OIG request went completely unanswered.⁹⁹ In its Aguirre investigation, the OIG failed to identify and obtain a key e-mail that corroborated Aguirre's account of his supervisor's reference to John Mack's "political clout" because it relied on the supervisors themselves to provide documents. Had the OIG been able to obtain a timely response from disinterested personnel in the Office of Information Technology, it may have obtained the e-mail and thus avoided closing the case based on findings that were inconsistent with the documentary evidence. The SEC directive should give the OIG authority to set specific deadlines for responses to its document requests and impose meaningful consequences for failure to comply with the deadlines.

The OIG has a position of enormous responsibility. Congress passed the IG Act in 1974, with the goal of ensuring that the public would have faith in government by providing an impartial arbiter tasked with independently overseeing the operations at an agency,

protecting the integrity and promoting the efficiency of government. Based on our review, the OIG at the SEC seems to have failed in its mission. Other SEC employees perceive it as a tool of management, used for retaliatory investigations against disfavored staff. The OIG's number-one priority should be to restore confidence in its ability to conduct professional investigations to ensure the highest standard of integrity at the SEC.

ENDNOTES

1. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 *codified as amended* at 5 U.S.C. App. 3 (2006).
2. General Accountability Office, *Highlights of the Comptroller General's Panel on Federal Oversight and the Inspectors General*, GAO 06-931SP, at 1 (Sept. 11, 2006).
3. *Id.*
4. S. HRG. 109-898, at 689 (SEC/OIG 0493).
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 690.
9. S. HRG. 109-898, at 689 (SEC/OIG 0493) (emphasis added).
10. *Id.* at 717-18.
11. *Id.*
12. *Id.* at 868-69.
13. *Id.*
14. *Id.*
15. *Id.* at 868.
16. Transcribed Interview with Kelly Andrews, Associate Counsel, Office of Inspector General, SEC, at 22 (Nov. 21, 2006) (hereinafter "Andrews transcript (Nov. 21, 2006)") (Exhibit 67).
17. Transcribed Interview with Mary-Beth Sullivan, Assistant Inspector General for Investigations, Counsel to the Inspector General, SEC, at 60 (Nov. 22, 2006) (hereinafter "Sullivan transcript (Nov. 22, 2006)") (Exhibit 68).
18. S. HRG. 109-898, at 869 (SEC/OIG 0489).
19. Andrews transcript, at 23 (Nov. 21, 2006) (Exhibit 67).
20. *Id.* at 23-24. *See also*, Sullivan transcript, at 57-58 (Nov. 22, 2006) (Exhibit 68).
21. S. HRG. 109-898, at 869 (SEC/OIG 0489).
22. Andrews transcript, at 27 (Nov. 21, 2006) (Exhibit 67).
23. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, *codified as amended* at 5 U.S.C. § 552a (2006).
24. S. HRG. 109-898 at 469, Responses of Inspector General Walter Stachnik to Questions from Hearing Record at 7.
25. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, *codified as amended* at 5 U.S.C. § 552a (2006).
26. *Dong v. Smithsonian Institution*, 943 F. Supp. 69 (D.D.C. 1996).
27. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, *codified as amended* at 5 U.S.C. § 552a (2006).
28. S. HRG. 109-898 at 469, Response of Inspector General Walter Stachnik to Questions from Hearing Record at 7.
29. Andrews transcript, at 27 (Nov. 21, 2006) (Exhibit 67).
30. S. HRG. 109-898, at 689 (SEC/OIG 0493).
31. SEC/OIG Document Production at 0451 (Exhibit 60).
32. *Id.*
33. *Id.*
34. SEC/OIG Document Production at 0452 (Exhibit 69).
35. *See* Section VI.B.3, *supra*.
36. SEC/OIG Document Production at 0002 (Exhibit 29); S. HRG. 109-898, at 898-901.
37. S. HRG. 109-898, at 934 (SEC/OIG 0504).
38. SEC/OIG Document Production at 0447-48 (Exhibit 70).
39. *Id.* at 0447.
40. *Id.*
41. SEC/OIG Document Production at 0449-50 (Exhibit 71).
42. *Id.* at 0449.
43. This statement appears to be inconsistent with the dates that surrounded the evaluation period. While the OIG never mentioned this inconsistency in its final closing memorandum, it is important to note that this meeting took place after the evaluation period had closed. According to Hanson, this meeting took place on August 1, 2005, which was after the Compensation Committee had met and approved the merit pay increase for Aguirre. *See* Section VI.c.2 (discussing the date of the Compensation Committee meeting), *supra*.
44. SEC/OIG Document Production at 0449 (Exhibit 71).
45. *Id.*
46. *Id.* at 0450.
47. *Id.*

48. SEC/OIG Document Production at 0444 (Exhibit 28).
49. *Id.*
50. *Id.*
51. *Id.* at 0445.
52. S. HRG. 109-898, at 869 (SEC/OIG 0489).
53. Andrews transcript, at 25 (Nov. 21, 2006) (Exhibit 67).
54. *Id.*
55. *Id.* at 25-26.
56. S. HRG. 109-898, at 668 (SEC 0832).
57. *See id.* at 898 (SEC/OIG 0087) (noting Hanson's reply of "No" to the question, "Did you tell Aguirre, or anyone, that it w/b very difficult to obtain approval to take Mack's testimony b/c of his powerful political connections?").
58. S. HRG. 109-898, at 824 (SEC/OIG 0126).
59. *Id.*
60. SEC/OIG Document Production at 0443 (Exhibit 72).
61. Telephone Interview with Richard Woodford, Associate Counsel, SEC/OIG (Nov. 17, 2006).
62. Andrews transcript, at 24 (Nov. 21, 2006) (Exhibit 67).
63. S. HRG. 109-898, at 870-76 (SEC/OIG 0001-07).
64. *Id.* at 872 (emphasis added).
65. SEC 1932 (Exhibit 35).
66. S. HRG. 109-898, at 872 (SEC/OIG 0003).
67. *Id.*
68. *Id.* at 873.
69. S. HRG. 109-898, at 576, Letter from Gary J. Aguirre to Sens. Shelby and Sarbanes 23 (Aug. 21, 2006), *see also* S. HRG. 109-898, at 1150-51 (Ribelin Tr.).
70. S. HRG. 109-898, at 873 n.2.
71. *Id.* at 876 (emphasis added).
72. *Id.*
73. *See* Hanson transcript, at 59-61 (Sept. 5, 2006) (Exhibit 41).
74. *See* Section VI.C.5, *supra*.
75. S. HRG. 109-898, at 870 (SEC/OIG 0001).
76. *Id.* at 873.
77. *Id.* at 717.
78. SEC/OIG Document Production at 0543 (Exhibit 73).
79. *Id.*
80. *Id.* at 0644 (Exhibit 74).
81. *Id.*
82. Sullivan transcript, at 151 (Nov. 22, 2006) (Exhibit 68).
83. *Id.*
84. Draft letter from SEC employee, SEC, to Chairman Christopher Cox, SEC 2 (Feb. 27, 2006) (on file with the Committee).
85. Draft letter from SEC employee, SEC, to Chairman Christopher Cox, SEC Addendum pg. 1 (Feb. 27, 2006) (on file with the Committee); Sullivan transcript, at 148-49 (Nov. 22, 2006) (Exhibit 68).
86. Sullivan transcript, at 148 (Nov. 22, 2006) (Exhibit 68).
87. Telephone Interview with James Fay, Staff Attorney, SEC (Sep 28, 2006).
88. *Id.*
89. *Id.*
90. Sullivan transcript, at 152 (Nov. 22, 2006) (Exhibit 68).
91. *Id.* at 157.
92. *Id.* at 157-58.
93. *Id.* at 154. In addition to these matters, we also asked the SEC/OIG staff about two other allegations reported during the course of our investigation. One allegation related to an insider trading referral involving Gary Taffet, an aid to New Jersey Governor Jim McGreevey. A supervisor allegedly approved delaying the investigation until after the next election after receiving a memo from SEC staff that referenced polling data. The SEC/OIG staff could not recall investigating the matter. The second allegation related to an SEC employee allegedly viewing child pornography on his computer. The SEC/OIG confirmed that it did substantiate the allegation and referred the matter to the FBI for further investigation. However, the employee resigned before being terminated and authorities declined to prosecute due to an inability to identify the child in the images.
94. SEC/OIG Document Production at 1063 (Exhibit 75).
95. Andrews transcript, at 63-64 (Nov. 21, 2006) (Exhibit 67). *See also* 9/11/2006 Ltr. from W. Stachnik to Sens. Grassley and Specter at 4.
96. Letter from Walter Stachnik, Inspector General, Securities and Exchange Commission, to Sens. Charles E. Grassley and Arlen Specter 3 (Aug. 28, 2006) (cit-

- ing Department of Justice Office of Legal Counsel memorandum 13 Op. O.L.C. 77 (Mar. 24, 1989), which cites DOJ's "longstanding policy to decline to provide Congressional committees with access to open law enforcement files") (Exhibit 76).
97. *See* Subpoena Duces Tecum (Exhibit 77).
 98. *See* Settlement Agreement between Mr. Aguirre and DOJ (Exhibit 78). *See also* S. HRG. 109-898, at 39-41, 470-71, Stachnik responses to questions for the record to Dec. 5, 2006, Senate Judiciary Committee hearing at 8.
 99. Interview with Richard Woodford, Associate Counsel, Office of Inspector General, SEC (Nov. 30, 2006).

APPENDIX I: EXHIBITS

Exhibits List

- 1: Testimony of Arthur Samberg, excerpt (May 3, 2005)*
- 2: Memorandum from Walter Ricciardi (June 15, 2006)
- 3: NYSE Advisory Memo to SEC (Jan 30, 2002)
- 4: Transcribed interview of Paul Berger, excerpt (Nov 2, 2006)*
- 5: Transcribed interview of Mark Kreitman, excerpt (Sept 6, 2006)*
- 6: Transcribed interview of Robert Hanson, excerpt (Nov 9, 2006)*
- 7: Memorandum from Tom Conroy (Aug 3, 2005)
- 8: Memorandum from Craig Miller, Tom Conroy, and Eric Ribelin (Nov 14, 2005)
- 9: E-mail from Joseph Cella (Nov 24, 2005)
- 10: Memorandum from Division of Enforcement (Dec 16, 2004)
- 11: E-mail from Gary Aguirre (Nov 1, 2004)
- 12: Transcribed interview of James Eichner, excerpt (Nov 14, 2006)*
- 13: Wells Notice on Pequot matter (July 14, 2006)
- 14: Transcribed interview of Mark Kreitman, excerpt (Nov 15, 2006)*
- 15: E-mail to Eric Ribelin (Feb 25, 2005)
- 16: E-mail from Gary Aguirre (May 20, 2005)
- 17: Memorandum from Gary Aguirre (June 28, 2005)
- 18: Letter from James Eichner to Audrey Strauss (Oct 20, 2005)
- 19: Testimony of Arthur Samberg, excerpt (June 7, 2005)*
- 20: Transcribed interview of James Eichner (Sept 1, 2006)*
- 21: E-mail from Art Samberg (May 11, 2001)
- 22: E-mail from Art Samberg (June 20, 2001)
- 23: Transcribed interview of Joseph Cella, excerpt (Sept 7, 2006)*
- 24: Transcribed interview of Mary Jo White, excerpt (Sept 25, 2006)*
- 25: E-mail from Mary Jo White to Linda Thomsen (June 26, 2005)
- 26: Transcribed interview of Linda Thomsen, excerpt (Sept 8, 2006)*
- 27: Transcribed interview of Paul Berger, excerpt (Nov 7, 2006)*
- 28: SEC/OIG notes on Kreitman
- 29: Memorandum from Kelly Andrews (Nov 29, 2005)
- 30: E-mail from Jim Eichner to Robert Hanson (July 19, 2006)
- 31: E-mail from Jim Eichner (Aug 3, 2005)
- 32: Unsigned tolling agreement
- 33: E-mail from Liban Jama (July 24, 2006)
- 34: Transcribed interview of Liban Jama, excerpt (Oct 11, 2006)*
- 35: Testimony of John Mack, excerpt (Aug 1, 2006)*
- 36: Memorandum from Stephen Cutler (July 15, 2006)
- 37: Gary Aguirre's Memorandum in Opposition to Summary Judgment
- 38: Order Entering Judgment, *Aguirre v. Donaldson* (June 14, 2006)

- 39: Gary Aguirre letter to Paul Berger (Jan 10, 2005)
- 40: Paul Berger e-mail to Gary Aguirre (Jan 13, 2005)
- 41: Transcribed interview of Robert Hanson, excerpt (Sept 5, 2006)*
- 42: Draft e-mail from Robert Hanson to Gary Aguirre
- 43: E-mail from Gary Aguirre to Paul Berger (Jun 28, 2005)
- 44: E-mail from Gary Aguirre to Paul Berger (June 30, 2005)
- 45: Gary Aguirre Fax to Committee (Oct. 19, 2006)
- 46: Dave Fielder e-mail to Mark Kreitman (Aug 1, 2005)
- 47: Compensation Committee Dates (summer 2005)
- 48: Mark Kreitman's supplemental evaluation of Gary Aguirre (Aug 1, 2005)
- 49: E-mail from Mark Kreitman (Aug 1, 2005)
- 50: E-mail from Mark Kreitman to Paul Berger (Aug 1, 2005)
- 51: SEC/OIG Audit (Feb 8, 2007)
- 52: Gary Aguirre e-mail to Robert Hanson (May 23, 2005)
- 53: E-mails between Gary Aguirre and Robert Hanson (May 25, 2005)
- 54: Gary Aguirre letter to Bloomberg, L.P. (May 31, 2005)
- 55: E-mail from Robert Hanson (July 7, 2006)
- 56: Gary Aguirre's Notice of Termination (Sept 1, 2005)
- 57: E-mail from Kevin O'Rourke to Mark Kreitman (May 25, 2005)
- 58: E-mail from James Clarkson to Kevin O'Rourke (March 15, 2005)
- 59: E-mail from Kevin O'Rourke (May 31, 2005)
- 60: SEC/OIG notes on Hanson
- 61: Judith Burns, SEC Associate Enforcement Director Stepping Down, DOW JONES NEWSWIRE (May 18, 2006)
- 62: E-mail from Margaret Cain to Eric Ribelin (Oct 21, 2005)
- 63: Additional e-mail from Margaret Cain (Oct 21, 2005)
- 64: Transcribed interview of Margaret Cain, excerpt (Oct 13, 2006)*
- 65: E-mail from Lawrence Renbaum to Timothy P. Peterson (Feb 15, 2006)
- 66: SEC Memorandum on seeking and negotiating employment
- 67: Transcribed interview of Kelly Andrews, excerpt (Nov 21, 2006)*
- 68: Transcribed interview of Mary-Beth Sullivan, excerpt (Nov 22, 2006)*
- 69: SEC/OIG notes on Hanson (Oct 24, 2005)
- 70: SEC/OIG notes on Thomsen (Oct 21, 2005)
- 71: SEC/OIG notes on Berger (Oct 21, 2005)
- 72: SEC/OIG notes on Kreitman (Oct 26, 2005)
- 73: Kelly Andrews e-mails
- 74: Memo of SEC/OIG discussion (Aug 16, 2006)
- 75: Memorandum from SEC/OIG to SEC (Aug 18, 2006)
- 76: Letter from Walter Stachnik to Senators Grassley and Specter (August 28, 2006)
- 77: Subpoena Duces Tecum to Gary Aguirre (Aug 11, 2006)
- 78: Settlement agreement between Gary Aguirre and DOJ

* Full transcripts are on file with the Committee.

EXHIBIT NUMBER 1

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

-----x
In the Matter of:

TRADING IN CERTAIN SECURITIES

File No. HO-9818
-----x

WITNESS: ARTHUR SAMBERG

PAGES: 1-193

PLACE: Securities and Exchange Commission

3 World Financial Center

New York, New York

DATE: May 3, 2005

The above-entitled matter came on for
hearing at 10:30 a.m.

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A P P E A R A N C E S:

On behalf of the Securities and Exchange
Commission:

L. HILTON FOSTER, ESQ.
GARY J. AGUIRRE, ESQ.
THOMAS P. CONROY
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1
2 me is my colleague from Wachtell, Lipton, Evan
3 Farber.

4 MR. HARNISCH: I'm Kevin Harnisch,
5 also with Fried, Frank.

6 BY MR. FOSTER:

7 Q. When we sent your counsel the
8 subpoenas in this matter they were accompanied
9 by Standard Forms 1662 and 1661.

10 Would you like an opportunity to
11 review those documents?

12 A. I would.

13 MR. FOSTER: Let's go off the
14 record. We'll go off the record to enable the
15 witness to read 1661 and 1662.

16 Q. Have you had an opportunity to
17 review Standard Forms 1662 and 1661?

18 A. Yes, I have.

19 Q. As I indicated, this is a formal
20 investigation. The Commission has entered a
21 document which is known as a formal order
22 directing an investigation and designating
23 officers to take testimony.

24 I note for the record that a copy
25 of the formal order is placed in front of the

1
2 A. Three years as a securities analyst
3 at Kidder Peabody, Lombard. And 15 years, from
4 1970 to 1985, at Weiss, Hecht and Greer. And
5 then at what was then Dawson Henry. It became
6 Dawson Samberg. Then it became Pequot Capital.

7 Q. What year did it become Pequot
8 Capital?

9 A. January 1, 1999.

10 Q. What is your current position?

11 A. I am a chairman and CEO.

12 Q. Have you ever been a defendant in
13 an SEC civil or administrative action?

14 A. Yes.

15 Q. Do you recall the dates?

16 A. Not exactly.

17 Q. Do you recall the outcome?

18 A. The outcome was no action in all
19 but one. There was an action against Dawson
20 Samberg, and an action that was completed in --

21 MR. MARTIN: Perhaps it might be
22 helpful to clarify the question in all due
23 respect. The question is whether or not you
24 personally were ever named as a defendant or a
25 respondent in an SEC enforcement action as

1
2 A. Pequot Capital Management.
3 Q. Is Pequot Capital Management a
4 registered investment body?
5 A. Yes, it is.
6 Q. What if any professional licenses
7 do you have, such as Series 7s or whatever?
8 A. None.
9 EXAMINATION BY MR. AGUIRRE:
10 Q. Mr. Samberg, I am Gary Aguirre,
11 and I am going to begin questioning.
12 Would you tell us the business of
13 Pequot Capital Management? What does it do?
14 A. We're an investment advisory firm.
15 Q. And who do you advise? Who does
16 Pequot Capital advise?
17 A. A series of funds.
18 Q. Are there different classes of
19 funds that you advise?
20 A. What do you mean by classes?
21 Q. Types of funds, domestic funds,
22 foreign funds.
23 A. Yes.
24 Q. Would you describe the types of
25 funds that you manage or advise?

1
2 They are the following analysts: Gavin Alpert,
3 Mark Harchelroad, Michael Benevento, Ian
4 McKinnon, Caroline Tribucca; and I believe those
5 are the analysts currently working for the
6 group.

7 Q. Would you describe for us the
8 nature of the services provided by what you
9 describe as an analyst?

10 A. Yes. Analysts are charged with
11 following the company's -- either in their area
12 of industry or expertise or other companies
13 related to those areas that the senior managers
14 believe might be interesting investment
15 opportunities.

16 Q. Do they make investment decisions?

17 A. They make recommendations.

18 Q. To whom do they make
19 recommendations?

20 A. To myself, to Mr. Takata and to
21 Mr. Corasaniti.

22 Q. Is the system that you have just
23 described for the core group followed by the
24 other groups at PCM? Your description of the
25 analysts, is your description of the analyst's

1
2 MR. AGUIRRE: Back on the record.

3 Q. Mr. Samberg, from time to time have
4 you had discussions with your institutional
5 investors regarding the topic of due diligence
6 by PCM in choosing securities?

7 A. How do you define due diligence in
8 this case?

9 Q. Well, let me ask you: Have you or
10 your firm, to your knowledge, used the
11 expression due diligence in connection with
12 doing research on investment possibilities?

13 A. Due diligence, in my 39 years of
14 experience in the industry, is usually done in a
15 deal. It is not a commonly used term for equity
16 investing fundamental research, is the term that
17 we're used to using.

18 Q. Do you have any understanding
19 whether or not -- let me withdraw that.

20 Does PCM in your judgment, have
21 some responsibility to its investors to exercise
22 some degree of care in selecting securities?

23 A. Certainly.

24 Q. How would you describe that
25 responsibility?

1
2 A. We tell our investors that we're
3 fundamental research driven investors. The firm
4 has had an exemplary record for many years of
5 delivering solid results in many, many, many
6 different securities, through many different
7 market environments.

8 We have always employed very many
9 analysts. It is a very desirable place to work
10 on the Street. We are known for doing that. I
11 think that's what attracts clients to the firm
12 in the first place. We have many clients'
13 meetings where we describe that process to them.
14 We have meetings with analysts on a daily basis.
15 So we do do that; and we inform our clients that
16 we do that.

17 Q. Sir, my question was relating to
18 whether or not PCM uses some kind of, some
19 degree of care, some prudence in selecting
20 securities for its clients?

21 A. And my answer is yes.

22 Q. And I would like you to focus on
23 how you would describe that, that type of
24 prudence that you use in selecting securities
25 for your clients.

1

2 A. An institutional investor.

3 Q. This institutional investor wants
4 to know whether you, that is PCM, uses diligence
5 in selecting securities. And I am clarifying
6 the prior question for you. What would be your
7 answer: Do you use diligence? And if so, what
8 do you do it?

9 A. Would you describe diligence in
10 this example?

11 Q. Care, doing research, careful
12 research, looking at alternatives. Do you have
13 an approach?

14 A. Yes. It's a research driven
15 approach.

16 Q. Do you have procedures that you
17 follow -- that the core group follows -- to
18 analyze possible investment funds?

19 A. Yes.

20 Q. Would you describe that procedure
21 for us?

22 A. Certainly.

23 I am the head of the group, I am
24 listed as the portfolio manager. Mr. Takata and
25 Mr. Corasaniti work below me. Mr. Corasaniti,

1
2 who joined me a year and a half ago, ran a
3 60-person research department. It's his daily
4 responsibility to interact with the analysts and
5 make sure they are doing diligent work in
6 understanding balance sheets, income statements,
7 meeting with companies, assessing industry
8 trends. So, yes, we have very, very careful.

9 Q. Do you have guidelines in anything
10 more specific than that that you follow?

11 A. No.

12 Q. Have you ever given either in
13 writing or by e-mail or in meetings with staff
14 directions to this core staff that they should
15 follow any particular steps or procedures in
16 choosing an investment opportunity and going
17 through the decision-making process?

18 A. Are we talking specifically about
19 me or are we talking about the group as it
20 operates?

21 Q. Let's take you first and then move
22 on to the group.

23 A. I delegate that daily
24 responsibility to Mr. Corasaniti and Mr. Takata.

25 Q. And are you aware whether they have

1

2 A. He left by July. He came in April,
3 so it would be April through the end of June.

4 He was, I guess what would be called an
5 assistant portfolio manager.

6 Q. He's listed as a principal. Was he
7 a principal?

8 A. Yes.

9 Q. Was he in the core group?

10 A. Yes.

11 Q. Was David Zilkha a vice president
12 in April through July 2002?

13 A. David Zilkha, yes.

14 Q. Was he in the core group?

15 A. Yes.

16 Q. Now, I would like for you to -- let
17 me withdraw that.

18 Were you involved in making trading
19 decisions in Heller Financial in July 2001?

20 A. Yes.

21 Q. Did anyone assist you in making
22 those trading decisions?

23 A. No.

24 Q. Do you recall approximately how
25 much stock in Heller Financial was purchased in

1

2 July 2001?

3 A. A little over a million shares.

4 Q. Do you remember the profit that was
5 made on Heller Financial?

6 A. No.

7 Q. Would 16 to \$17 million seem about
8 correct?

9 A. It's possible.

10 Q. I would like for you to tell us,
11 sir, in whatever manner you feel comfortable,
12 how you made the decision that PCM should invest
13 in Heller Financial in July 2001.

14 A. Certainly.

15 As somebody who has been in the
16 industry for over 30 years and observed many
17 different market trends, we were in a unique
18 period of time; we were in a recession. The
19 Federal Reserve had been raising interest rates
20 steadily since July 2001.21 We were coming out of a speculative
22 bubble. Markets were imploding. The telecom
23 debt market was in severe trouble. It was
24 putting pressure on credit markets. The credit
25 markets were in turmoil. That was causing

1
2 problems for companies to fund their operations.

3 Heller had a strong financial
4 model. It historically grew as a company that
5 capitalized on its receivables and inventories;
6 it had developed a very strong healthcare
7 financial services structure.

8 There had been consolidation in the
9 industry. Tyco bought CIT, Berkshire; Hathaway
10 bought Finochia.

11 There was speculation in the press
12 that there would be other acquisitions in that
13 area.

14 Heller is a company that actually
15 does well in a period like that, because
16 companies have a harder time borrowing through
17 normal mechanisms and they use more asset backed
18 methodologies of borrowing, which Heller was
19 very strong in.

20 Heller's business was doing quite
21 well. There were many analysts' reports how
22 they were growing 10 percent and how it was
23 expected that they would continue to grow at 10
24 percent.

25 There were also many analysts'

1
2 reports that described the attractiveness of the
3 franchise.

4 I read those things. I observed
5 the fact that, unlike other financial stocks,
6 the stock was behaving well. And I purchased
7 the stock.

8 Q. So aside from your knowledge -- let
9 me restate that.

10 I think you have described in your
11 answer two aspects that went into this
12 decision-making process. What you knew from
13 your experience and analysts' reports that you
14 have reviewed. Is that correct?

15 A. That's a summary.

16 Q. Okay.

17 Let's focus, first, on the
18 analysts' reports that you have read. Can you
19 tell us which analysts' reports those were?

20 A. I don't have a clear recollection
21 of reading any analyst's report in that time
22 period. But I know that they were out there.

23 Q. You have known since approximately
24 mid February that your testimony was going to be
25 given today, did you not, sir?

1

2 A. Uh-huh.

3 Q. How many people are working for you
4 at PCM?

5 A. PCM, the firm today?

6 Q. Yes.

7 A. 210.

8 Q. Have you made any effort to locate
9 any of these analysts' reports that you
10 considered in making the decision to invest in
11 PCM?

12 A. Yes.

13 Q. What have you done in that regard,
14 sir?

15 A. In that regard or in general?

16 Q. In that regard. What have you done
17 to try to find the analyst's report that you
18 considered in making your decision to invest in
19 Heller Financial?20 A. My attorneys did a literature
21 research.

22 Q. I'm sorry?

23 A. The attorneys did a literature
24 search.

25 Q. Your law firm did a literature

1

2 A. I believe I said a little over a
3 million shares in my funds.

4 Q. I am sorry, I didn't mean shares; I
5 meant actual capital.

6 A. The stock was trading in the high
7 30s, it was 34, \$38 million.

8 Q. What was the average size
9 investment of PCM in July 2001?

10 A. Across the firm?

11 Q. Across the firm.

12 A. The firm was managing over \$15
13 billion. I am not sure what was the average
14 size of the positions. I can say in the core
15 funds -- because as you say, I have looked --
16 Heller was not one of the top 20 holdings of the
17 firm.

18 Q. As you sit there today, can you
19 identify a single analyst's report that you
20 considered in connection with your decision to
21 buy Heller Financial in July 2001?

22 A. No, I cannot.

23 Q. Did you communicate with anyone at
24 PCM by e-mail or any other written form
25 regarding Heller Financial before you made the

1
2 Q. Did you speak with anyone at
3 Merrill Lynch before you began making the
4 investments?

5 A. I have no recollection of that.

6 Q. Did you speak with anyone at GE
7 Capital before you began making those
8 investments?

9 A. I have no recollection of that.

10 Q. Do recall seeing any newspaper
11 articles that sparked, perhaps sparked curiosity
12 on your part in Heller Financial?

13 A. I had seen newspaper articles in
14 preparation for this, but I have no recollection
15 of seeing them at that time.

16 Q. How long had you been following
17 Heller Financial before you made the decision to
18 buy it in July 2001?

19 A. I really had not closed Heller
20 Financial closely in the way people follow
21 stocks before it was purchased.

22 Q. Were you aware that Heller
23 Financial had been a potential GE candidate or
24 target, acquisition target for years before July
25 2001?

EXHIBIT NUMBER 2

Privileged & Confidential Attorney Client Material, Attorney Work Product & Law Enforcement Privileged Material

Memorandum

TO: Files

FROM: Walter G. Ricciardi, Deputy Director, Division of Enforcement *WR*

RE: Status of Pequot Capital Management Investigation

DATE: June 15, 2006

In order to ascertain the current status of the Enforcement investigation into possible insider trading by Pequot Capital Management, I interviewed the Enforcement staff responsible for the investigation: Mark Kreitman, the Assistant Director, Robert Hanson, the Branch Chief, and James Eichner, the Senior Counsel. Prior to May 24, 2006, I had no involvement in any aspect of this investigation. Prior to October 2005, my only role at the Commission was as the District Administrator of the Boston office, and I was not in the chain of command with regard to this investigation.

The staff informed me that Pequot Capital Management is a large hedge fund and is run by Art Samberg. According to the staff, there are two components of the investigation that appear to involve possible insider trading.

First, in 2001 Pequot purchased approximately \$44 million in Heller Financial stock and sold short approximately \$37 million in General Electric stock shortly before a public announcement that GE would acquire Heller. The staff told me that they have taken the testimony of Mr. Samberg and have identified numerous individuals who may have had information regarding the acquisition prior to its public announcement and may have been in communication with Mr. Samberg prior to Pequot's transactions.

Second, in April of 2001, Pequot invested in Microsoft shortly before a favorable announcement. The staff informed me that Pequot agreed to hire an individual from Microsoft shortly before the investment, and the individual stayed in touch with his Microsoft colleagues after he joined Pequot. After Pequot invested in Microsoft, good news was announced, and its stock increased in value, Mr. Samberg sent an email message to the former Microsoft employee complimenting him on his performance. The staff is currently spending its time on this aspect of the investigation. In addition, the staff met in March with counsel for Pequot and Mr. Samberg. Their counsel contends that information regarding the Microsoft developments were out in the market place. The staff obtained the testimony on Thursday, June 1 from two Goldman Sachs employees with regard to the Pequot investment in Microsoft.

I asked the staff whether there are any current plans to take the testimony of John Mack. The staff indicated that they have no current plans to take Mr. Mack's testimony. Instead, the

staff plans to concentrate their resources on more promising leads. The staff explained to me that Mr. Mack and Mr. Samberg are very good friends, and Mr. Mack is an investor in Pequot. Mr. Mack joined CS First Boston shortly after Pequot began purchasing stock in Heller, and CSFB advised on the deal. Mr. Mack spoke to Mr. Samberg on the Friday before the Monday when Pequot purchased Heller stock, but Mr. Mack and Mr. Samberg are "buddies" and communicate frequently. The staff indicated that they have received approximately 4-5 million email messages related to the investigation, and there is no further evidence pointing to Mr. Mack as a possible source of the information to Mr. Sandberg. In addition, there is no evidence that Mr. Mack had notice of the transaction at the time Pequot began purchasing the shares of Heller. The staff expressed their belief that it would be premature to take Mr. Mack's testimony at this time because they do not have any evidence to confront him with that suggests he passed confidential information to Mr. Samberg, and the staff would prefer "to have their ducks in a row" and not "go in and wing it."

EXHIBIT NUMBER 3

Memorandum


NYSE

COPY

To: Aldo Martinez *AM*
 From: Sandra Clayton and James McColgan *SCJ*

Date: January 30, 2002
 Re: Heller Financial Inc.
 (HF and HFPRM #01138);
 Closed: SEC Highlight

Date Case Opened: August 1, 2001
 Date Case Closed: January 30, 2002
 Headquarters: Chicago, IL

REASON FOR REVIEW

On July 30, 2001, General Electric Company's (NYSE: GE) GE Capital Corp. announced that it would acquire Heller Financial Inc. (NYSE: HF) for \$53.75 per share, in a cash transaction valued at \$5.3 billion. HF closed at \$52.99 (+17.09) on 101,000 shares. The preferred, HFPPRM, closed at \$34.95 (+7.85) on 8,300 shares. According to news reports, the acquisition of HF had been expected.

Japan's Fuji Bank Ltd. owned 52% of HF and controlled approximately 77% of HF's voting power. Staff analyzed trading in HF and HFPRM for atypical and concentrated activity that was possibly foreign and found none.

The acquisition was completed on October 25, 2001.

REVIEW PERIOD

July 24-July 27, 2001

HF traded 2.5 million shares from July 16 through July 20 down \$2.80 to \$36.00. (On July 17, 2Q earnings were released. The earnings met expectations). HF declined .10 from July 23 through July 27, on 1.6 million shares. HFPRM traded 603,300 shares from July 16 through July 20. HFPRM declined by .324 from July 23 through July 27 on 46,300 shares.

Firms that purchased 5,000 shares or more (.41% and above) were bluesheeted. The investigation focused on ASAM and Chronology matches to direct insiders because the deal between GE Capital and HF had been expected.

General Electric Co., Heller Financial and Morgan Stanley provided Chronologies. The review period was not expanded because the proposed transaction was not endorsed until July 27 and was in doubt if GE Capital did not make a "compelling" and "cash tender offer."

COMPANY PROFILE

Heller Financial provided specialized financing solutions to small and mid-sized companies in the US and abroad. The company had assets of \$20 billion and 2,500 employees worldwide. At the time of the acquisition there were 96 million shares outstanding.

GE Capital is the finance arm of General Electric Co. and has \$370 billion in assets. GE Capital is based in Stamford, CT. Analysts stated that GE Capital acquired Heller Financial because it provides GE Capital with a new international platform in factoring, particularly in Europe, expertise and relationships across the middle market finance sector, and relationships within the healthcare finance industry.

ISG CONTACT

Copies of the opening memorandum were sent to the AMEX and NASDR.

On August 26, 2001, Rich Coffey of the AMEX informed Staff that the SEC was interested in a [REDACTED] was not found in the bluesheets.

SEC CONTACT

Copies of the opening memorandum were sent to the SEC.

On September 25 and November 26, 2001 and January 11, 2002, copies of the chronologies were sent to Jessica Weiner of the SEC in Washington.

CHRONOLOGY OF EVENTS

DATE	EVENT
Prior to May 2001	Members of GE Capital and Fuji Bank met to explore a business combination between GE Capital and HF. The discussions were general and did not result in anything definitive.
Early May 2001	GE Capital met with financial and legal advisors regarding possible transaction terms should GE Capital determine to make a more specific proposal to acquire HF.
Mid-May 2001	Representatives of GE Capital approached Fuji about GE Capital's potential interest in buying Fuji's interest in HF as part of a transaction in which GE Capital would acquire all of the outstanding shares of HF in cash. (The meeting took place in Japan). Based on the feedback from the meeting in Japan, GE Capital held further discussions with its investment advisor. The discussions continued through June and included valuation and other considerations relating to a potential transaction.
Late June and July 2001	HF, Fuji and GE Capital met to discuss the possibilities of a transaction. GE Capital was informed that a transaction would not be supported unless

	GE Capital offered a compelling price and agreed to proceed to consummate the transaction as quickly as possible, including by using a cash tender offer structure.
	Due diligence performed. Continuing discussions.
July 20, 2001	HF Board Meeting to discuss the proposed transaction.
July 26, 2001	HF's Board met to consider the transaction and authorized management to continue negotiations.
July 27, 2001	The GE Board met and endorsed the proposed transaction.
July 29, 2001	HF's Board met and unanimously approved the Merger.
July 30, 2001	Merger Agreement executed.

NAME RECOGNITION

The names of eight individuals and institutions were submitted to both companies for name recognition. Neither company recognized the individuals/institutions. Included in the Name Recognition Letter was a [REDACTED] identified by ASAM as being a manager with [REDACTED] of [REDACTED] matched against [REDACTED] of [REDACTED]. The [REDACTED] purchased [REDACTED] on July 26.

GE Capital confirmed that [REDACTED] GE Capital indicated that [REDACTED] was not aware of any proposed transaction between GE Capital and HF prior to July 30, 2001, and he at no time owned securities in HF. Also, he was not an employee of a unit of GE Capital that was involved in the acquisition of HF. Counsel for GE called to see if we had any information that the [REDACTED] were related, as he had none. Staff informed him that the name was included because it was a last name match.

TRADING ANALYSIS

Trading activity in HF was analyzed in ICASS and STARS. Bluesheets were matched against the Chronology for the accounts that were entered into the Participant Database ("PDB"), Automated Search & Match ("ASAM") and the Unusual Activity File ("UAF"). Folders were also built to further analyze and find any possible geographic/foreign concentrations

ASAM Matches: There were no "fine" matches.

Chronology Matches: There were no "fine" matches. The coarse matches included a person whose name was indicated on the attention line for an average price account at Robinson Humphrey (that bought and sold an equal amount of HF). The others sold or purchased 300 share or less. These names were not matched any where else.

UAF Matches: The only "fine" UAF matches were for activity in 1990.

CRD Matches: There were five CRD matches. None of the CRD matches were affiliated with Morgan Stanley. The largest buyer, [REDACTED] on July 25 (before the transaction between HF and GE Capital was officially endorsed). The account was not linked to any associates and was not geographic. Additionally, no customer bought HF and this deal was highly expected. [REDACTED] is a registered employee with [REDACTED]. They were not involved in the deal.

- 4 -

Specialist Activity: [REDACTED] (0501) bought 161,600 shares and sold 164,000 shares during the review period.

Rule 106 Contacts: The Rule 106 contacts did not appear in the bluesheets.

Foreign Activity: There were no buyers located in Japan. The largest foreign account was Anova Master Fund Limited of Hamilton, Bermuda. Anova purchased 26,000 shares between July 24 and July 27. The next largest foreign buyer was [REDACTED] purchased [REDACTED] between July 25 and July 27. Again, this deal was expected and some of these purchases were before the deal was assured.

Highlight: Pequot Capital Management purchased approximately 332,000 shares of HF (the transactions were spread throughout the review period). The 13F filed for June 30, 2001 revealed that Pequot's holdings were valued at \$7.8 billion. The amount of HF purchased is not unusual because Pequot routinely held 500,000 shares or more in various stocks. In addition, Pequot held 100,000 shares of Owen Financial Corp. (NYSE: OCN) which is part of HF's industry group. The account is highlighted rather than referred because the deal was expected and the size did not appear out of character.

SUPERVISION

Lack of supervision on the part of a member firm or supervisory employee of a member firm was not an issue in this investigation.

CONCLUSION

The investigation is closed at this time with one account being highlighted. There were no referrals and there were no "fine" ASAM or Chronology matches. In addition, none of the accounts submitted to GE Capital and HF were recognized and no connections between any of the accounts that purchased HF and the companies were established.

cc: Joseph J. Cella III

The above information is being sent to the SEC for surveillance purposes only, and confidential treatment is requested pursuant to the Freedom of Information Act and the applicable SEC Rules thereunder. Such treatment is requested on the grounds, among others, that the information submitted may contain confidential financial data of private parties, as well as sensitive surveillance data whose disclosure may significantly impair the effectiveness of the Exchange's self-regulatory mechanism. Accordingly, should any request be made for disclosure of these materials, or their contents, we ask that you notify us of this fact immediately, giving us a chance to interpose our objections.

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SEC 00007162

EXHIBIT NUMBER 4

UNITED STATES SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

----- -x
:
In the Matter of: :
:
TRADING IN CERTAIN SECURITIES, :
No. HO-0818, and the SEC's :
TERMINATION OF EMPLOYMENT OF :
GARY AGUIRRE :
:
----- -x

Thursday
November 2, 2006

The interview of PAUL R. BERGER, Esquire
was convened, pursuant to notice, at 10:10 a.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, ESQ.
Investigative Counsel
U.S. Senate Committee on Finance

HAROLD H. KIM, ESQ.
Chief Civil Counsel
U.S. Senate Committee on the Judiciary

HANNIBAL G. WILLIAMS II KEMERER, ESQ.
Counsel
U.S. Senate Committee on the Judiciary

SEEMA SINGH
U.S. Senate Committee on the Judiciary

TIANA BUTCHER
Staff Member
U.S. Senate Committee on Finance

STEPHANIE MIDDLETON
U.S. Senate Committee on the Judiciary

APPEARANCES (Continued)

SAMUEL M. FORSTEIN, ESQ.
Assistant General Counsel
Litigation and Administrative Practice
U.S. Securities and Exchange Commission

JANE O. COBB
Director, Office of Legislative Affairs
U.S. Securities and Exchange Commission

DAVID M. BECKER, ESQ.
ANTONIO J. REYNOLDS, ESQ.
Cleary, Gottlieb, Steen & Hamilton LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

1 MR. FORSTEIN: Let him finish reading it.
2 MR. BERGER: Yeah, let me just finish.
3 [Pause.]
4 MR. BERGER: Okay.
5 MR. FOSTER: Do you recall receiving this at
6 the time, in January of 2005?
7 MR. BERGER: I do recall the letter. The
8 timing I don't remember.
9 MR. KIM: Do you have any reason to believe
10 that the timing of this letter is inaccurate?
11 MR. BERGER: No.
12 MR. FOSTER: So does that refresh your
13 recollection about when it was that Gary Aguirre asked
14 for a transfer?
15 MR. BERGER: It must have been in--actually,
16 I think it was before this because this letter is marked
17 January 10, 2005, and there were, as I already told you,
18 there were at least a couple of conversations before
19 that, prior to this letter.
20 MR. FOSTER: How long prior to the letter?
21 MR. BERGER: Again, I'm suggesting it was
22 probably a matter of weeks.
23 MR. FOSTER: The second page of the exhibit
24 is what appears to be a draft response of some kind with
25 some edits on it.
26 MR. BERGER: Right.

1 MS. MIDDLETON: Let me just ask you a little
2 bit about the subpoenas. Do you know in this situation
3 whether Gary had sent a draft or a copy of the subpoena
4 to his supervisor and the supervisor just hadn't had a
5 chance to look at it? Or, I mean, was it a situation
6 where Gary was just not sending copies to people, or was
7 it one where his supervisor was letting him do it and
8 just saying cc me on this stuff, I'll get around to
9 looking at it? Did anybody look into that issue?

10 MR. BERGER: What I was told is that he--all
11 I can tell you is what I was told because I don't have
12 firsthand knowledge of it. But what I was told was that
13 he sent them out without running them by his branch chief
14 or Assistant Director.

15 MS. MIDDLETON: And do you know whether--

16 MR. BERGER: In fact, I can add that what I
17 did learn--again, I'm not sure when I learned this--is
18 that we didn't--we couldn't determine from reviewing all
19 of the files whether some subpoenas were sent out or not.
20 In other words, there were subpoenas on the network that
21 we couldn't even determine whether they had gone out or
22 not, because the files were in such disarray.
23 Apparently, there was no organization to the file or the
24 record. And so we didn't know, we didn't have a good
25 sense of what had gone out and what didn't go out.

1 that were in violation of, you know, the RFPFA and
2 whatever other acts that might have been involved, and
3 that we had to resolve that. And like I said, I told you
4 my reaction. I was concerned about that. I told them--I
5 was frankly more concerned that Gary had not run things
6 by his supervisors.

7 I should back up just one second to
8 volunteer something. When Gary moved from Richard
9 Grime's group to Mark Kreitman's group, I had a
10 conversation with him, and I said, "I'm going to go ahead
11 and move you. I am concerned about your ability to take
12 supervision." And I said, "I hope that in this new
13 atmosphere with what I think is a terrific Assistant
14 Director and the branch chief we're going to assign you
15 to I think is just--I think the world of him. I think
16 you should thrive in that atmosphere, but I hope that
17 we're not going to have the issue again with not taking
18 supervision." And he assured me that that would be the
19 case, and here we were, whatever amount of time passed,
20 where he was sending out subpoenas and not running them
21 by his supervisors, and I was concerned about that.

22 MS. MIDDLETON: But you didn't ascertain
23 whether he had been told that he should do that or had
24 been given a blanket okay, you know, here's a template
25 subpoena, use it? You didn't look into whether--

1 MR. FOSTER: Do you recall any
2 communications with Audrey Strauss before Gary Aguirre
3 transferred?

4 MR. BERGER: I don't recall any.

5 MR. KEMERER: Do you recall what the dispute
6 with respect to production involved?

7 MR. BERGER: Yes. I remember that Gary had
8 come to me--and, again, time frames I'm just not--unless
9 you have some documents that help refresh my memory, I
10 don't remember time frames. But I remember Gary came to
11 me being very upset that he wasn't getting production
12 from Fried Frank, which represented Pequot. And he said
13 he had had a running correspondence with them, and I
14 asked him what the issues were, and I think it was about
15 e-mails and some other production, and I can't remember
16 exactly what it was. And I asked him if he could shoot
17 me a copy of the correspondence back and forth. And I
18 didn't actually get it right away. I remember seeking
19 out him or Mark and saying, "I thought there was an
20 issue. Are you guys going to get me the correspondence?"
21 They did after a while.

22 I looked at it, and it was fairly long back
23 and forth, and I said, "Well, why don't we put together a
24 quick bullet point of what the issues are here and
25 potential resolutions?" And apparently things had become
26 very belligerent between Gary and Fried Frank. And so I

1 eventually got this one- or two-page memo of bullet
2 points, looked it over, and said, "Look, let's set up a
3 conference call and see if I can mediate this dispute and
4 get it resolved." And, in fact, we set up a
5 correspondence call. Audrey Strauss was on the line, I
6 think other counsel for Fried Frank. I think that Judge
7 Sporkin had been brought into the matter, and he was on
8 the line. There may have been other people on the line.
9 I can't remember. Irv Pollack might have been on the
10 line. I just don't remember. And we had it all in my
11 office, and I tried to make it very cordial and tried to
12 get some resolution, and we set up a timetable.

13 MR. KEMERER: With rolling document
14 production?

15 MR. BERGER: Exactly, rolling document
16 production and a timetable for production and a schedule
17 for the beginning of taking testimony. Everyone was on
18 board with that, both sides of the table. I think we
19 sent a confirming letter. I have a memory that we sent a
20 confirming letter, but I'm not positive of that.

21 MR. FOSTER: Prior to that conference call,
22 do you remember any communications with anyone about
23 narrowing the scope of the Pequot investigation from 18
24 referrals to two or three?

25 MR. BERGER: I think that Mark had told me
26 that he wanted to narrow the scope because there were

1 just so many and there was just--and some of them were
2 very old. As I said earlier this morning, I think some
3 were 8 or 9 years old. And just for the sake of, you
4 know, moving the investigation along and getting it done,
5 he wanted to narrow the scope.

6 MR. FOSTER: Do you recall if that
7 conversation occurred before or after Gary Aguirre's
8 transfer?

9 MR. BERGER: Oh, that would have been after
10 because it was Mark talking to me.

11 MR. FOSTER: Did you discuss with Mark
12 Kreitman before the transfer whether he would be willing
13 to take on this Pequot investigation?

14 MR. BERGER: Yes.

15 MR. FOSTER: What did he know? To your
16 knowledge, what did he know about it?

17 MR. BERGER: I think I mentioned earlier
18 this morning that one of the things I did is I talked
19 both with Richard Grime to see if he wanted to give up
20 the investigation and then I talked with Mark to see if
21 he wanted the investigation. And I think what Mark said
22 is, "Let me talk with Gary." I think he talked with
23 Gary. I think he mentioned that he talked with Richard.
24 But I can't remember for sure. And then he came back to
25 me and he just said, "Okay. We'll take the
26 investigation."

1 MR. FOSTER: Okay. So there was no
2 discussion at that time about narrowing it?

3 MR. BERGER: I don't remember that. It
4 might have. I just don't remember.

5 MR. FOSTER: Did the narrowing discussion
6 that you do recall, did that occur before you had
7 received any documents from--

8 MR. BERGER: I don't remember.

9 MS. MIDDLETON: Can I ask something? You
10 said that the files were in disarray.

11 MR. BERGER: Yeah.

12 MS. MIDDLETON: Is that based on your
13 personal knowledge or is that what--

14 MR. BERGER: No. That's what I was told.

15 MS. MIDDLETON: You were told that by whom,
16 do you know?

17 MR. BERGER: I was told that by both Mark
18 and Bob.

19 MR. KEMERER: Can you describe for me what a
20 proffer is? And I mean that with respect to Department
21 of Justice and SEC parallel proceedings involving--

22 MR. BERGER: Sure.

23 MR. KEMERER: --potential insider trading.

24 MR. BERGER: Sure. Proffers take place all
25 the time, and they can be--not necessarily with the
26 Department of Justice. People can come in--rather,

1 counsel can come in with a witness or by themselves and
2 proffer what would be testified to or what evidence
3 people might have. Proffers with the Department of
4 Justice, often people would bring in their clients,
5 counsel would bring in their clients and sit down and
6 say, okay, if asked, this is what we would have to
7 provide on the record, this is the evidence that we have.
8 And oftentimes when we're doing parallel investigations
9 with the Department of Justice, we would have joint
10 proffers, and that is, the SEC and DOJ or the U.S.
11 Attorney's Office would sit in and listen to counsel and
12 the witness and hear what they have to say.

13 MR. KEMERER: Are you aware of the--did the
14 Pequot referrals include one referral concerning trading
15 ahead of a Microsoft earnings report?

16 MR. BERGER: Yeah. Just to back up, during
17 the course of the Pequot investigation, periodically in
18 just, you know, sometimes hallway conversation, I'd ask
19 Mark or any of my Assistant Directors what's happening
20 with a case or something like that, and I'd periodically
21 ask what's happening with Pequot. And he would say, you
22 know, "It's moving, but it's moving slowly." And
23 periodically I'd say, because I thought it was important,
24 "Is this something we should talk to the U.S. Attorney
25 about?" Because a lot of times in an investigation when
26 you hit a wall, you might be able to go to the U.S.

1 Attorney, and they might be able to break that wall by
2 talking with an individual, getting a proffer, or
3 ultimately flipping a witness.

4 And so several times Mark had told me, "No.
5 Let's not do that yet." And then it got to a point where
6 I asked him and he said, "You know, it might be a good
7 idea." So I called the chief of the Securities and
8 Commodities Fraud Section at the U.S. Attorney's Office
9 for the Southern District of New York, talked to him.

10 It turns out that they had looked--I'm
11 sorry.

12 MR. KEMERER: I'm sorry. What was his name?
13 Just before I forget.

14 MR. BERGER: Richard Owens.

15 MR. KEMERER: Okay. Sorry.

16 MR. BERGER: It turns out that they had
17 looked at one piece of this investigation in the past.

18 MR. KEMERER: Which part?

19 MR. BERGER: That's what I'm trying to
20 remember. I know this.

21 I know. There was a--one of the
22 transactions involved a pharmaceutical company.

23 MS. MIDDLETON: AstraZeneca?

24 MR. BERGER: That sounds right. Do you want
25 to come over here?

1 [Laughter.]

2 MR. BERGER: I'm trying to remember this. I
3 think it was AstraZeneca. I don't remember. But it was
4 a pharmaceutical company, and it involved a decision that
5 was coming down from, I think, a court in New York, and
6 somehow the concern was that Pequot had gotten
7 information as to what--yeah, I remember that--what the
8 decision was going to be and had traded in advance
9 understanding what the impact of that decision would be
10 on the marketplace. And so Richard Owens had told me
11 that they had looked into that and, in fact, had
12 interviewed people. There was a suspicion that the tip
13 might have come from the courthouse, and so they
14 interviewed people at the courthouse.

15 This is okay to disclose, a U.S. Attorney's
16 investigation?

17 MR. FORSTEIN: Is there...?

18 MR. BERGER: I don't know.

19 MR. FORSTEIN: Well, you are authorized to
20 disclose it. I just request the Committee not to put
21 this out publicly since we don't know the status.

22 MR. BERGER: Okay. I know that when I left,
23 the U.S. Attorney was still conducting its investigation.
24 I don't know what's happened since. Let me finish this,
25 though.

1 So Richard told me that they had looked at
2 that matter, and they had been unsuccessful in
3 determining whether or not a tip had been provided to
4 Pequot. And I said, "Look, does it make sense in light
5 of the fact that we're still looking at this"--hedge
6 funds are important, I'm concerned about it; we had, you
7 know, a 10-minute conversation about it--"to take another
8 look not only at that transaction but all these other
9 transactions"--including Microsoft, who's one of them.
10 And he said, "Well, let me talk with some people here and
11 see." And then he got back to us, and they said they
12 were interested, and I told Mark, "Let's set up a
13 meeting. Let's give them all the facts that we have that
14 we can product to them. They would give us an access
15 request, and we would give them everything that we have
16 and help them and see if we can't break the logjam.

17 MR. KEMERER: And did Mr. Aguirre indeed go
18 up to New York to brief the Assistant U.S. Attorney?

19 MR. BERGER: I believe she did.

20 MR. KEMERER: And to your knowledge--well,
21 do you know who David Zilkha is?

22 MR. BERGER: Yeah. I think he was an
23 employee of Microsoft.

24 MR. KEMERER: That's--

1 MR. KEMERER: Well, maybe you could tell us
2 who worked on Pequot at that time.

3 MR. BERGER: I'm sorry?

4 MR. KEMERER: When did you stop working on
5 the Pequot case?

6 MR. BERGER: In January 2006, I think.

7 MR. KEMERER: And why did you stop working
8 on the Pequot case?

9 MR. BERGER: Because I recused myself.

10 MR. KEMERER: And how did you go about
11 recusing yourself?

12 MR. BERGER: My practice was just to send an
13 e-mail around to my Assistant Directors and asking them,
14 you know, if the firms that I was looking at were
15 involved in any of my matters, and talking to them and
16 telling them I don't want to be involved in any of those
17 cases.

18 MS. MIDDLETON: Did you send such an e-mail?

19 MR. BERGER: Yes, I did.

20 MS. MIDDLETON: And which firms did you
21 list?

22 MR. BERGER: Well, it wasn't just one e-mail
23 with one firm. It was periodically as I approached firms
24 or they approached me that I sent an e-mail.

1 MR. BERGER: Yes. I think that back in
2 roughly the September '05 time frame, one of my
3 colleagues at the Commission, Larry West, who was an
4 Associate Director, was looking for a position to leave
5 the Commission. And he came to me--Larry and I were good
6 friends, still are good friends--and said that he was
7 looking for a position, that he wanted to--was it okay if
8 he could share information with me about his looking and
9 get my advice, bounce ideas off me, et cetera. I said
10 sure.

11 At one point he came to me and he said, "You
12 know, wouldn't it be great if the two of us worked
13 together someplace?" And I said, "Well, it would be
14 great, but it's never going to happen." And he said,
15 "Why?" And I said, "Because no firm is going to absorb
16 two of us without any book of business, no matter what
17 our experience is." And I said, "That's just not going
18 to happen, Larry, so we're going to have to get
19 comfortable with that."

20 And at some point he came to me and he said,
21 "Well, would it be okay if I told Debevoise, who I'm
22 talking with, that you're interested in leaving?" And I
23 said, "Okay. Sure." You know, "It's okay to go ahead
24 and do that." And then he went and did that.

1 After I said that, I got a little concerned
2 about whether or not that was inappropriate or I just
3 wasn't sure whether or not I should have let him use my
4 name. So I went to Ethics and asked Ethics whether or
5 not, you know, Larry mentioning my name at a firm was
6 okay. Their response was, "If an individual acts as an
7 agent for you, then you should recuse yourself." And I
8 said, "Well, okay. What is acting as an agent?" And
9 they gave me some examples. They said, "If the
10 individual hands out your résumé, says, you know, you
11 should hire this guy or you should interview this guy,
12 you should talk with this guy, something like that, that
13 would be acting as an agent."

14 They gave me another example of a
15 headhunter. If you said to a headhunter, "Sure, go ahead
16 and talk to a firm on my behalf," and where the
17 headhunter is going to go say, you know, "You should talk
18 with this guy because he would be a great person at your
19 firm, and you should think about hiring him, that would
20 be acting as an agent." And I said, "Okay. Fine."

21 And then when I saw Larry again, I sought
22 him out, and I said, "Larry, what happened when you
23 talked with Debevoise?" And he said, "Well, actually I
24 mentioned your name, that you might be thinking of
25 leaving, and their only response was, 'Well, we're

1 interested in talking with you, Larry.'" And my name
2 didn't come up again. I said, "Larry, did my name come
3 up at all again?" And he said, "No." And I said, "Okay.
4 Look, I've talked with Ethics, and they told me that if
5 you were acting as an agent, then I should recuse myself.
6 Can you"--I basically said, "Did you act in any way as an
7 agent for me?" And he said, "No. All I did was I said
8 you were interested in leaving." He said, "I might have
9 said it would be great for the two of us to work
10 together, but they showed no interest in you"--
11 unfortunately. Or fortunately. Who knows? "And they
12 said, 'We walk to talk with you'"--again, Larry.

13 I said okay, and I explained what Ethics had
14 said. I said, "Look, it's probably best not to mention
15 my name again to anyone, to any other firms that you're
16 talking with."

17 MR. KEMERER: Who was the person you talked
18 to in Ethics?

19 MR. BERGER: Bill Lennox.

20 MR. KEMERER: And did Bill Lennox give you
21 any written memoranda depicting the sort of different
22 tests?

23 MR. BERGER: No.

24 MR. KEMERER: Did he refer you to any
25 internal SEC rules with respect to recusal?

1 working with the Board of Directors of Morgan Stanley and
2 he wanted to know if Mack had a problem, because they
3 were thinking about hiring him as the CEO.

4 I said, Eric, you know that I can't tell you
5 anything. We're in the middle of an investigation. It's
6 premature to say. He said, I knew you were going to say
7 that, but I needed to ask anyway. I said, well, you
8 know, I appreciate the fact that you guys are interested
9 and have, you know, a decision to make, but we can't be
10 part of that decision.

11 Then he said, well, where are you in the
12 investigation? I said, well, we're just in the middle of
13 the investigation. He said, is there any way to speed
14 that up? I said, not that I'm aware of, but if there is,
15 you know, we'll be in touch with you if you can be of
16 help.

17 MR. KEMERER: Was this conversation on June
18 24th, your conversation?

19 MR. BERGER: It was the same day. It was the
20 same day as the e-mails and the conversation with Mark.
21 I assume, because of these e-mails, it's the 24th.

22 MR. KEMERER: Would one way of "speeding up the
23 investigation", as Mr. Dinallo suggested, be to have
24 taken Mr. Mack's testimony?

1 MR. BERGER: No. And he wasn't suggesting that.
2 What he was wondering is -- what he was saying, is can we
3 get to a conclusion as to whether or not the Commission
4 is going to take any action with respect to Mr. Mack. I
5 said, you know, look, we can -- we're working on the
6 investigation as fast as we can.

7 He asked, well, do you think you'll be done in a
8 week or two? I kind of laughed and I said, no, it's not
9 going to happen. We're still in the middle of this
10 investigation. And he said, well, if there's anything we
11 can do to speed it up, let us know. That was it. It was
12 actually a fairly short conversation.

13 After that, I went to Mark and I said, Mark, I
14 had the conversation with Dinallo. I said, you realize
15 now that your suggestion was contrary to Commission
16 policy? We could not tell a party, particularly someone
17 who was not even a party to the investigation, any of the
18 confidential information about the investigation, nor
19 could we express an opinion one way or the other about
20 Mr. Mack.

21 I said, you know, think about it. If the
22 Commission staff--five presidentially-appointed
23 Commissioners--were to say to someone who was trying to
24 make a hiring decision, this man has a problem, they may

1 MR. BERGER: Well, I should add one more
2 important point. I said, just make sure that we convey
3 this information in your oral evaluation, and Mark said,
4 sure, he would.

5 MS. MIDDLETON: So when Bob Hanson said, I worry
6 and I don't want to send the wrong -- I'm sorry. You
7 said he said there was some reason he didn't --

8 MR. BERGER: He was -- Bob is an incredibly nice
9 guy and he was being bombarded by two individuals with --
10 I mean, he was getting e-mails from people--I think Rob,
11 actually--at 3:00 in the morning, 4:00 in the morning,
12 just constantly being bombarded.

13 MS. MIDDLETON: What kind?

14 MR. BERGER: E-mails about, you know, we should
15 do this, we should do that.

16 MS. MIDDLETON: In cases?

17 MR. BERGER: Yeah. And he was being very
18 difficult. I mean, Bob would have a better sense of it.
19 I was getting this second-hand, obviously. And he was
20 having a tough time supervising these two individuals.
21 And so, you know, my response was, well, you've got to
22 think as a supervisor and what's beneficial to the
23 Commission here in terms of what you tell these people.

24 And, you know, what I'm thinking about is what
25 he's going to tell them in his oral evaluation. The oral

1 Mark in terms of dealing with them. And very often I'd
2 talk with Mark about it, the issues.

3 MS. MIDDLETON: You talked.

4 MR. BERGER: Yeah. Yeah.

5 MS. MIDDLETON: But, I mean, did you ever meet
6 with Gary?

7 MR. BERGER: I met with Gary on a couple of
8 occasions, yeah. Well, more than two occasions.

9 MS. MIDDLETON: About these issues?

10 MR. BERGER: I met with Gary specifically with
11 some issues that were raised in the Pequot investigation.

12 MS. MIDDLETON: And what meetings? Could you
13 tell us about those meetings?

14 MR. BERGER: Sure. I mean, one meeting -- I
15 can't give you times of meetings. I don't remember in
16 terms of when they occurred. But one meeting Gary came
17 in and he was very exorcised over a meeting that had just
18 occurred with Mark Kreitman, and it was about taking
19 Mack's testimony.

20 He said, Mark is afraid to take his testimony
21 because Mack is a powerful guy. I explained to him that
22 no one in the Division of Enforcement is afraid of taking
23 an individual's testimony because they're powerful.

24 I said, the fact of the matter is, most people
25 in the Division of Enforcement, including me, are more

1 than willing to take powerful people's testimony if we
2 have a good reason to. I said, it's like we're going to
3 take Mack's testimony, just do it toward the end. He
4 said, well, why not do it now? And I explained the
5 reasoning for not doing it now.

6 I said, look, this is a judgment by Mark and Bob
7 and me, and we have a lot of experience doing these
8 investigations, and we think this is a good way to do it.
9 And he came back to the fact that we were afraid to take
10 it.

11 I said, look, let me give you a laundry list of
12 the people that we've put on the record or interviewed,
13 and I described to him some of the people, many more who
14 are much more powerful, much more influential, and much
15 better known than Mack.

16 I mean, most of us in the room probably couldn't
17 name all the CEOs of investment banks on Wall Street, me
18 included, but you could probably name a lot of the people
19 whose names you see in the paper every single day who we
20 talk to, and we're not afraid to talk to.

21 And he seemed to calm down, I mean, when he
22 heard some of the names of the people that we were
23 willing to talk to. He seemed to be okay. By the end of
24 the conversation, it lasted for a while, he seemed to be
25 okay.

1 I mean, he seemed to understand that the
2 decision here is to do it at the end when we have all of
3 our ducks in a row and we have all the evidence that we
4 think we can compile, and then have that conversation.

5 MS. MIDDLETON: Okay.

6 MR. FOSTER: Did you tell Gary Aguirre during
7 that conversation that you took the accusation
8 personally, or words to that effect?

9 MR. BERGER: I don't remember that.

10 MS. MIDDLETON: We may come back to that. My
11 question was actually on a conversation that you had with
12 Gary about his performance, per se, and the conduct of
13 performance, however you want to characterize it --

14 MR. BERGER: Yeah.

15 MS. MIDDLETON: -- such that he would be aware
16 that there were concerns about that and he was on,
17 perhaps, thin ice at that point.

18 MR. BERGER: Yeah.

19 MS. MIDDLETON: Would you say he was on thin
20 ice?

21 MR. BERGER: I'd say there were some serious
22 issues, yeah. And --

23 MS. MIDDLETON: And did you have any
24 conversations with him about that?

1 talking about, you know, through the course of a year or
2 as part of the sit-down and tell the employee orally what
3 you think of their performance, do you?

4 MR. BERGER: What I knew and what I took from
5 the conversation, and what GC asked us in that
6 conversation as well, was the sum and substance of this
7 particular document -- and we identified the supplemental
8 evaluation. Was the sum and substance of that conveyed
9 to Gary as part of his evaluation, and the answer was
10 yes.

11 MS. MIDDLETON: From Mark, you think, that
12 answer?

13 MR. BERGER: Yes.

14 MS. MIDDLETON: Let me ask you this. Could you
15 turn to the second page?

16 MR. BERGER: Sure.

17 MS. MIDDLETON: We've talked about the
18 subpoenas.

19 MR. BERGER: Yeah.

20 MS. MIDDLETON: I'm going down about six or
21 seven lines. Could you tell me what "inaccurately stated
22 Commission policy in communication with defense counsel"
23 -- do you know what that refers to?

24 MR. BERGER: Yeah, I think I do. One of the --
25 one thing that was raised with Gary, was he was -- the

1 word came up very often. He was belligerent with counsel
2 on the other side of the table, and that -- you know, we
3 talked earlier this morning about the fact that people at
4 the Commission, particularly once you've been granted a
5 formal Order of Authority, have considerable power and we
6 want people to represent the Commission well outside the
7 building, whether it's with the defense bar, public
8 companies, or in the marketplace. The problem that had
9 arisen with Gary, is that he was "volatile", which is a
10 word that was used, and "belligerent" with people.

11 MS. MIDDLETON: You say "was used"?

12 MR. BERGER: By a lot of people referring to --

13 MS. MIDDLETON: Counsel?

14 MR. BERGER: Well, from people like Mark
15 Kreitman and Bob Hanson, and then calls that were coming
16 in from people outside the building that Gary had had
17 contact with, and complaints about him. One complaint --
18 there were a number of complaints that came up that Mark
19 told me about that came in from some counsel.

20 MS. MIDDLETON: Who?

21 MR. BERGER: From -- I believe he told me Irv
22 Pollack -- Irvin Pollack, who --

23 MS. MIDDLETON: Pollack complained to Mark?

24 MR. BERGER: Yeah. Irvin Pollack was the first
25 Director of Enforcement at the SEC and a former

1 Commissioner, and really kind of the dean of the
2 securities bar, and also just an incredible gentleman,
3 had complained. There were other counsel, I think, that
4 -- Judge Sporcan had complained.

5 And I can't remember if I had a conversation
6 with Sporcan, who complained to me about Gary, or if it
7 was Mark. But there were complaints. I did receive a
8 complaint from the general counsel for Credit Suisse.

9 MS. MIDDLETON: Who was it?

10 MR. BERGER: Gary Lynch.

11 MS. MIDDLETON: Okay.

12 What was the complaint?

13 MR. BERGER: Apparently Gary had called a lawyer
14 at Credit Suisse and was demanding documents.

15 MR. KIM: "Gary" is Gary Aguirre?

16 MR. BERGER: I'm sorry. Yeah. Gary Aguirre had
17 called the lawyer at Credit Suisse, was demanding
18 documents, and said, I'm instructing you to keep all this
19 confidential and you can't tell anyone about this, all of
20 the things that Gary Aguirre was saying. So apparently
21 that lawyer told Gary Lynch, who was the general counsel.

22 The general counsel called Gary Aguirre. Gary
23 yelled at the general counsel, told him that, you have to
24 keep this confidential. Gary said, I don't know -- you
25 know, I used to be the Director of Enforcement, I don't

1 know what you mean by that, and Gary Aguirre hung up on
2 him.

3 MS. MIDDLETON: And --

4 MR. BERGER: And so -- let me just finish. And
5 so after he hung up, Gary Lynch, general counsel, called
6 me and said, who is this guy? I mean, you know, the guy
7 just hung up on me. I don't know what I'm supposed to
8 do. He's telling me to keep it confidential. Does that
9 mean I can't tell -- who can I tell, who can't I tell?

10 Since when does the Commission have a policy
11 that you can instruct a private party to keep something
12 confidential? I said, look, there is no such policy.
13 Just like when you were director, you can do with this
14 information as you please.

15 Obviously people would prefer that you keep it
16 confidential, but that's up to you. I will make sure
17 that, you know, our people call your people back and
18 straighten this out.

19 And then I talked with Mark and I said, you
20 know, you've got to get this guy on the reservation. He
21 can't just scream and hang up on people. How are we
22 going to move the investigation along if you treat people
23 like that? And so that -- I guess that's an instance
24 inconsistent with Commission policy.

1 MR. FOSTER: Did you consider that acceptable
2 behavior?
3 MR. BERGER: I would consider that unacceptable
4 behavior, yes.
5 MR. FOSTER: Do you know if that occurred before
6 or after the performance assessment you were looking at?
7 MR. BERGER: I don't remember. I don't
8 remember.
9 MS. MIDDLETON: So the -- my question was
10 "inaccurately stated Commission policy". Do you think
11 that is what this refers to --
12 MR. BERGER: Oh, I think that's -- I think --
13 MS. MIDDLETON: -- telling someone?
14 MR. BERGER: -- that's an instance. I -- there
15 are other instances, I think, that Mark had identified.
16 I don't remember what they are.
17 MS. MIDDLETON: So as you sit here today, the
18 one you remember about inaccurately stated Commission
19 policy related to telling Credit Suisse to keep it
20 confidential, was that fair?
21 MR. BERGER: I think that's fair.
22 MS. MIDDLETON: Okay.
23 Now, you also mentioned other staff attorneys
24 finding it difficult to work with him. And again, you
25 don't have to repeat what you've already said. Does

1 that, as you sit here today, refer to Eichner, Jama,
2 Hanson? Who, specifically, if you know, as you sit here
3 today?

4 MR. BERGER: I think -- I think those three, and
5 probably should include Mark. I think that there were
6 other people in the group who I had been told by Bob
7 Hanson were beginning to have difficulties just being --
8 existing in the group with Gary.

9 MS. MIDDLETON: Could you name them?

10 MR. BERGER: No, I couldn't. I don't remember
11 who they were.

12 MS. MIDDLETON: And then it talks about, "he
13 inaccurately perceives as attempts by his supervisors to
14 thwart his success." Is there anything that comes to
15 mind as you sit here that you haven't already told us
16 about today that this refers to? "Expresses resentment
17 at what he inaccurately perceives as attempts by his
18 supervisors to thwart his success"?

19 MR. BERGER: Uh-huh. I'm just trying to find it
20 in here. Could you --

21 MS. MIDDLETON: Yeah. It's at the end.

22 MR. BERGER: Now, I mean, there may be other --
23 I'm not aware of.

24 MS. MIDDLETON: I just want to be sure that,
25 while we still have you, everything that this document,

1 Since you've had -- how long have you had the
2 process of a compensation committee?
3 MR. BERGER: I want to say 2003.
4 MR. FOSTER: And you're on the compensation
5 committee, correct?
6 MR. BERGER: That's correct.
7 MR. FOSTER: And who else is on the compensation
8 committee?
9 MR. BERGER: All the senior staff.
10 MR. FOSTER: Who?
11 MR. BERGER: All the Associate Directors, the
12 Chief Counsel, the head of Regional Operations, Chief
13 Litigation Counsel, Deputy Litigation Counsel.
14 MR. FOSTER: So how many people was that?
15 MR. BERGER: I was afraid you were going to ask
16 that.
17 MR. FOSTER: Approximately.
18 MR. BERGER: Eleven, twelve. Something like
19 that.
20 MS. MIDDLETON: Have you ever fired an attorney
21 other than Gary?
22 MR. BERGER: No. Fired a paralegal.
23 MR. BERGER: And how many people, total, have
24 you fired? The paralegal and Gary. Any others?

1 Do you see that?

2 MR. BERGER: I do.

3 MR. FOSTER: Okay.

4 So is this consistent with your recollection or
5 do you have any reason to believe this isn't accurate?

6 MR. BERGER: I don't know where this comes from
7 and I have no reason to believe it's inaccurate. I just
8 don't know.

9 MR. FOSTER: It came from the SEC when we asked.

10 MR. BERGER: Yeah. Yeah.

11 MR. FOSTER: So when you were -- when you were
12 discussing the supplemental evaluations with Mr. Kreitman
13 and Mr. Hanson, was it in your mind that you were trying
14 to get this done by August 1st so that it could be
15 transmitted to the Office of Human Resources along with
16 the other evaluations?

17 MR. BERGER: I don't remember. I remember that
18 we -- I don't remember.

19 MR. FOSTER: Do you remember there being
20 any sort of time pressure to get the supplemental
21 evaluations --

22 MR. BERGER: Yeah, it's possible that there was.
23 I just -- Mark would be -- would know better.

1 the recommendation. Do you recall if that was a two when
2 you received the spreadsheet from Mr. Staiger?

3 MR. BECKER: The recommendation -- just so the
4 record's clear, is the recommendation with respect to Mr.
5 Aguirre?

6 MR. KEMERER: Right. Yes.

7 MR. BERGER: I don't remember. I assume it was.

8 MR. KEMERER: Do you recall recommending a
9 downward departure, like a one, with respect to that
10 recommendation?

11 MR. BERGER: No. I think I had said before, and
12 if I didn't, let me say it, that when I did review what
13 the recommendations were, I think I said that the
14 Assistant Directors usually gave me a piece of paper with
15 what their recommendations were, and ultimately that
16 found its way to Chuck Staiger, who put them -- input
17 that into this document that he created.

18 I asked him, I said, are you comfortable with
19 this number? And for Gary, it was a two. And they said,
20 yeah. I said, in light of everything else? And they
21 said, yeah, we want to reward him for the hard work. And
22 I said, fine.

23 MR. KEMERER: And did Ms. Thomsen -- so by the
24 time she got it, it was still a two, right?

25 MR. BERGER: That's right.

EXHIBIT NUMBER 5

U.S. SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

----- x
: In the Matter of: :
: :
: TRADING IN CERTAIN SECURITIES,: :
: No. HO-9818, and the SEC's : :
: TERMINATION OF EMPLOYMENT OF : :
: GARY AGUIRRE : :
: :
: :
----- x

Wednesday,
September 6, 2006

The interview of MARK KREITMAN, Assistant
Director, Division of Enforcement, U.S. Securities and
Exchange Commission was convened pursuant to notice, at
2:36 p.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, Esq.
Investigative Counsel
U.S. Senate Committee on Finance

HAROLD H. KIM, Esq.
Chief Civil Counsel
U.S. Senate Committee on the Judiciary

HANNIBAL G. WILLIAMS II KEMERER, Esq.
Counsel
U.S. Senate Committee on the Judiciary

MR. NATHAN MORRIS
Professional Staff Member
U.S. Senate Committee on the Judiciary

MS. JANE COBB
Legislative Affairs

ANIL ABRAHAM, Esq.
Counsel to the SEC Chairman

MS. SEEMA SING
U.S. Senate Committee on the Judiciary

MR. MARK KRIETMAN
Assistant Director
Division of Enforcement
U.S. Securities and Exchange Commission

SAMUEL FORSTEIN, Esq.
Assistant General Counsel
Litigation & Administrative Practice
U.S. Securities and Exchange Commission

1 remember being consulted in Mr. Aguirre's case.

2 MR. KIM: Consulted by the hiring powers within
3 the Commission?

4 MR. KRIETMAN: Correct.

5 MR. FOSTER: How did he do in your class?

6 MR. KRIETMAN: He was the best student in the
7 class. I think he got an "A". I also supervised his
8 Master's thesis. At that time it was required that
9 students do a thesis in order to gain the LLM degree. He
10 asked me to supervise his. I characteristically would
11 supervise two or three, and I did.

12 MR. FOSTER: So the fact that you chose him
13 among the two or three to supervise an indication of his,
14 in your opinion, merit?

15 MR. KRIETMAN: No. Actually, they --

16 MR. FOSTER: Is it a competitive thing for you
17 to supervise the thesis?

18 MR. KRIETMAN: I'm sorry?

19 MR. FOSTER: Is it a competitive thing --

20 MR. KRIETMAN: No.

21 MR. FOSTER: -- to see who gets those?

22 MR. KRIETMAN: Everybody who asks get it.

23 MR. FOSTER: Okay. And how did he do on his
24 paper?

25 MR. KRIETMAN: It required some editing, but I

1 degree upon disputes with opposing counsel concerning
2 production of documents in response to subpoenas, and I
3 had significantly lesser involvement at that stage.

4 MR. FOSTER: Before we get into that a little
5 bit more, can you back up a little bit and explain, you'd
6 said earlier there were 14 referrals that came in and
7 that was an unusually large number of referrals. All 14
8 -- was Mr. Aguirre attempting to investigate all 14 at
9 the time that he was transferred to your group?

10 MR. KRIETMAN: I believe that was his initial
11 intention. I recall an e-mail that he sent to me
12 mentioning that number of potential insider trading
13 incidents, but since we didn't have the staff or
14 resources to undertake that scope of investigation, we
15 tried to triage the matter down to what seemed to us to
16 be the most potentially fruitful possible violations.

17 MR. FOSTER: So would it be fair to say you
18 instructed him to narrow the scope, to focus on some
19 smaller number than 14 of the referrals?

20 MR. KRIETMAN: Yes.

21 MR. FOSTER: Did you give him a specific
22 instruction to only do three, or only do two, or any
23 particular number?

24 MR. KRIETMAN: No. I think I instructed him to
25 triage the case and determine which violations were most

1 significant and most likely to bear fruit.

2 MR. FOSTER: Did you have in mind the total
3 number that the SEC had the resources to investigate?
4 Did you have a goal of, we only have resources to do two,
5 or three, or five?

6 MR. KRIETMAN: No. It would depend upon -- I'm
7 sorry.

8 MR. FOSTER: Go ahead.

9 MR. KRIETMAN: No. It would depend upon the
10 significance of the matters and the strength of the
11 evidence.

12 MR. KEMERER: Is one way of determining the
13 significance to ascertain how much profit was made, at
14 least allegedly, based on material, non-public
15 information?

16 MR. KRIETMAN: That would certainly be relevant

17 MR. KEMERER: And do you have a sense -- I know
18 you may or may not. But do you have a sense whether the
19 profits made allegedly by insider trading in Microsoft
20 was larger or relatively smaller than the profits made
21 allegedly through insider trading in GE-Heller?

22 MR. KRIETMAN: My recollection is that the GE-
23 Heller profits were significantly larger.

24 MR. KEMERER: But I think you mentioned one of
25 the other criteria you considered was the evidence

1 MR. KRIETMAN: I would say mid-'05.

2 MS. MIDDLETON: So we're talking May or June?

3 MR. KRIETMAN: Probably earlier. Probably
4 April, May. It was my view that we were encountering the
5 kind of ordinary resistance that we encounter in seeking
6 full, accurate, and complete compliance with subpoenas.
7 We encountered some resistance.

8 MS. MIDDLETON: So did Audrey call you, if you
9 recall?

10 MR. KRIETMAN: No. Initially I think I called
11 her.

12 MS. MIDDLETON: And what caused you to call
13 her?

14 MR. KRIETMAN: I don't know what the specific
15 issue was. But I didn't know Audrey. I'd never met her.
16 I knew her by reputation as a fine white-collar lawyer at
17 a good firm. It became clear to me that this process was
18 becoming contentious and I wanted to see whether or not I
19 could establish a helpful kind of relationship with Ms.
20 Strauss.

21 MS. MIDDLETON: And it became clear to you from
22 Gary's conversation with you, or Eichner's? Who told you
23 it was contentious?

24 MR. KRIETMAN: I picked it up from Alan
25 Turner's deliberations, and very largely from Mr.

1 MR. PODSIADLY: And those were Irving Pollach and
2 Larry Storch, correct?

3 MR. KREITMAN: Yes.

4 MR. PODSIADLY: And who are those two, if you can
5 elaborate for the record?

6 MR. KREITMAN: Irv Pollach was the first Director
7 of Enforcement of the Commission.

8 MR. PODSIADLY: Okay.

9 MR. KREITMAN: And became a Commissioner, and is an
10 icon in Commission history. Larry Storch is a law school
11 classmate of mine.

12 MR. PODSIADLY: Okay.

13 MR. KREITMAN: Close friend. He has worked with
14 Mr. Pollach for some years at a firm at which he was a
15 principal, and then at a Washington office, Philadelphia
16 firm, and now at Fuelbright and Jaworsky.

17 MR. PODSIADLY: And you said that you were a law
18 school classmate with Larry Storch. Do you have any
19 other relationships with them?

20 MR. KREITMAN: We are close friends.

21 MR. PODSIADLY: Close friends.

22 MR. KREITMAN: And have been.

23 MS. MIDDLETON: Are you neighbors as well?

24 MR. KREITMAN: I'm sorry?

25 MS. MIDDLETON: Are you neighbors as well?

1 MR. KREITMAN: No. Well, we both live in -- he
2 lives in Cleveland Park, I live in north Cleveland Park.
3 So we live within a mile of each other.

4 MS. MIDDLETON: Okay.

5 MR. PODSIADLY: When they were retained as counsel
6 to sort of mediate this dispute, or whatever their role
7 was, was there a period where you instructed Mr. Aguirre
8 not to contact them?

9 MR. KREITMAN: Yes, and I advised Ms. Strauss that
10 I was not prepared to deal with them as an intermediary,
11 and that if she was prepared to represent to us that they
12 represented Pequot for all purposes and could bind that
13 client by their representations, then I would deal with
14 them. But otherwise, I would not.

15 MR. PODSIADLY: Did you ever determine what their
16 role was? Did they actually represent Pequot?

17 MR. KREITMAN: Ultimately Ms. Strauss gave me that
18 assurance, I believe in writing.

19 MR. PODSIADLY: Okay.

20 MR. KREITMAN: And at that point, I agreed to deal
21 with them.

22 MR. FOSTER: So your instruction for Mr. Aguirre
23 not to speak to them, was that an instruction specific to
24 him, or was that an instruction more generally to all SEC
25 staff under your direction?

1 MR. KREITMAN: Well, everybody on the case.

2 MR. FOSTER: Right.

3 MR. KREITMAN: And I also told Ms. Strauss that I
4 would not deal with them unless they were representing
5 that client and could bind that client.

6 MR. FOSTER: Okay. So the reason had nothing to do
7 with your friendship with them or that you didn't,
8 weren't confident in Mr. Aguirre in his ability to deal
9 with them?

10 MR. KREITMAN: No. I had had a case against -- from
11 friendship, I had a case against Mr. Pollach and Mr.
12 Storch previously in which they ultimately caved,
13 utterly. They put out a press release saying that no
14 investor could rely on anything that they ever --
15 and I for many, many, well, since I have been at the
16 Commission, had an agreement with Mr. Storch that we do
17 not discuss business outside of the office. It is very
18 common, you know, in this practice to deal with alumni.
19 I have been at the Commission for 19 years, so I have a
20 great many close friends against whom I appear, so that's
21 not an issue.

22 With respect to my direction that nobody contact
23 them, my view was that if you are a lawyer on the other
24 side, you are either representing the client or I have
25 nothing to say to you. Since you can't speak for that

1 client, you have nothing to say to me.

2 In this particular case, actually someone else --
3 have enormous respect for Judge Sprokin. He was the one
4 who arranged for Mr. Pollach and Mr. Storch to have this
5 role. Nonetheless, I told the judge, as I told Ms.
6 Strauss, that I was not going to deal with some
7 intermediary investigation who has no formal role.

8 MS. MIDDLETON: Was there a question about that
9 they might be representing the firm of Freed Frank in
10 connection with some document production issues?

11 MR. KREITMAN: It was never clear to me what their
12 role was until I got the assurance from Ms. Strauss that
13 they were representing Pequot for all purposes.

14 MS. MIDDLETON: And then what happened?

15 MR. KREITMAN: Then I dealt with them as counsel to
16 Pequot because Pequot was entitled to be represented by
17 anybody that they chose.

18 MS. MIDDLETON: And was Gary allowed to contact
19 them after that?

20 MR. KREITMAN: Yes.

21 MS. MIDDLETON: And did he in fact deal with them?
22 Did Gary deal with Larry and --

23 MR. KREITMAN: I believe he did.

24 MS. MIDDLETON: So was this just a period of a few
25 weeks where you said to Gary, don't talk to them until we

1 Mr. Storch.

2 MS. MIDDLETON: Had you had any discussions with
3 Mr. Hanson about the fact that he had had a case with
4 Audrey Strauss where she produced nothing?

5 MR. KREITMAN: I don't recall that.

6 MS. MIDDLETON: Did Audrey Strauss have a
7 reputation or practice with the Commission that she was
8 not producing a lot of documents?

9 MR. KREITMAN: No, I don't think so. Ms. Strauss
10 has a very good reputation. I think she is in the
11 southern district and she's very well regarded. But she
12 is protecting her clients zealously as she is obligated
13 to do.

14 MS. MIDDLETON: And did you get all the documents
15 from Pequot that you had requested? That the SEC had
16 requested.

17 MR. KREITMAN: Well, it was ambiguous because a lot
18 of the documents were email documents which were only
19 available on backup tapes, and questions arose concerning
20 the retrievability of some of those documents.

21 MS. MIDDLETON: Did you ever get the backup tapes
22 restored and get to look at those documents?

23 MR. KREITMAN: I believe we got some of them
24 restored. My recollection is that there were some that
25 may not have been restored.

1 back, the phone call you had with Mr. Denalo, did it
2 follow a conversation that was had between Mr. Hanson and
3 Mr. Denalo? Or do you recall it independent of whatever
4 this recollection is recorded here?

5 MR. KREITMAN: Can I read this?

6 MR. PODSIADLY: Yes, please.

7 MR. KREITMAN: I think that Mr. Denalo called Mr.
8 Hanson who brought that quote to my attention, and I
9 called Mr. Denalo back.

10 MR. PODSIADLY: Would this be a representation of
11 that conversation?

12 MR. KREITMAN: I think this was Bob Hanson's note
13 of a conversation on the speaker phone in my office in
14 which Mr. Hanson and I were present. We were present in
15 my office, and Mr. Denalo was in his office.

16 MS. MIDDLETON: Does this seem to be an accurate,
17 as far as you remember, sort of an accurate rendition of
18 what happened?

19 MR. KREITMAN: It's hard for me to read it, to read
20 all of it.

21 MS. MIDDLETON: Well why don't you tell us what
22 happened in that phone call.

23 MR. KREITMAN: Okay. Mr. Denalo I believe
24 indicated that he had some reason to believe that we were
25 interested in Mr. Mack from an investigative perspective,

1 and that he was kind of betting Mr. Mack with respect to
2 a potential offer to return to Morgan Stanley as the
3 Chief Executive and wanted to know whether or not there
4 was any likelihood that we would be proceeding against
5 Mr. Mack.

6 I think I told Mr. Denalo that I would have to get
7 back to him about that before I could say anything. I
8 was concerned. I didn't know whether we would ultimately
9 proceed against Mr. Mack. We had, at the time, I
10 believe, documents related to Mr. Mack from I think
11 Morgan Stanley and other entities, and we didn't know
12 where the investigation would go with respect to Mr.
13 Mack.

14 I had some concern that if Mr. Mack became the head
15 of Morgan Stanley and then we did proceed against him,
16 that could be disruptive to the markets or potentially
17 injurious to investors. But I also knew that as this was
18 an open investigation, which is by statute nonpublic, and
19 I couldn't say anything to Mr. Denalo -- statutory
20 prohibition -- so I called Mr. Berger and asked his
21 advice.

22 MS. MIDDLETON: Were other people present for that
23 call? Was it on the box?

24 MR. KREITMAN: I think Mr. Hanson was still
25 present. It happened immediately. My recollection is I

1 tipper, I would be considerate. It never is in an
2 investigation a closed question.
3 Obviously you go with, just like a trial, you go
4 with the evidence as developed. But --
5 MR. KEMERER: I'm sorry. Go ahead.
6 MR. KREITMAN: But it was utterly unproductive to
7 bring in Mr. Mack and simply ask him if he tipped Mr.
8 Samberg about the GE Heller deal when he would simply --
9 MR. KEMERER: Isn't that the case --
10 MR. FORSTEIN: Let him finish. We are at a touch
11 area now, at least let him complete his answer.
12 MR. KEMERER: Okay. Sure.
13 MR. KREITMAN: And there would be no effective way
14 to challenge his denials.
15 MR. KEMERER: Are you done?
16 MR. KREITMAN: Yes.
17 MR. KEMERER: Okay. Isn't that true in virtually
18 every insider tipping case, but investigators nonetheless
19 still bring people in, nail them down, get whether they
20 deny or confirm, generally deny that they tipped someone?
21 MR. KREITMAN: No, it's not true in a great many
22 cases. In some cases, there is an advantage to nailing
23 somebody's testimony down. Generally it is the trader.
24 You immediately want to get that person's story, because
25 you want to find out what it is that they say motivate

1 trade so that you can challenge that, and also establish
2 a chronology.

3 When you try these things, you try them on the basis
4 of chronology. The tipper has access to the information,
5 the tipper has communication with the tippee, tipping
6 trades, the information -- it is different in this case
7 when we were investigating in 2005 conduct that occurred
8 in 2001. The chance that we benefitted nailing down some
9 of these stories when it is so remote from the events is
10 very limited. In any case, when you say nail down the
11 story of a potential tipper, the question is who is a
12 potential tipper?

13 In most cases, there is a rather small universe of
14 people who are potential tippers. The evidence points to
15 one. In this case, Mr. Aguirre's bases for believing
16 that Mr. Mack was the tipper was in my mind insufficient.
17 In some instances, the evidence you pointed to was wrong.

18 MS. MIDDLETON: Could you be specific about that?

19 MR. KREITMAN: Well, he said, for example, that Mr.
20 Mack had been allowed to invest in closed Pequot funds.
21 That turned out not to be true.

22 MS. MIDDLETON: He did invest in Pequot funds.

23 MR. KREITMAN: He did.

24 MS. MIDDLETON: And he did profit from the trades
25 that Mr. Samberg made in the transaction?

EXHIBIT NUMBER 6

U.S. SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

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:
In the Matter of: :
:
TRADING IN CERTAIN SECURITIES, :
No. HO-0818, and the SEC's :
TERMINATION OF EMPLOYMENT OF :
GARY AGUIRRE :
:
-----x

Thursday
November 9, 2006

The interview of ROBERT HANSON, Esquire,
was convened, pursuant to notice, at 10:10 a.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, ESQ.
Investigative Counsel
U.S. Senate Committee on Finance

HANNIBAL G. WILLIAMS II KEMERER, ESQ.
Counsel
U.S. Senate Committee on the Judiciary

STEPHANIE MIDDLETON
U.S. Senate Committee on the Judiciary

SAMUEL M. FORSTEIN, ESQ.
Assistant General Counsel
Litigation and Administrative Practice
U.S. Securities and Exchange Commission

JANE O. COBB
Director, Office of Legislative Affairs
U.S. Securities and Exchange Commission

1 questions. Was there any reason why it was 6 months instead
2 of 2 months or 4?

3 MR. FORSTEIN: Five.

4 MR. KEMERER: Five.

5 MR. FORSTEIN: Five questions.

6 MR. KEMERER: Is there any reason?

7 MR. HANSON: We thought we could get done what we
8 needed to get done in 6--I think we initially started at 6
9 months, and we ended up with a tolling agreement of 4
10 months. I mean, it's a negotiated thing, and I think they--
11 "they" being Pequot and its attorneys--promised that they
12 would do whatever they could to get us the information
13 quickly.

14 MR. KEMERER: What ever became of the wash trades
15 aspect of the investigation?

16 MR. HANSON: There was a theory that Pequot had
17 engaged in a series of wash trades to manipulate stocks post
18 IPOs, and I believe that I suggested that we ask Pequot the
19 reason that they did these wash trades. And they provided
20 us sort of a white paper in response to that request, which
21 showed pretty clearly that they seemed to be doing it for a
22 reason other than a manipulative purpose, and that was to
23 change beneficial ownership from those in the fund who could
24 invest in IPOs to those that could not. And we found that
25 there was an NASD provision that specifically had taken into

1 consideration that particular situation, and it allowed
2 firms to do that.

3 MR. FOSTER: Did you check to find out whether or
4 not there were actual investors in the fund who were
5 disallowed from participating in the IPOs?

6 MR. HANSON: We got from Pequot the certifications
7 that the auditors of Pequot had done with respect to those
8 particular transactions.

9 MR. FOSTER: I am sorry. I don't understand that
10 answer.

11 MR. HANSON: Sure. I'll try again. One of the
12 NASD rules allowed you to do that provided you had certain
13 documents or certifications in place, and I believe that we
14 got the certifications from the counsel and from the
15 auditors, who would have been looking at those transactions,
16 that said that those things had occurred.

17 MR. FOSTER: So does that mean the answer is yes
18 or no?

19 MR. HANSON: We got comfort that that's what was
20 happening, yes.

21 MR. FOSTER: When you say that's what was
22 happening, you mean that there were investors--

23 MR. HANSON: That the wash trades were for a
24 specific purpose as opposed to a manipulative purpose.

25 MR. FOSTER: Right. But what I'm asking you is:

1 Did the SEC determine whether or not the investors--that the
2 investors in these particular funds that were engaged in the
3 wash trades, whether or not those funds actually had
4 investors who were disallowed from participating in the IPOs
5 at issue?

6 MR. HANSON: I guess the answer to that is I know
7 for a fact that they had people that are disallowed that
8 invest in those partnerships. Samberg cannot participate in
9 an IPO, for example. Dartley cannot participate in IPOs.
10 Some of the people that are disqualified from participating
11 in IPOs are industry people, and Pequot had a number of
12 investors who were industry people. So the answer to that
13 is pretty clearly they had disqualified investors.

14 MR. KEMERER: Did the FBI ever have trouble
15 finding Mr. Zilkha, do you recall hearing?

16 MR. HANSON: I think they did.

17 MR. KEMERER: And they ultimately found him where,
18 do you know?

19 MR. HANSON: He lived in an apartment. I think
20 they were staking out his apartment for a while, and he
21 wasn't coming home when they were watching his apartment
22 door.

23 MR. KEMERER: Did he live in a New York apartment
24 or some other State?

25 MR. HANSON: It was New York or the general

EXHIBIT NUMBER 7

MEMORANDUM

TO: Pequot File
 FROM: Tom Conroy
 RE: Pequot Short Sales
 CC: Eric Ribelin
 DATE: August 3, 2005

As part of the investigation into the Matter of Trading in Certain Securities (File HO-09818) we've identified at least three scenarios in which Pequot Capital had executed apparent "wash sales" through executing brokers. Those scenarios are as follows:

- 1) Wash sales reported as an agency cross in the immediate aftermarket of an IPO;
- 2) Wash sales reported as an agency cross in the aftermarket of a secondary offering; and,
- 3) Wash sales in which buy and short sale orders are executed against each other.

Trade blotters received from Pequot pursuant to subpoena suggest that the vast majority of these trades involve no change in beneficial ownership. We believe that in the first two scenarios above, the trades are designed to benefit Pequot by artificially inflating the volume and/or price and thus inflating the value of shares received by Pequot in the offerings. In the third scenario, staff has noted several instances of trading following the wash sale trade in which Pequot does substantial selling, short selling and then buying and/or covering at substantially lower prices. In scenarios one and two, after the execution of the wash sale, we found instances where they would then short their long position.

Regarding the 3 scenarios, we have several questions that we are going to explore with the Prime Broker(s) to the trades. Those questions, among others, are as follows:

- 1) In scenario 3 is Pequot avoiding the need to borrow stock for a short sale by merely having a wash sale executed which puts them as the buyer of the short sale and essentially loaning and borrowing the stock with themselves;
- 2) In scenario 3 when Pequot begins the process of executing sales, are these sales reported as long sales or short sales (records suggest sales that are *de facto* short sales are reported as long sales);
- 3) In scenario 3 when *de facto* short sales are executed are those trades done pursuant to the "tick" or "bid" test (we have identified several trades that appear to be *de facto* short sales that are executed on downticks);
- 4) In the shorting of the stock related to scenarios 1 and 2 are they again avoiding the need to borrow for a short sale by shorting their own longs and what happens if they begin selling the longs; and,
- 5) In general, what are the micro aspects of stock borrows and loans as they relate to these scenarios.

We are concerned that insufficient brokerage surveillance systems may be in place that allow for the execution of manipulative orders that artificially elevate or reduce the price of securities for the benefit of Pequot and to the detriment of market integrity.

EXHIBIT NUMBER 8

11/7/2005, 7:04:31 AM

MEMORANDUM

Final
DRAFT

To : File
 From : Craig Miller
 Tom Conroy
 Eric Ribelin
 CC : Joe Cella
 Re : HO-09818 Artificial Trades
 Date : November 14, 2005

I. Introduction – The Artificial Trade In General

In our investigation into the Matter of Trading in Certain Securities (File HO-09818), we've identified a type of trade ("short to buy,") repeated hundreds of times over a four-year period, in which Pequot instructs its executing broker to effect an agency cross transaction in which one side of the trade is a short sale and the contra side is a buy. Both the short sale and the buy are for the same number of shares at the same price and are executed simultaneously against each other. The trade is reported to NASDAQ as an agency cross, but the Pequot Trade Report (or "trade blotter") reflects the same Pequot funds on both sides of the trade, thus causing no change in beneficial ownership.¹ The trade creates an artificial net flat position that Pequot can unwind in several ways.

In general, Pequot follows this trade over the next days or weeks (or months) with a series of sell and short sell orders. The sell orders that apparently reduce the synthetic long position are indicated on the Pequot trade blotter as long sales. After the selling and short selling is concluded, purchases at lower prices are executed in volume equal to the previous selling and short selling, eventually returning the position to net flat – an equal short and long position.

We theorize that Pequot carries out this particular pattern of trading when the opportunity of making a profit on the short side presents itself. In other words, the short to buy trade puts them in a position whereby they can trade opportunistically. Should the short side trading opportunity not present itself, they simply close out the net-flat position with a journal entry in the back office.²

¹ A majority of these trades from 2001 – 2004 are executed through C.L. King & Associates, an executing broker in Albany, New York. CL King is an investor in Pequot and during the four year period made approximately \$5 million in commissions from Pequot including approximately \$1 Million in commissions for short to buy trades that were reported as agency crosses. The majority of the other trades that represented \$4 Million in commissions involved other types of wash trades. CL King indicated to staff that they believed when Pequot entered orders that were to be agency cross trades there would be a change in beneficial ownership. Interestingly, they don't have on file a document required of institutional accounts that makes a representation that all cross orders given to CL King are for trades between different funds that represent changes in beneficial ownership.

² The staff has information that Pequot has closed out positions in the back office.

As Pequot sells and shorts the stock in question, whether they locate stock to borrow and deliver to themselves, or not, the selling that follows the initial "wash trade" would appear to be *de facto* short selling. A motivation for the overall strategy may be that they are able to mask *de facto* short sales as long sales. It may be the case, also, that they are able to effectively sell short by executing trades as long sales without making delivery and thus causing a "naked" short.

What follows, in II below, is one of several examples of a short to buy followed by trading. We've analyzed this situation using the Pequot trade blotter, the CL King blotter, audit trails and emails. The staff has yet to determine other important information including, among other things, the following:

1. Did Pequot locate, borrow and deliver stock to themselves when executing a short to buy?;
2. To the extent Pequot sold short without securing a borrow, did their trades cause fails, and, if so did those fails remain until they entered covering transactions?; and,
3. When executing sell orders after the short to buy trade, did Pequot abide by the applicable tick or bid test?

II. The Artificial Trade ("Short to Buy") in Atheros Communications

On February 11, 2004, prior to executing the short to buy, multiple Pequot accounts bought 75,000 shares of Atheros Communications, Inc. ("ATHR") a NASDAQ stock at the IPO price of \$14. The first trades in ATHR on February 12, 2004, the first day of secondary market trading in the stock, occurred at 12:55:00.³ Within a few minutes of the opening trades, Seaport Securities executed a wash trade (a sell and a purchase) between the same two Pequot accounts on both sides of the trade, according to Pequot's trade blotter and the audit trail.⁴ The trade was reported to NASDAQ at 12:57:27 as an agency cross of 75,000 shares at 18.75 by Seaport Securities.⁵

³ NASD audit trail shows 33 trades executed and reported at 12:55:00 at prices from 18.50 to 18.75.

⁴ Pequot's Trade Report (trade blotter) shows 14,600 shares of the 75,000 share wash trade allocated to Pequot Select Offshore Fund with the remaining 60,400 shares allocated to Pequot Select Fund L.P. In other words, Pequot Select Offshore Fund both bought and sold 14,600 shares at \$18.75 at the same time and the Pequot Select Fund L.P. both bought and sold 60,400 shares at the same time at \$18.75. Staff has discovered dozens of wash sale trades by Pequot in the immediate aftermarket of IPO and secondary offerings in which Pequot received offering shares.

⁵ Staff believes that a comparison of Pequot's trade blotter with the NASD audit trail for February 12, 2004 is a sufficient basis for concluding that the "wash trade" on Pequot's blotter represents the cross trade printed on the NASD audit trail, however, we intend to obtain the order tickets to verify our conclusion.

On Thursday, February 19, 2004, Pequot, for several funds, engaged in the short to buy that is at question here. According to the NASDAQ Audit Trail CL King executed this short to buy, or "wash trade" of 441,350 shares at \$17.90 as an agency cross at 16:00:00, the close of the market, and reported it to the tape at 16:28:12. (The accounts involved in the short to buy are different than the two accounts that did the initial "wash trade" in the immediate aftermarket of the IPO). One side of the trade was a short sale and the other side was a purchase leading to the creation of a artificial net-flat position. The transaction represented nearly a third of the 1,358,914 share reported volume in ATHR for February 19, 2004. Interestingly, the official close for the day (normally at or about 4pm) was \$17.84. The "wash trade" print of \$17.90, turned out to be the opening price the following morning.

The following day, February 20, 2004, Pequot began selling off the long side of this artificial position and continued for several days. By the close of March 3, 2004, Pequot had sold long 441,350 shares of ATHR and established a net short position of the same amount.⁶ Total shares sold "long" by Pequot between February 20, 2004 and March 3, 2004 was 441,350, which was same amount of shares on opposing sides of the wash trade executed on February 19, 2004 ("short to buy" scenario involved 441,350 short sale by Pequot at 17.90 executed at the same time as Pequot bought 441,350 shares).⁷ At this point the entire artificial short position in ATHR is no longer offset by the artificial long position, which had been sold off.

Nearly a month after the above "long" sell-off ends, Pequot begins short selling on April 2, 2004 that lasts for several days.⁸ At the close of April 13, 2004, Pequot's

⁶ From February 20, 2004 to March 3, 2004 Pequot sold 441,350 as detailed below:

2/20/04	94,050 sold at 17.967 (Bloomberg daily volume = 654,736),
2/23/04	59,100 sold at 17.545 (Bloomberg daily volume = 429,377),
2/25/04	24,174 sold at 17.535 (Bloomberg daily volume = 230,110),
2/27/04	43,715 sold at 17.700 (Bloomberg daily volume = 240,987),
3/1/04	50,610 sold at 17.789 (Bloomberg daily volume = 254,344),
3/2/04	56,998 sold at 17.926 (Bloomberg daily volume = 261,131),
3/3/04	44,913 sold at 17.911 (Bloomberg daily volume = 141,570).

⁷ A remaining long position in ATHR of 85,000 shares (75,000 @ 18.75 bought on February 12, 2004 and an additional 10,000 @ 18.04 bought on February 17, 2004) subsequent to the 441,500 share long position sell-off appears to have been sold at a \$313,175 loss on April 6, 2004 (50,000 shares @ 15.05 and 35,000 shares @ 14.885).

⁸

4/2/04	15,500 sold short at 16.13 (Bloomberg daily vol. = 200,114),
4/5/04	30,000 sold short at 15.88 (Bloomberg daily vol. = 347,874),
4/6/04	38,500 sold short at 15.06 and 30,000 sold short at 14.90 (Bloomberg daily vol. = 408,989),
4/7/04	113,500 sold short at 15.727 (Bloomberg daily vol. = 435,527),
4/8/04	30,000 sold short at 16.2083 (Bloomberg daily vol. = 189,649),
4/12/04	25,000 sold short at 16.1058 (Bloomberg daily vol. = 91,368),
4/13/04	30,000 sold short at 16.2526 (Bloomberg daily vol. = 89,485).

Also on 4/6/04, Pequot Select Offshore Fund sold 6,600 shares which it bought on 2/12/04 and 2/17/04 and Pequot Select Fund L.P. sold 68,400 shares which it also bought on 2/12/04 and 2/17/04 for a realized loss of \$313,175.

total short position⁹ had grown to 787,500 shares. Beginning on June 10 and continuing through July 26, 2004, Pequot purchased stock totaling 787,500 shares at lower prices from the selling and short selling campaign. These purchases occurred during a period when the price of ATHR declined from approximately 13.3611 to 6.98.¹⁰

At the close of July 26, 2004 Pequot's position ATHR has returned to an apparent net-flat artificial position. Pequot's position is 787,500 share open short position for a credit of \$13,447,480.19, which is offset against a 787,500 share open long position for a debit of \$6,430,736.25.

On October 11, 2004, Pequot again resumes selling and then short selling in ATHR.¹¹ By the close of October 21, 2004, Pequot appears to have built its short position to 1,080,700 shares.¹² On October 28, 2004, Pequot finally begins to cover a large piece of its short position in ATHR.¹³ This is the last trading for ATHR for which we have Pequot trading reports.

As of the close of November 1, 2004, it appears that Pequot had a realized a profit of \$4,278,347 based on shorts being covered and longs being sold using a FIFO method starting from the initial short to buy trade. In addition, at the end of the trading in question, Pequot still maintained an artificial short/long position. This position was marked to market and an additional profit of \$1,374,308 resulted.

⁹ Staff suspects that Pequot continued to engage in what appear to be "naked" short sales.

¹⁰

6/10/04	22,500	bought at 13.3611 (Bloomberg daily vol. = 185,714),
7/7/04	75,000	bought at 9.7743 (Bloomberg daily vol. = 562,786),
7/8/04	70,000	bought at 9.4977 (Bloomberg daily vol. = 395,648),
7/9/04	10,000	bought at 9.50 (Bloomberg daily vol. = 336,137),
7/15/04	100,000	bought at 9.90 (Bloomberg daily vol. = 405,401),
7/16/04	20,000	bought at 9.8 (Bloomberg daily vol. = 99,610),
7/22/04	350,000	bought at 7.06 (Bloomberg daily vol. = 2,274,662),
7/23/04	30,000	bought at 7.08 (Bloomberg daily vol. = 295,798),
7/26/04	110,000	bought at 6.98 (Bloomberg daily vol. = 482,973).

¹¹

10/11/04	26,000	sold short at 9.3824 (Bloomberg daily vol. = 732,559),
10/12/04	25,200	sold short at 9.4772 (Bloomberg daily vol. = 536,9
10/13/04	15,000	sold short at 9.48 (Bloomberg daily vol. = 584,096)
10/14/04	12,000	sold short at 9.4325 (Bloomberg daily vol. = 300,909),
10/19/04	100,000	sold short at 10.61 (Bloomberg daily vol. = 1,354,784),
10/20/04	15,000	sold short at 10.50 (Bloomberg daily vol. = 227,135),
10/21/04	100,000	sold short at 10.725 (Bloomberg daily vol. = 639,566).

¹² In addition, Pequot "sold long" 149,000 shares of ATHR @ 9.38 on 10/11/04, 142,800 shares @ 9.4772 on 10/12/04, 85,000 shares @ 9.48 on 10/13/04, and 73,000 shares @ 9.4325 on 10/14/04.

¹³

10/28/04	200,000	covered at 11.1213 (Bloomberg daily vol. = 889,128),
10/29/04	300,000	covered at 11.8384 (Bloomberg daily vol. = 1,198,039),
11/1/04	200,000	covered at 11.7756 (Bloomberg daily vol. = 845,705).

Emails obtained from Pequot pursuant to subpoena shed light on their trading strategy in the aftermarket of the IPO in February, 2004. On Friday, February 13, two days after the offering and less than one week prior to their initiating the synthetic short to buy ██████████ ██████████ an analyst at Pequot, and ██████████ ██████████ carry on an email exchange under the subject of "Athr pricing." The exchange in pertinent part follows:

██████████:what did you think of Atheros?

██████████: ...I think I'm going to make a bundle shorting the stock. It should be my best shorting opty of the year.

██████████: I tried shorting it today!!! My traders begged me to wait 2 days so we don't piss off Morgan Stanley too much, which gave a nice allocation to ██████████ fund on the ipo

██████████: That's it, I'm shorting ATHR on Wed (\$800 min MV, ridiculous!!).

One possible theory that explains Pequot's motive for maintaining the open short position offset by a long position, instead of closing out the opposing positions to realize profits in the stock at this juncture, is based on an August 26, 2004 email from ██████████ ██████████ to Scout; PCM-Tech which appears to describe a renewed intention to drive the price of the stock down further, after previously expressing an intention. The email states the following: "ACTION: Maybe short some BRCM? Also maybe go after ATHR again?"

Although we have not determined whether Pequot is borrowing stock as they short, there are several emails which refer to "boxing" the borrow once they locate available stock. In these instances, short to buy transactions have been traced to Pequot Trade Reports. This apparent borrowing coupled with the short to buy trade appears to indicate that Pequot is borrowing stock to short to themselves. This would appear to decrease the amount of stock available for others to borrow for shorting purposes. It seems Pequot is taking stock available to borrow out of circulation until they decide to implement their trading strategy.

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EXHIBIT NUMBER 9

Conroy, Thomas

From: Ribelin, Eric
Sent: Monday, November 14, 2005 9:35 AM
To: Conroy, Thomas; Miller, Craig
Subject: FW:

fyi

From: Bergmann, Larry E.
Sent: Thursday, November 10, 2005 6:35 PM
To: Cella, Joseph J.; Brigagliano, James A.
Cc: Ribelin, Eric
Subject: RE:

Joe,
Sorry for the delay. This memo describes some wild and troubling trading.
The wash sales may be manipulative or fraudulent.
The cross trades appear to be shams to set up purported positions to do other trading. The net flat position appears to be just that: there is no position. So all of the sales are short sales. Even if Pequot could be deemed to be long the shares, I assume that they had to borrow to deliver on the sales to the market, in which case the sales are short by definition. The idea that they may also be borrowing to dry up the float is also intriguing. We'd also like to explore the impact that the trading had on these IPOs, although Pequot may be shorting with the view that the stock had become overpriced (or the IPO was overpriced).
It would also be interesting to see if Pequot failed on the sales, whether done long or short. Either case involves potential SEC or Nasd rule violations.
Thanks, Larry

From: Cella, Joseph J.
Sent: Friday, November 04, 2005 4:05 PM
To: Bergmann, Larry E.; Brigagliano, James A.
Cc: Ribelin, Eric
Subject: FW:

Larry/Jamey: attached is a memo that has been drafted for discussion purposes as part of our ongoing investigation of trading practices at the Pequot Funds. We would like your view on the legality of putting up the purported agency cross transactions to establish the offsetting long and short positions. As you will see from the memo, we are not certain of the ultimate motive(s) but think that clearly the initial trade is problematic.

Thanks,

Joe

From: Ribelin, Eric
Sent: Friday, November 04, 2005 3:35 PM
To: Cella, Joseph J.
Subject:

SEC 0004924

11/15/2005

EXHIBIT NUMBER 10

Privileged and Confidential

**Action Memorandum Seeking
Formal Order In Insider Trading Investigation**

December 16, 2004

To: The Commission

From: Division of Enforcement

Re: Trading in Certain Securities, HO-9818

Recommendation: That the Commission issue a formal order of private investigation to determine whether there have been violations of Sections 10(b), and 14(e) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5, and 14e-3 promulgated thereunder, and Section 204A of the Investment Advisers Act of 1940 ("Advisers Act").

Action Requested By: Summary Calendar

Prior Commission Action: None

Novel, Important Or Complex Issues: None

Other Offices Or Divisions Consulted:

- Office of the General Counsel
Richard A. Levine [REDACTED]
(copy provided)
- Office of Compliance, Inspections and Examinations
Lori A. Richards [REDACTED]
(copy provided)
- Office of Economic Analysis
Peter G. Simonyi [REDACTED]
(copy provided)
- Office of Investment Management
Barbara C. Chretien-Dar [REDACTED]
(copy provided)

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**Other Interested
Government Agencies:**

The U.S. Attorney for the Southern District of New York

Source Of Case:

Referral from the NASD (August 5, 2003) and the Office of
Market Surveillance

Persons to Contact

Paul R. Berger
Richard W. Grime
Charles E. Cain
Gary J. Aguirre

[REDACTED]
[REDACTED]
[REDACTED]

L. Hilton Foster
Eric J. Ribelin
Stephen P. Glascoe

[REDACTED]
[REDACTED]
[REDACTED]

Privileged and Confidential***Summary of Case:***

This matter involves: (1) possible insider trading by Pequot Capital Management ("Pequot Management"), a registered investment adviser, fourteen of its affiliated hedge funds and two privately owned accounts which it manages (individually and collectively "Pequot Funds"), and (2) possible violations by Pequot Management, as an investment adviser, of Section 204A of the Advisers Act.

Pequot Management advises and manages twenty-three hedge funds, including Pequot Funds, and three privately owned accounts. Currently, Pequot Management and its affiliated hedge funds comprise one of the largest hedge fund families in the nation, with approximately \$4.7 billion under management.¹ All hedge funds affiliated with Pequot Management claim exemption from registration under Section 4(2) of the Securities Act of 1933 ("Securities Act") or under Rule 506 of Regulation D.²

Over the past 15 months, the NASD and NYSE have made several referrals to the Division of Enforcement in which one or more hedge funds affiliated with Pequot Management has been identified for possible insider trading. Two of these referrals are discussed below. Further, a director of market trading analysis with the NYSE has informed the staff that he closely monitors the hedge funds affiliated with Pequot Management because they have been "just too lucky."

The number of suspicious transactions also raises questions of the adequacy of Pequot Management's compliance with the requirements of Section 204A of the Advisers Act to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information.

Brief description of issuer and trading range:**Pequot Funds' Trading in Elite Information Group ("Elite")**

On April 3, 2003, The Thomson Corporation ("Thomson"), listed on the NYSE under the symbol TOC, made a friendly tender offer for the common stock of Elite at a price of \$14.00 per share and, subsequently, acquired 98% of Elite's outstanding shares.

Before its acquisition, Elite provided business management software for law firms and professional services companies. Its common stock was registered under Section 12(g) of the Exchange Act and traded on the NASDAQ National Market System, under the symbol ELTE, with 7,890,600 shares outstanding.

¹ This figure was taken from Pequot Management's most recently filed Form 13F.

² Rule 506 of Regulation D allows an issuer, such as a hedge fund, to sell securities of unlimited value to an unlimited number of investors without complying with the registration requirements of the Securities Act, provided the offers and sales are only made to "accredited investors," i.e., institutional investors and individuals 1) whose annual income exceeds \$200,000, 2) whose joint income with his or her spouse exceeds \$300,000, or 3) whose individual or joint net worth with his or her spouse exceeds \$1,000,000.

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Between October 1, 2002, and April 2, 2003, Elite's daily trading volume was between a low of 100 shares and a high of 228,000 shares, with an average daily volume of 17,036 shares. During that period, its share price ranged from \$5.80 to \$10.16 per share, with a 52 week low of \$4.75.

Brief chronology: material events, relevant communications, trading and announcement:

August 20, 2002	Thomson's CEO, during Florida conference, tells Elite's CEO of interest in acquiring Elite for between \$9 and \$11 per share in cash.
October 10, 2002	Elite contacts Broadview International ("Broadview"), a specialist in IT mergers and acquisitions, about "informal" expressions of interest by Thomson and one other party.
October 10, 2002 through April 2003	Several Broadview employees, including two working on the Elite acquisition, have numerous social and business contacts with Pequot executives.
November 25, 2002	During a phone call, representatives of Morgan Stanley (M&A advisor to Thomson) tell Elite's CEO of Thomson's interest in acquiring Elite at \$9.00 per share.
November 27-29, 2002	Pequot Funds buy 16,500 shares of Elite. Pequot Management's Form 13F filings show no prior holdings in Elite and available data show no trading in Elite by Pequot Funds during the prior eleven months.
December 3-4, 2002	Elite formally retains Broadview as its M&A adviser in negotiations with Thomson. Broadview's and Morgan Stanley's representatives discuss acquisition terms during conference call.
December 4-6, 2002	Pequot Funds purchase an additional 115,000 Elite shares; Elite trading volume reaches 228,000 shares on December 6.
March 10 - April 1, 2003	Elite and Thomson continue negotiating terms of the tender offer. Pequot Funds accumulate 44,100 more shares of Elite.
April 3, 2003	Public announcement of Elite-Thomson agreement that Thomson will make a tender offer of \$14 per share for all Elite common stock.

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<i>Market reaction to announcement:</i>	
Volume surged from 15,500 shares traded on Tuesday, April 2, 2003, to 3,170,984 shares traded on Wednesday, April 3, 2003. Elite's closing share price increases from \$9.97 on Tuesday, April 2, 2003, to a closing price of \$13.86 on Wednesday, April 3, 2003, a 39% increase.	
<i>Name, occupation, and profits of potential violators.</i>	<i>Basis for believing trading is suspicious.</i>
Pequot Funds Profits: \$1,017,686.	<ul style="list-style-type: none"> • Size, timing and profitability of trades. • No known trading activity or holding of Elite stock by any hedge fund affiliated with Pequot Management prior to the purchases in November 2002. • Existing business relationships between Pequot executives and Broadview employees, such as: [REDACTED], a general partner of Pequot Management, "who calls and meets with [REDACTED] ... every few weeks, if not more," according to a Broadview staff person. • Three former Broadview employees become Pequot executives before Elite purchases: [REDACTED] leaves Broadview in 2000 and becomes a general partner in Pequot Ventures; [REDACTED] leaves Broadview in 1997 and becomes a general partner of Pequot Ventures; and [REDACTED] leaves Broadview in 1996 and becomes a general partner in Pequot Management. • Social and business encounters between Broadview employees, some with knowledge of nonpublic information, and Pequot executives during the period of suspected insider trading.

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- Pequot Funds were an aggressive buyer of Elite stock during the period of suspected insider trading. Of the 17 days Pequot Funds bought Elite stock, its purchases were more than 20% of the buy volume for twelve days, more than 50% for three of these twelve days, more than 80% for three days, and 100% on one day.

Insider trading theory:

The most likely flow of information is from someone within Broadview, which advised Elite in connection with this transaction. Members of Pequot Management had personal and business ties with employees of Broadview, and several were former employees of Broadview.

Pequot Funds' Trading in AstraZeneca PLC ("Astra") and Par Pharmaceutical Companies, Inc. ("Par")***Brief description of case:***

Astra and Par are discussed together in this section because a single event affected the value of Pequot Funds' holding in the stocks of both companies. That event was an October 11, 2002 decision by a federal district court upholding the validity of Astra's patents relating to Prilosec and also holding that a generic drug distributed by Par in the U.S. infringed upon those Astra patents.

Shortly before the court announced its decision, Pequot Funds reversed its trading pattern in both stocks. Between August 2, 2002, and August 22, 2002, Pequot accumulated a short position of 279,000 shares in Astra. From August 23, 2002, to September 25, 2002, Pequot closed its short position and purchased an additional 213,000 Astra shares. It also ceased buying Par shares and liquidated 452,000 shares, or 87% of its holdings, which it had recently acquired. Consequently, Pequot Funds had a combined potential profit and loss avoided of \$2.6 million on its Astra trades and losses avoided of \$3.1 million on its Par trades.

Brief description of issuer and trading range:

Astra is a UK company engaged in the development, manufacture and marketing of pharmaceutical products. Astra's American Depositary Shares are traded on the NYSE under the symbol AZN, with 127,459,929 outstanding shares.

Astra is subject to the reporting and other requirements of the Commission applicable to foreign issuers.

Between August 1, 2002, and October 10, 2002, the daily trading volume of Astra shares ranged from a low of 430,500 to a high of 3,847,600 with an average daily volume of 1,474,234 shares. During that period, the share price ranged from \$29.15 to \$38.00 per share, with a 52 week low of

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\$29.15 on August 30, 2002.

Par³ manufactures and distributes a broad line of generic drugs. Its common stock is registered pursuant to Section 12(b) of the Exchange Act and is listed on the NYSE under the symbol PRX, with 34,992,488 shares outstanding.

Between August 1, 2002, and October 10, 2002, daily trading volume of Par shares ranged from a low of 133,800 to a high of 1,007,400 with an average daily volume of 303,882 shares. During that period, the share price ranged from \$22.47 to \$28.60 per share, with a 52 week low of \$16.10 on February 10, 2002.

Brief chronology: material events, relevant communications, trading and announcement:

October 5, 2001	Astra's patent on Prilosec's main chemical ingredient, omeprazole, expires.
November 16, 2001	Federal Drug Administration gives another manufacturer (not Astra) a final approval for the first generic version of Prilosec.
December 6, 2001	Astra and generic drug manufacturers, including Par, begin a non-jury trial in the United States District Court for the Southern District of New York over the validity of Astra's five collateral patents relating to Prilosec and whether the generic drugs, including the one distributed by Par, infringe those patents.
May through October 10, 2002	Most Wall Street analysts predict the court will decide in favor of the generic manufacturers as the courts have done in the vast majority of similar disputes in the years just prior to the Prilosec-generic trial.
June 13, 2002	The trial ends with the court taking the matter under submission. The trial record includes six thousand pages of trial testimony and thousands of exhibits.
August 2 through August 22, 2002	Consistent with the expected outcome of the case, Pequot Funds accumulate an initial short position of 279,000 Astra shares.
August 23, 2002 through September 30, 2002	Pequot Funds abruptly reverses its trading pattern in Astra. Despite the lack of any news relating to the outcome of the Prilosec-generic trial, it closes its short position and accumulates a long position of 213,000 shares. These trades are completed 12 trading days before the court's decision is released.

³ Par Pharmaceutical was previously known as Pharmaceutical Resources until its name change in May 2004.

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September 5 through 11, 2002	Pequot Funds, as an entity, is the largest institutional buyer of Par, according to the NYSE, purchasing 291,000 shares in the week before the announcement of Par's earnings.
September 12, 2002	Par raises its earnings range for its next quarter, causing its stock to increase \$3.04 or 12%. Pequot Funds make a potential profit of \$736,500.
September 27, 2002 through October 4, 2002	Pequot Funds sells 87% of its Par shares, reducing its holdings from 518,000 shares to 66,000 shares. These trades were completed one week before the court's decision is released.
October 11, 2002	In a decision announced after the market closes, the Court upholds Astra's patents and also finds the generic drug distributed by Par infringes upon those patents. The Associated Press reports, "The decision was viewed as a tremendous boon for AstraZeneca. Most Wall Street analysts had predicted the company's earnings would drop substantially when it lost the patent on its biggest selling drug."
Market reaction to announcement:	
Astra's trading volume surged from 820,000 shares traded on Friday, October 11, 2002, to 3,176,000 shares traded on Monday, October 14, 2002. Astra's closing share price increased from \$32.55 on Friday, October 11, 2002, to a closing price of \$36.60 on Monday, October 14, a 12% increase.	
Par's volume surged from 235,000 shares traded on Friday, October 11, 2002, to 2,913,000 shares traded on Monday, October 14, 2002. Par's closing share price decreased from \$25.61 on Friday, October 11, 2002, to a closing price of \$20.05 on Monday, October 14, 2002, a 21% decrease.	
Name, occupation, and profits of potential violators.	Basis for believing trading is suspicious.
Pequot Funds Profits and losses avoided: \$5.7 million	<ul style="list-style-type: none"> • Size, timing and profitability of Astra and Par trades.

Privileged and Confidential

- Pequot Funds, as an entity, is the single largest institutional buyer of Par stock during the five days just before Par announces it is raising its earnings guidance.
- After the patent trial has been completed, Pequot Funds initially take positions in both Astra and Par which would increase in value if Astra loses, which is the expectation of most analysts.
- In the absence of any news, and shortly before the court's unexpected decision, Pequot Funds reverses its trading patterns in both stocks, buying Astra and selling Par, the correct positions to take if Astra were to win the trial.
- According to the NYSE referral, Par's CEO was informed by Prem Lachman, a manager at another hedge fund, that a court clerk had accepted a bribe from an unidentified third party in exchange for information regarding the court's decision before its public announcement.

Insider trading theory:

An employee of the court would be the most likely person to have provided Pequot Funds with nonpublic material information of the court's decision before its public disclosure. The U.S. Attorney's Office for the Southern District of New York has expressed an interest in this investigation and the staff intends to work with that office.

Need for Formal Order

A formal order is needed for subpoena authority in order to obtain phone records, bank records, compel testimony and the production of documents.

NON-PUBLIC

**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

January 6, 2005

In the Matter of Trading in Certain Securities	:	ORDER DIRECTING PRIVATE INVESTIGATION AND DESIGNATING OFFICERS TO TAKE TESTIMONY
File No. HO-9818	:	

I.

The Commission's official public files disclose that:

A. Before its acquisition by The Thomson Corporation ("Thomson") in April 2003, Elite Information Group ("Elite") was a Delaware corporation headquartered in Los Angeles, California. Elite provided business management software for law firms and professional services companies. Its common stock was registered under Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") and traded on the NASDAQ National Market System.

B. AstraZeneca PLC ("Astra") is a UK company headquartered in London, England. Astra develops, manufactures and markets pharmaceutical products. Astra is subject to the reporting and other requirements of the Commission applicable to foreign issuers. Its American Depository Shares are listed on the New York Stock Exchange.

C. Par Pharmaceutical Companies, Inc. ("Par") is a New Jersey Corporation headquartered in Spring Valley, New York. Par manufactures and distributes a broad line of generic drugs. Its common stock is registered pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange.

II.

Members of the staff have reported information to the Commission which tends to show that:

A. Certain persons, directly or indirectly, in connection with the purchase or sale of the securities of Elite, Astra, Par and other issuers, may have employed devices, schemes or artifices to defraud; may have made untrue statements of material facts, or may have omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or may have engaged in acts, practices or courses

of business which operated or would operate as a fraud or deceit upon any person, in that, among other things:

1. Such persons may have effected transactions in the securities of Elite while in possession of material nonpublic information concerning the acquisition of Elite by Thomson;
2. Such persons may have effected transactions in the securities of Astra and Par while in possession of material nonpublic information concerning a court decision affecting said parties' rights to manufacture, sell or distribute certain drugs;
3. Such persons may have effected transactions in the securities of Par while in possession of material nonpublic information concerning a future earnings announcement;
4. Such persons may have communicated such material nonpublic information to other persons who thereafter effected transactions in the securities of Elite, Astra, Par, and other issuers.

B. At a time when Elite and Thomson may have taken substantial steps to commence a tender offer for outstanding Elite shares, certain persons, directly or indirectly, may have made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or may have engaged in fraudulent, deceptive, or manipulative acts or practices, in connection with a cash tender offer for Elite securities or a request or invitation for tender, or a solicitation of security holders in opposition to or in favor of any such offer, request, or invitation, in that, such persons may have effected transactions in Elite securities while in possession of material, nonpublic information relating to such tender offer, which such persons knew or had reason to know had been acquired directly or indirectly from:

1. the offering person;
2. the issuer of the securities sought or to be sought by such tender offer; or
3. any officer, director, partner, or employee or any person acting on behalf of the offering person or issuer.

C. Certain persons, subject to the Investment Advisers Act of 1940 ("Advisers Act"), may have failed to establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of such investment adviser's business, to prevent the misuse in violation of the Advisers Act, or the rules or regulations thereunder, of material, nonpublic information by such investment adviser or any person associated with such investment adviser.

D. While engaged in the acts and practices referred to in Paragraphs II.A through II.C above, such persons may have made use of the means or instrumentalities of interstate commerce or of the mails, or of the facilities of a national securities exchange.

III.

The Commission, having considered the information provided by the staff, and deeming such acts and practices, if true, to be in possible violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, Section 14(e) of the Exchange Act and Rule 14e-3 promulgated thereunder, and Section 204A of the Advisers Act, finds it necessary and appropriate and hereby:

ORDERS, pursuant to Section 21(a) of the Exchange Act and Section 209(a) of the Advisers Act, that a private investigation be conducted to determine whether the aforesaid persons or any other persons have engaged in, are engaging in, or are about to engage in any of the aforesaid acts or practices, or acts or practices of similar purport or object; and;

FURTHER ORDERS, pursuant to Section 21(b) of the Exchange Act and Section 209(b) of the Advisers Act, that for the purposes of such investigation, Paul R. Berger, Richard W. Grime, Charles E. Cain, Gary J. Aguirre, Eric M. Hansen, Adriene Mixon, Bryan A. Sillaman, Nichola L. Timmons, L. Hilton Foster, Eric J. Ribelin, Stephen Glascoe, Reid A. Muoio and Timothy P. Peterson, and each of them, be, and hereby are designated officers of the Commission and are empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, require the production of books, papers, correspondence, memoranda, contracts, agreements or any other records deemed relevant or material to the inquiry, and to perform all other duties in connection therewith as prescribed by law.

By the Commission.

Jonathan G. Katz
Secretary

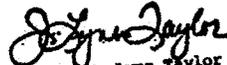

By: J. Lynn Taylor
Assistant Secretary

EXHIBIT NUMBER 11

From: Cain, Charles
Sent: Monday, November 01, 2004 12:09 PM
To: Aguirre, Gary J.; Grime, Richard
Subject: RE: New case for action memo
Follow Up Flag: Follow up
Flag Status: Red

While it is a bit older, the timing and switching positions on both sides of AztraZeneca/Pharm. Resources certainly sounds more compelling - and there are significantly more potentially illicit profits at issue. Which funds engaged in the trading?

On the PRX pre-earnings release buildup, did the company announce better than expected earnings for that period, or was it solely raising its guidance going forward (which is how I interpreted the chart)?

Airborne also looks good as its not their usual industry group and no prior position. The groundwork is already laid from the Airborne investigation, so we are one step ahead re: Chronologies etc. While it likely won't be an issue given the timing of their trading, there was a leak about the deal in the German press - I believe it was the Friday before the announcement (3/21), but its easy enough to verify.

C.

From: Aguirre, Gary J.
Sent: Monday, November 01, 2004 10:35 AM
To: Grime, Richard; Cain, Charles
Subject: New case for action memo

Richard and Charles:

As Richard requested, I have reviewed the SRO referrals as well as the Form 13 filings and PQ trade blotters (8/1/02--7/31/03) for a stronger case possible violation than PQs trading in Emcor for the action memo. Upon your decision, I will redraft the action memo and resubmit it to Charles. I understood that I should not automatically disqualify a referral because of its age, though Richard previously indicated I should focus on cases within the past two to three years.

I have ranked all referrals by an SRO after 1/1/2002 on the attached spreadsheet. The first three rows, shaded in green, are a single matter (my first choice)--AstraZeneca (AZN) and Pharmaceutical Resources (PRX) trades. The two rows shaded in blue are viable alternatives. The two shaded in yellow need more investigation and the four in coral even more. My comments are intended to supplement the data summarized on the attached spreadsheet.

The AZN-PRX story has two merging plots and a subplot.

Plot 1: AZN. AZN switched from a short to a long just in time to be a big winner when the court's decision was announced. PQ did not hold or trade AZN until it accumulated a short position of 279,000 shares between 8/2/02 through 8/22/02. On 8/23, it reversed course and began to buy. It closed its short and created a net long position of 212,000 shares by 9/25/02, 16 days before the court announced its decision. Curiously, PQ did not list AZN on its Form 13 for the period ending 9/30/02. The PQ trade blotters and NYSE referral independently confirm the AZN long. My research indicates that no listing exception applies and thus the omission violates Section 13(f) of the Exchange Act and Rule 13f-1. Why

would PQ not list AZN? Could this be a mistake? Maybe, but this seems unlikely. What about to conceal one side of AZN-PRX trades?

Plot 2: PRX. Like it did with AZN, PQ reversed its position in PRX just in time for the announcement of the court's decision. But first, PRX also has a subplot, one that sharpens its main plot. On 9/12/02, one month before the court announced its decision, PRX announced its earnings. From 8/12/02 through 9/11/02, Pequot bought 695,000 shares of PRX, for a total position of 776,600 shares on 9/12/02, the date of the earnings announcement. Sixteen days later, PQ began to sell PRX and, by 10/4/02, a week before the court decision was announced, it had a short position of 34,000 shares.

There is some evidence of the identity of a possible tipper that suggests one possible direction for the investigation. A hedge fund manager (formerly Goldman's "pharm" analyst) reportedly told PRX's CEO that a court clerk had been the tipper, according to a statement given to the NYSE by PRX's counsel, Kirkpatrick & Lockhart. The FBI chased down one theory of the possible tippees (not PQ), but came up dry.

The next two matters on the spreadsheet, Rambus (involving another court decision) and Airborne, also have stories. I can go into this if you feel uncomfortable with the first choice.

How do you want to proceed?

Gary

From: Aguirre, Gary J.
Sent: Tuesday, November 02, 2004 5:03 PM
To: Foster, Hilton
Subject: RE: Status and request
Attachments: PQ Case Ranking.xls

I'm attaching my latest spreadsheet boiled down to the top candidates. I'm on my way over.

More comments below on #1.

I have ranked all referrals by an SRO after 1/1/2002 on the attached spreadsheet. The first three rows, shaded in green, are a single matter (my first choice)--AstraZeneca (AZN) and Pharmaceutical Resources (PRX) trades. The two rows shaded in blue are viable alternatives. The two shaded in yellow need more investigation and the four in coral even more. My comments are intended to supplement the data summarized on the attached spreadsheet.

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Plot 2: PRX. Like it did with AZN, PQ reversed its position in PRX just in time for the announcement of the court's decision. But first, PRX also has a subplot, one that sharpens its main plot. On 9/12/02, one month before the court announced its decision, PRX announced its earnings. From 8/12/02 through 9/11/02, Pequot bought 605,000 shares of PRX, for a total position of 776,600 shares on 9/12/02, the date of the earnings announcement. Sixteen days later, PQ began to sell PRX and, by 10/4/02, a week before the court decision was announced, it had a short position of 34,000 shares.

There is some evidence of the identity of a possible tipper that suggests one possible direction for the investigation. A hedge fund manager (formerly Goldman's "pharm" analyst) reportedly told PRX's CEO that a court clerk had been the tipper, according to a statement given to the NYSE by PRX's counsel, Kirkpatrick & Lockhart. The FBI chased down one theory of the possible tippee (not PQ), but came up dry.

The next two matters on the spreadsheet, Rambus (involving another court decision) and Airborne, also have stories. I can go into this if you feel uncomfortable with the first choice.

How do you want to proceed?

Gary

From: Foster, Hilton
Sent: Tuesday, November 02, 2004 3:59 PM
To: Aguirre, Gary J.
Subject: RE: Status and request

I'm free now

From: Aguirre, Gary J.
Sent: Monday, November 01, 2004 4:56 PM
To: Foster, Hilton
Subject: RE: Status and request

Great. You call the time.

From: Foster, Hilton
Sent: Monday, November 01, 2004 4:46 PM
To: Aguirre, Gary J.
Subject: RE: Status and request

I was out Friday and most of today. How about tomorrow?

From: Aguirre, Gary J.
Sent: Friday, October 29, 2004 11:39 AM
To: Foster, Hilton
Subject: RE: Status and request

Got a minute? I got a situation.

From: Foster, Hilton
Sent: Tuesday, October 26, 2004 5:21 PM
To: Aguirre, Gary J.
Subject: RE: Status and request

ATTACHED IS SAMPLE CHRON

From: Aguirre, Gary J.
Sent: Tuesday, October 26, 2004 5:16 PM
To: Foster, Hilton
Subject: Status and request

The action memo is done and had begun to get its various approvals so it can be submitted to the Commission.

Would you happen to have one or more of the letters requesting the chronology and name recognition?

As soon as I get draft letters and subpoenas pulled together, I would like to have planning session when you have the time.

EXHIBIT NUMBER 12

U.S. SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

----- -x
: In the Matter of: :
: :
: TRADING IN CERTAIN SECURITIES, :
: No. HO-0818, and the SEC's :
: TERMINATION OF EMPLOYMENT OF :
: GARY AGUIRRE :
: :
----- -x

Tuesday
November 14, 2006

The interview of JIM EICHNER, Esquire,
was convened, pursuant to notice, at 10:09 a.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, ESQ.
Investigative Counsel
U.S. Senate Committee on Finance

HANNIBAL G. WILLIAMS II KEMERER, ESQ.
Counsel
U.S. Senate Committee on the Judiciary

SAMUEL M. FORSTEIN, ESQ.
Assistant General Counsel
Litigation and Administrative Practice
U.S. Securities and Exchange Commission

JANE O. COBB
Director, Office of Legislative Affairs
U.S. Securities and Exchange Commission

1 Mack? Would that be exactly the same universe or were there
2 GE/Heller-related subpoenas that were not related to John
3 Mack?

4 MR. EICHNER: The Credit Suisse one--the September
5 1, 2005, one--was definitely related to John Mack. The
6 October 6, 2005, subpoena was related to GE/Heller, but it
7 wasn't related to John Mack. It was a subpoena about new
8 hires at Pequot.

9 MR. FOSTER: And the purpose of that subpoena was
10 what?

11 MR. EICHNER: The purpose of that subpoena was we
12 had started to get into the Microsoft transaction, and the
13 person who we believed was the tipper in that was David
14 Zilkha, and he had gone from Microsoft to Pequot, and it
15 seemed like Pequot--we had a theory that Samberg was wooing
16 Zilkha to get information from him about Microsoft. And so
17 it seemed that maybe there had been a similar dynamic in
18 play in regard to GE/Heller or other companies, that maybe
19 this was not a one-time thing, and that Samberg was trying
20 to hire people who had information about companies they came
21 from or contacts at that company and then used those to get
22 inside information. And so we subpoenaed Pequot for all of
23 its new hires for some period--at least that period. I'm
24 not remembering. But it was focused on--it was like a band
25 around the GE/Heller stuff, and we then used that subpoena

1 to try and--and we looked hard at the people whose names
2 were identified to see if we could find a potential tipper
3 for GE/Heller. So that was that subpoena.

4 MR. FOSTER: Did you ever take any of the
5 testimony of any of those people, that is, suspected
6 tippers?

7 MR. EICHNER: We didn't take the testimony because
8 we couldn't find enough of a connection, but we actually--I
9 spent a fair amount of time working up those leads and
10 trying to find connections between those people and the
11 entities--the entities that were involved in the deal and
12 Pequot. And there were actually a surprising number of
13 people who came from the entities involved in the deal. The
14 reason--the problem was we couldn't ever find--they weren't
15 people--none of them were on the lists of the chronologies
16 of people who knew the information, so we couldn't place any
17 of the information. And although we spent a fair amount of
18 time--I spent a fair amount of time going through the e-
19 mails that had been produced looking for some indication
20 that those people had provided information or that they had
21 some relationship in the right period, we couldn't find
22 anyone who--we couldn't place them with the information, and
23 we couldn't find anything that suggested that they had
24 provided the information. So, unfortunately, it seemed like
25 a good idea, and I spent a fair amount of time on it, but it

1 didn't pan out.

2 Just to be overly cautious in answering your
3 question, there was a person who we were going to take the
4 testimony of, and then when we contacted--they were a Pequot
5 employee, and so when we reached out to Pequot, they told us
6 that she was an administrative--let me back up.

7 There was a person who appeared to have gone from
8 Heller to Pequot, and yet on--and we learned that later.
9 They disclosed her as being from Morgan Stanley or some
10 other entity. And so it seemed--

11 MR. FOSTER: When you say "they disclosed," who do
12 you--

13 MR. EICHNER: Pequot. They identified her as
14 coming from--I think it was JP Morgan or Morgan Stanley.
15 But when we did some research on her, it turned out that she
16 had worked at Heller. And so we thought, hmm, here is
17 someone who's, like, a VP at Heller and then they go to
18 Pequot, that may be the person we're looking at. But then
19 when we got to the point of taking her testimony, it turned
20 out that while they had the same name, they had a different
21 middle initial, and it wasn't the same person. And so we
22 didn't take that person's testimony.

23 MR. KEMERER: So this woman had the same name as a
24 VP at Heller?

25 MR. EICHNER: I think she was a VP at Heller. I

1 different possible phones that he used?

2 MR. EICHNER: That's right.

3 MR. FOSTER: And do you have a sense of whether
4 that was a comprehensive list of all of the phone numbers
5 that he would have been using at the time?

6 MR. EICHNER: I believe it was. I'm not 100
7 percent sure.

8 MR. FOSTER: Did you ask him if he had contacted
9 Mr. Samberg on the evening of June 29, 2001?

10 MR. EICHNER: I believe I did, and at first he
11 said no, and then I think he said, "I don't know."

12 MR. FOSTER: Do you recall whether you showed him
13 during the testimony the e-mail that suggested that he did
14 have a conversation at that time?

15 MR. EICHNER: I did. That's what prompted this
16 exchange. That's what prompted him to say at first no and
17 then "I don't know." I don't remember the exact sequence
18 whether--but, yes, we showed him that e-mail, I believe.

19 MR. FOSTER: Why didn't you subpoena his personal
20 records and phone records earlier than July 24, 2006?

21 MR. EICHNER: After the events of the previous
22 fall, we hadn't really focused on him as--we had not focused
23 on him as a tipper or as a potential tipper. We were
24 focusing on other things. So there was a--once there was
25 the lack of evidence that he had information, he ceased to

1 be a primary focus of the investigation.

2 MR. KEMERER: Were you concerned that you'd be
3 terminated if you tried to subpoena John Mack?

4 MR. EICHNER: No.

5 MR. FOSTER: But it was after Mr. Aguirre was
6 terminated that you ceased to focus on Mr. Mack?

7 MR. EICHNER: Well, yeah, but the sequence was
8 that there was this issue of can we show that Mack had the
9 information, and that was pending when Gary left, and then
10 we got information back from First Boston after Gary left,
11 and there was nothing in that information that showed that
12 he had the information.

13 MR. FOSTER: About the GE/Heller--

14 MR. EICHNER: Right.

15 MR. KEMERER: Prior to Gary leaving, did he
16 suggest subpoenaing John Mack's personal e-mail account?

17 MR. EICHNER: Not that I recall, but again, as I
18 talked about the last time, towards the end I was not sort
19 of prime--I was not very directly involved in the insider
20 portion of the case at the time, at the end of, you know,
21 Gary being there. And so, you know, I wasn't--I wasn't part
22 of those day-to-day discussions, and then when I inherited
23 the case, the state of play was, you know, we weren't going
24 to take his testimony if we didn't have the information, and
25 we didn't have the information.

1 MR. EICHNER: We generally seek tolling
2 agreements--the way we get tolling agreements is by
3 suggesting that people will want to enter into a tolling
4 agreement because otherwise they will get--they will be
5 charged with something. And so my understanding is that you
6 need some leverage--some leverage or evidence to get them,
7 and we didn't have any evidence that Mr. Mack was the
8 tipper.

9 MR. KEMERER: You could have threatened him with a
10 subpoena, right?

11 MR. EICHNER: I don't know whether that's--I mean,
12 my understanding of tolling agreements is that that's when
13 you get them, when you're ready to--so I don't know whether--
14 -I don't have any experience with whether you threaten--you
15 know, I would imagine you would just come in, but I don't
16 know.

17 MR. KEMERER: Right.

18 MR. PODSIADLY: What was the leverage you used to
19 acquire the Pequot tolling agreement?

20 MR. EICHNER: The evidence on the Microsoft
21 transaction.

22 MR. PODSIADLY: And they agreed to the tolling
23 agreement based on--what was said to them, either enter into
24 the tolling agreement or...?

25 MR. EICHNER: Or we would--I think it was that we

1 were getting ready to Wells them.

2 MR. PODSIADLY: Okay.

3 MR. EICHNER: Wells Pequot and Samberg, and that
4 they did not want to be Wells'd. And so I think that was
5 the leverage. And we also agreed--basically the way it
6 worked out in the end is they wanted to--they wanted a
7 meeting with us to re-pitch their case on Microsoft, and so
8 the agreement was they would give us the tolling agreement,
9 we would not immediately Wells them, and instead we would--
10 they would come and make their pitch to us about why we were
11 wrong on Microsoft. And, similarly, we got tolling
12 agreements from--we got tolling agreements from Samberg,
13 Pequot, and from Mr. Zilkha.

14 MR. KEMERER: Could we mark this?

15 [Exhibit No. 32 marked for
16 identification.]

17 MR. KEMERER: Mr. Eichner, could you take a look
18 at Exhibit 32 and tell me if you recognize that document?

19 MR. EICHNER: Sure.

20 [Pause.]

21 MR. EICHNER: Do you want me to take the time to
22 read the whole--I mean, I recognize it and I can talk
23 generally of it. But do you want me to read the whole thing
24 or do you want me to--

25 MR. KEMERER: I mean, if you recognize it, that's

1 fine.

2 MR. EICHNER: I do recognize it.

3 MR. KEMERER: Did you draft this document?

4 MR. EICHNER: I did.

5 MR. KEMERER: With input from anyone else?

6 MR. EICHNER: I don't know whether this is a draft
7 or--I mean, I guess--we never used--we never Wells--this is
8 a Wells outline, is what this was intended to be, and we
9 never actually Wells'd them, so I guess you can't really say
10 it's final. But I am sure that at some point I got edits
11 from either Bob Hanson or Mark Kreitman or both. And I
12 think also Kevin O'Rourke was the trial counsel assigned to
13 the case, and I'm sure I showed it to him. Whether I got
14 edits from him, I don't know.

15 MR. KEMERER: You said you are sure you showed it
16 to Kevin O'Rourke. Did Mr. O'Rourke view this aspect of the
17 Pequot investigation as promising?

18 MR. EICHNER: He did. There was a period in which
19 I viewed it as more promising than he did, I think. He was
20 concerned about--there's this tip in here about the MSN
21 controller being more relaxed. I'm trying to remember...oh,
22 yeah. In paragraph 6 and carrying on to paragraph--page 1
23 and 2, and so he was skeptical of that as being sort of
24 concrete enough. I mean, Kevin is a trial attorney, and,
25 you know, he was sort of thinking about can we prove this,

1 will this work, and he was always--I mean, he certainly
2 viewed it as promising and was encouraging me, but maybe
3 just to be devil's advocate, he was always sort of pointing
4 out potential pitfalls in the case. But he was--I would say
5 he was positive and encouraging--you know, he thought they
6 had done something wrong, and was helping me figure out what
7 we needed to do to figure out whether we can bring a case or
8 not.

9 MR. KEMERER: Did it appear based on the
10 chronology, or just from your recollection, if you will,
11 that Mr. Samberg found the information passed to him as
12 described in paragraph 6 of this Wells notice outline
13 significant enough to trade on it 2 to 3 days later?

14 MR. EICHNER: That was my view.

15 MR. KEMERER: Okay. So at some point, the SEC,
16 someone at the SEC, decided not to issue a Wells notice to
17 Pequot, Zilkha, and Samberg on the Microsoft trading that's
18 outlined here, correct?

19 MR. EICHNER: Yes.

20 MR. KEMERER: All right. Were you privy to that
21 discussion?

22 MR. EICHNER: Yes.

23 MR. KEMERER: Okay. Describe for me why the
24 trading that's at issue in Exhibit 32 was not of a
25 sufficient concern or whatever to issue Wells notices?

1 MR. EICHNER: Yeah. Well, just as sort of a
2 background point, we prepared this--the Wells notice was--
3 what we really wanted was a tolling agreement because we
4 were running up against the statute for this, and we had--
5 there were more things that I wanted to do and that we
6 needed to do, and so we wanted--the purpose of this was to--
7 I wanted to get--we wanted to get authority from above to
8 tell them that--the thing is to get a Wells--or to get a
9 tolling, you say that the staff is prepared to recommend to
10 the Commission that we bring an action against your client.
11 That's not a decision that I can make, and so we needed to
12 get people higher up in the chain on board to letting us say
13 that.

14 And so Bob suggested to me that I do a Wells
15 outline because we would need it eventually, because we
16 would probably Wells them and it would be where you put all
17 the facts and then you would have it if you were going to do
18 the Wells outline, and it also could be the vehicle to run
19 it up the chain because it had all the evidence in it.

20 And so it was--I mean, it was a Wells outline, and
21 my hope was that we were going to Wells them and we were
22 going to charge them because we were going to be able to
23 prove this case, because I felt that he did something wrong.
24 But it was also a vehicle to get the tolling agreement. So
25 that's the first--

1 MR. KEMERER: "He," meaning Samberg, did something
2 wrong? You were of the view that he, Samberg, did something
3 wrong? Or Zilkha?

4 MR. EICHNER: I'm still of the view that--well...

5 MR. KEMERER: This is just an opinion. I mean--

6 MR. EICHNER: I mean, my opinion was that--my
7 opinion was certainly that Samberg thought he was getting
8 inside information and trading on it. That was my opinion
9 and continues to be my opinion. The problem, getting to
10 your next question, is that information was kind of squishy,
11 and so while Samberg may have--it was almost like Samberg--I
12 think Samberg thought he was committing insider trading, but
13 it's not clear that he was, in fact, committing insider
14 trading.

15 As a background, this focused on two tips--one
16 being this earnings call and one being this XP Watch. We
17 were also looking at--there was an earlier period of heavy
18 trading by Pequot in Microsoft which was followed by--which
19 followed an e-mail exchanged between Zilkha and Samberg in
20 which it seemed like Zilkha and Samberg had given him
21 information, but it didn't identify the information. And
22 one of the problems is that Microsoft--I mean, there's like,
23 you know--in some companies they do one thing a year that
24 moves the market. Microsoft, you know, there's analyst
25 reports every day and news, so it's harder to isolate what

1 the event is that moves the stock. So we were never able to
2 sort of figure out what this early piece of information was,
3 and we pressed Zilkha hard. We had two proffers with him
4 with the criminal authorities, and we pushed him hard. We
5 couldn't get him to tell us what it was.

6 Going back to this, so on the tip from the MSN
7 controller, you know, there was always the concern that the
8 tip is kind of vague. You know, what does it mean that
9 they're more relaxed? And, you know, if there is case law
10 and how specific.

11 The other problem we had was--

12 MR. KEMERER: So that was a materiality concern,
13 just to clarify, whether the information was truly material.

14 MR. EICHNER: Yes, and whether a jury would
15 believe that Samberg traded on it because it's so vague,
16 which--

17 MR. KEMERER: I believe that he traded within 2
18 days, you know, 6,000 options or whatever it--so go ahead.

19 MR. EICHNER: This was--I wish you would have been
20 there. You could have been on my side of this conversation.
21 But I had this debate on sort of a running basis with Kevin
22 O'Rourke about it. And I don't think he necessarily didn't
23 believe it, but he wanted the strongest possible case, and
24 he was pushing me to develop it. So that's one problem.

25 The second problem is I spent a lot of time trying

1 to figure out who this MSN finance controller was and
2 identify that person, and I thought, well, that would be
3 easy, we know their position. But it turned out there's no
4 one who's really a finance controller at MSN. There was no
5 one with that title at that time, and there is a controller
6 department, and there's like 36 people in that. And so we
7 spent a lot of time trying to figure out who this person
8 was, and I got information from Microsoft, and when we
9 pushed Zilkha, he said, "I think it's this person," and we
10 had a name. So we interviewed that person, and she flatly,
11 flatly denied it, denied even knowing who Zilkha was, and so
12 that was--you know, that was going to be a big evidentiary
13 problem if we ever brought this case in that the person who
14 Zilkha said gave him the information flatly denied it.

15 And it seemed more credible than some denials
16 because the people at Microsoft had an out in this in that
17 they could have credibly said, "I gave him the information
18 because I thought he worked at Microsoft," and they wouldn't
19 have done anything wrong. So they could have--they could
20 have told on Zilkha without implicating themselves, but they
21 were adamant--adamant, adamant, adamant. And we also talked
22 to some of the other people. There's other tips in here
23 that are less useful. We were able to identify all the
24 people that Zilkha told us they were, and they all just
25 adamantly denied it. And so we faced the prospect of Pequot

1 MR. FOSTER: Okay. And do you recall why you sent
2 it or if there were any other discussions prior to sending
3 the e-mail that prompted you to send it?

4 MR. EICHNER: Yes.

5 MR. FOSTER: And what were they?

6 MR. EICHNER: In the meetings that we were talking
7 about before with Walter and Peter, I don't know
8 specifically the meeting that we looked at an e-mail, but in
9 the context of discussing with Mack, Walter expressed a view
10 that part of the reason we should take Mack is that he had
11 written some memo in which he had characterized the--

12 MR. FOSTER: I'm sorry. "He," who?

13 MR. EICHNER: Walter. Walter had written a memo
14 to some--I don't know whether it was--he wrote some memo
15 about the events of the newspaper article, you know, about
16 this issue, and he had said that it had been decided during
17 Gary's tenure that taking Mack's testimony was premature and
18 that because we had--to him, premature meant we were going
19 to do it eventually and we just hadn't done it yet.

20 MR. FOSTER: To Mr. Ricciardi?

21 MR. EICHNER: Yes. And so he felt like one reason
22 to take Mack's testimony was that we had always--we had--he
23 had written this memo, which I assume had been shared--I
24 don't know whether it was with the IG or with the Hill or
25 what, but that in that it had talked about the decision that

1 it had been decided it was premature and that that suggested
2 we were going to take it. And so that it would be--that was
3 an argument in favor of actually going ahead and taking
4 testimony. And there was a discussion--

5 MR. FOSTER: Mr. Ricciardi is making that
6 suggestion.

7 MR. EICHNER: Yes. And Mr.--and the others of us,
8 myself, Bob Hanson, and Mark Kreitman, said, no, it wasn't--
9 you know, our recollection was that it wasn't definitely
10 decided it was premature, but that we decided we weren't
11 going to do it unless and until we had evidence that Mack
12 knew about the deal.

13 And there was a discussion about what premature
14 meant and whether it means that something that's premature
15 can ever not mature and that kind of thing, and so I came
16 across this e-mail, which to me made it seem like it wasn't
17 that we were--you know, that it wasn't--which sort of went
18 to that discussion and showed that the decision had been
19 that--that it was sort of unless and until, not that we were
20 going to take it anyway; and that, you know, it was not--
21 that I felt that that was sort of the consistent position.

22 MR. FOSTER: And you only forwarded it--here on
23 this e-mail, you only forwarded it to Mr. Hanson, you didn't
24 forward it to Mr. Ricciardi?

25 MR. EICHNER: Yeah. I mean, Mr. Macardi's lots of

EXHIBIT NUMBER 13

1. Arthur Samberg is, and was at all relevant times, the Chairman and CEO of the large hedge fund Pequot Capital Management ("Pequot"). (5/3/05 testimony at 12).
2. On February 28, 2001, Samberg offered Zilkha a job as an analyst at Pequot. (2/28/01 e-mail from Samberg to Zilkha). Samberg knew that Zilkha had no financial services experience. (1/23/06 testimony at 13-14). At the time of this offer, Zilkha was employed by Microsoft, although he was on paternity leave. (Zilkha proffer). During this period, Zilkha communicated with Samberg using a Microsoft e-mail address. Zilkha remained an employee of Microsoft until May 7, 2001. (Microsoft memo).
3. In the same e-mail in which Samberg offered Zilkha a job, he asked whether Zilkha had any current views on Microsoft that might be helpful. He wrote "might as well pick your brain before you go on the payroll!!" (2/28/01 e-mail from Samberg to Zilkha). Zilkha did not start work at Pequot until March 23, 2001. (4/23/01 e-mail from Samberg to Broach and Schendel).
4. On April 6, 2001, Samberg asked Zilkha if he had any "tidbits" about Microsoft. (4/6/01 e-mail from Samberg to Zilkha). Zilkha responded that he would get back to Samberg about Microsoft "ASAP." (4/7/01 e-mail from Zilkha to Samberg).
5. On April 16, 2001, Samberg asked Zilkha if he had "any further [c]olor" on Microsoft. (4/16/01 e-mail from Samberg to Zilkha).
6. On April 17, 2001, at 8:01 p.m., after the close of the market, Zilkha informed Samberg "I heard this afternoon from the MSN finance controller that our CFO

has been much more relaxed before this next earnings release than he has been in the last year. Augurs well." (4/17/01 e-mail from Zilkha to Samberg).

7. Samberg testified that he assumed that employees of companies did not provide members of his firm with confidential, material, non-public information. (1/23/06 testimony at 36-37). Thus, unless an employee made "a very clear statement of something that [Samberg] believe[d] would be a material non-public statement" he would not have concerns trading on that information (1/23/06 testimony at 36-37).
8. Samberg testified that he had no concerns about Zilkha soliciting information from Microsoft employees because he "would not have expected [Zilkha] to do anything that he was not supposed to do." (1/23/06 testimony at 73). Samberg made this assumption even though he knew Zilkha had never been a financial analyst and, because Zilkha did not yet work for Pequot, could not have been exposed to Pequot's policies or training regarding insider trading. Despite these facts, Samberg left it to Zilkha to decide how to obtain information about Microsoft. (1/23/06 testimony at 73). Samberg doesn't remember having any conversations with Zilkha about 1) whether or not he should call Microsoft; 2) the impact his status (as a Microsoft employee who was going to work for Pequot) should have on how he obtained information; or 3) the ways in which he should or should not use his employment relationship with Microsoft. (1/23/06 testimony at 73). Samberg testified he had no concerns about asking Zilkha for information about Microsoft, even though Zilkha was a Microsoft employee and was coming to work for Pequot. (1/23/06) testimony at 92).

9. Zilkha told the staff that he assumed that if Samberg asked him to call Microsoft it must be proper because of Samberg's greater experience in the financial sector. (Zilkha proffer).
10. Samberg testified that he did not remember receiving the information about the earnings release from Zilkha. After reviewing the e-mail he asserted that it was "not a meaningful comment." While Samberg testified he would be very concerned if the CFO of a company told him whether earnings would be bad or good, he dismissed Zilkha's information as speculation and therefore would have had no concerns about trading based on it. (1/23/06 testimony at 100).
11. On April 19, 2001 Samberg bought 6000 Microsoft calls with a May expiration date and a strike price of 65 and shorted 6000 Microsoft puts with the same expiration date and strike price.¹ (Trading Blotter).
12. Samberg was unable to give a specific explanation for this trade or any other transaction involving Microsoft about which he was questioned. Before Zilkha was hired, the funds Samberg managed did not employ a software analyst, much less someone following Microsoft. (1/23/06 testimony at 26). While Samberg's trade established a long position, Pequot's technology fund, which had a successful track record and employed a technology analyst Samberg described as highly trained, was shorting Microsoft. (1/23/06 testimony at 120-21). Samberg testified that he did not pay attention to earnings releases and did not routinely try to make money by assessing the impact such releases would have on a company's stock price. (1/23/06 testimony at 112).

¹ These trades were made in funds managed by Samberg and he is identified on the trade blotter as the manager. Samberg testified that he had no knowledge of placing these trades.

13. Samberg gave two general explanations for his bullish investments in Microsoft during this time period. First he pointed to an e-mail showed to him by the staff in which he expressed a "hunch" that technology stocks were down so sharply that it might be worth investing in some of them. This hunch prompted Samberg to ask Zilkha about Microsoft in February 2001. (2/28/01 e-mail from Samberg to Zilkha). However, Samberg's funds continued to take short positions in Microsoft in March and only invested on the long side starting in April.
14. Samberg also stated that he might have been investing in Microsoft during this period as a hedge against the large short position in technology stocks held by Pequot's technology funds. (1/23/06 testimony at 120). Samberg himself labeled both explanations "speculation." (1/23/06 testimony at 120).
15. On April 19, 2001, at or right before the close of the market, Microsoft announced its quarterly earnings. (Microsoft press release). Microsoft's results beat estimates for revenues and earnings. (4/20/01 e-mail from Samberg to Zilkha). Microsoft's stock price rose 2.5 points (about 3.6%) on the 19th and another point on the 20th.
16. On April 20, 2001, Samberg closed out his April 19, 2001 position, realizing a profit of approximately \$1.6 million. That same day Samberg wrote Zilkha, in an e-mail string containing the news about Microsoft's earnings, "I shouldn't say this, but you have probably paid for yourself already!" (4/20/01 e-mail from Samberg to Zilkha). Samberg testified that this e-mail suggested that Zilkha had been "helpful" in his trading in Microsoft, but he maintained that the explanations he termed "speculation," and not Zilkha's specific information about earnings

from a Microsoft comptroller, explained these trades. (1/23/06 testimony at 127).

On April 23, 2001, Samberg sent an e-mail to senior Pequot managers that Zilkha had a great profit and loss record based on his Microsoft input. (April 23, 2001 e-mail from Samberg to Broach and Schendel).

17. On April 25, 2001, Zilkha references a conversation with his "former colleague in charge of MSN planning" regarding whether Microsoft would be interested in acquiring Earthlink and At Home. (4/25/01 e-mail from Zilkha cc: Samberg). Samberg testified that he had no concerns about Zilkha providing him with the information because he presumed that Zilkha was "acting in accordance with our code [of ethics]. He was on our payroll at this time." (1/23/06 Testimony at 134). Samberg made this assumption even though it was Zilkha's fifth day, he was Zilkha's only supervisor, he didn't know if Zilkha had received any ethics training at this time, and he hadn't spoken to Zilkha about the rules regarding insider trading. (1/23/06 testimony at 144-45).
18. On Friday April 27, 2001, Samberg forwarded Zilkha a report that Microsoft was pushing back the release of Windows XP from August to October. (4/27/01 e-mail from Samberg to Zilkha). Samberg asked Zilkha "Is this True? Should [I] be concerned about it?" (4/27/01 e-mail from Samberg to Zilkha) Later the same day Zilkha wrote back to Samberg "My client side contact who is a Group Product Manager tells me August is still the goal and [Microsoft] hasn't changed this - although he did acknowledge a 'shit load of speculation in the press.'" (4/27/01 e-mail from Samberg to Zilkha)

19. That same day Samberg bought 2500 June 70 Microsoft call options and shorted 2500 June 70 Microsoft puts. (Trade Blotter) On April 30, 2001, the next trading day, Samberg bought 2500 June 70 Microsoft call options and shorted 2500 June 70 Microsoft puts. (Trade Blotter).
20. Samberg, in testimony, said that Zilkha had sent him "an e-mail that says there is no change. Things that aren't changed don't concern me." (1/23/06 testimony at 151).
21. The price of Microsoft's stock dropped 2 points (or 3%) on April 27, the day that the report forwarded by Samberg was hitting the market. On May 1, 2001 Microsoft released a statement to "quell computer-industry speculation." (May 1, 2001 article). The statement said noted that "there has been speculation about the delivery date of Windows XP . . . This speculation is not true. Microsoft is still on target for delivering Windows XP . . ." (May 1, 2001 article). Microsoft's stock rose 2.4 points on the day of the May 1, 2006 press announcement. On May 2, 2001, Samberg closed out his trades from the 27th and 30th, realizing a profit of a little less than \$1 million dollars.
22. On June 15, 2001, Zilkha wrote in an e-mail to Samberg "Just spoke to one of my buds at the company. He had 2 data points: 1) Orlando Ayala, in charge of sales worldwide, told managers this week that the quarter looks set to end on a strong note. 2) Bob McDowell, in charge of Microsoft Consulting Services, told my friend that [Microsoft Consulting Services] was having a blow-out quarter." (6/15/01 e-mail from Zilkha to Samberg). Ayala and McDowell were both senior

Vice Presidents at Microsoft. Samberg responded to Zilkha saying "good info."
(6/15/01 e-mail from Samberg to Zilkha).

23. On June 18, 2001, Zilkha told Samberg that he had told an analyst at Goldman Sachs about the information he learned about Microsoft on the 15th. Specifically, he told the analyst, on a public call, that Microsoft was anticipating beating earnings for the quarter. (6/18/01 e-mail from Zilkha to Samberg). Samberg responded to Zilkha that we "absolutely should not be relaying [information on the analyst call] that you learn via contacts within the company." (6/18/01 e-mail from Samberg to Zilkha). Samberg forwarded his response to Zilkha to Kevin O'Brien, Pequot's General Counsel, with the message "I think you're going to have a talk with the young man." (6/18/01 e-mail from Samberg to O'Brien).
24. In testimony, Samberg said that he forwarded the e-mail to O'Brien because O'Brien was in charge of enforcing Pequot's policies, and it was against Pequot policy to provide information on public calls with analysts. He denied that he forwarded the e-mail to O'Brien because he was concerned that Zilkha had obtained confidential, material non-public information or that he was concerned that Zilkha had told people outside Pequot that he obtained such information. (1/23/06 testimony at 189-90). O'Brien wrote an e-mail to Zilkha in which he said "we need to have a discussion about material, non-public info." (6/19/01 e-mail from O'Brien to Zilkha). Below his message was Zilkha's e-mail to Samberg stating that Zilkha had shared the information he learned from Microsoft on the public conference call.

25. On June 20, 2001, Samberg asked Zilkha if he had "any flavor on [Microsoft]" (6/20/01 e-mail from Samberg to Zilkha). Zilkha wrote back that he "didn't hear back re [Microsoft]." (6/20/01 e-mail from Zilkha to Samberg). Zilkha told the staff that there came a time when Microsoft employees stopped returning his phone calls. He related a specific instance in which the same person who had provided the information that the Microsoft CFO was more relaxed (referenced above) didn't return his calls.
26. Other than covering soon-to-expire options, Samberg did not trade in Microsoft securities after he traded after receiving the information regarding Windows XP.
27. Zilka was asked by Samberg to leave Pequot at the end of September 2001. (9/28/01 e-mail from Zilkha to Samberg). We believe that Samberg fired Zilkha, at least in part, because he no longer has access to confidential, material, non-public information regarding Microsoft and therefore was no longer of use to Sam

Humes, Richard M.

From: Hanson, Robert
Sent: Friday, July 14, 2006 3:11 PM
To: Bresnan, Peter
Cc: Ricciardi, Walter; Eichner, Jim; Kreitman, Mark J.
Attachments: chron since sept.doc; wells facts.doc

Peter,

Attached are two documents that may be helpful in connection with next week's planned meeting on Pequot. The first is a chronology of our investigative steps since September 2005 on the case. The second is a wells outline Jim prepared for Pequot, when we are looking at the Microsoft trading by Pequot. There are additional facts that we subsequently learned (included in that memo) which make that case a tough one.

We have not prepared any action memos other than the original formal order memo; at this stage we are not recommending any actions.

If you have any questions, or need any other information please let me or others know.

Bob

From: Eichner, Jim
Sent: Friday, July 14, 2006 2:19 PM
To: Hanson, Robert
Subject:

EXHIBIT NUMBER 14

UNITED STATES SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

----- x
: In the Matter of: :
: :
: TRADING IN CERTAIN SECURITIES, :
: No. HO-9818, and the SEC's :
: TERMINATION OF EMPLOYMENT OF :
: GARY AGUIRRE :
: :
----- x

November 15, 2006

Whereupon,

MARK KRIETMAN

was called for examination by counsel for the Senate
Judiciary Committee and the Senate Finance Committee,
pursuant to notice, commencing at 1:07 p.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, Esq.
Investigative Counsel
U.S. Senate Committee on Finance

HAROLD H. KIM, Esq.
Chief Civil Counsel
U.S. Senate Committee on the Judiciary

HANNIBAL G. WILLIAMS II KEMERER, Esq.
Counsel
U.S. Senate Committee on the Judiciary

MS. STEPHANIE MIDDLETON
U.S. Senate Committee on the Judiciary

MS. JANE O. COBB
Director
Office of Legislative Affairs

MR. MARK KRIETMAN
Assistant Director
Division of Enforcement
U.S. Securities and Exchange Commission

SAMUEL FORSTEIN, Esq.
Assistant General Counsel
Litigation & Administrative Practice
U.S. Securities and Exchange Commission

1 group and whether or not there was some improvement in
2 management that I should undertake.

3 MR. FOSTER: And you learned about these
4 concerns from Mr. Berger?

5 MR. KREITMAN: I think so. I don't specifically
6 recall, but I would assume that's the case because I
7 addressed this e-mail to Paul.

8 MR. FOSTER: Through an in-person conversation,
9 or over the phone, or by e-mail?

10 MR. KREITMAN: I'm sure it would have been in
11 person.

12 MR. FOSTER: In person.

13 MR. KREITMAN: My relationship with Mr. Berger
14 was such that a complaint about my performance would
15 certainly be communicated face to face.

16 MR. FOSTER: How close in time to this e-mail do
17 you think your conversation with Mr. Berger was about the
18 complaints?

19 MR. KREITMAN: I'm sure it was a matter of days,
20 at the most. I take criticism of my performance very
21 seriously and would immediately investigate to see
22 whether or not I was at fault and, if so, how I could
23 improve.

24 MR. FOSTER: On the second page of the exhibit,
25 you see the date there is August 1, 2005, 6:28 p.m.

1 I didn't get the sense that he went in and winged it, but
2 do you get the sense that when he took Mr. Mack's
3 testimony he was winging it?

4 MR. KREITMAN: No, he didn't wing it. In fact,
5 I reviewed the outline, along with Mr. Hanson.

6 MR. KEMERER: Okay.

7 After June 15, 2006, did something occur that
8 undermined the emphasis that the SEC was placing on the
9 Microsoft trades aspect of the Pequot investigation?

10 MR. KREITMAN: What point in time?

11 MR. KEMERER: Post-June 15, 2006.

12 MR. FORSTEIN: I'm not sure what you mean by the
13 word "undermine" in that context.

14 MR. KEMERER: We'll let him answer and then I'll
15 clarify if he has a question.

16 MR. KREITMAN: Well, at some point in time the
17 Microsoft aspect of the case, which appeared initially to
18 be the most promising because we had a tipper, an
19 information, weakened because of two factors.

20 One, the informant proved not susceptible of
21 corroboration. People that he told us conveyed the
22 information to him from Microsoft denied it. One of
23 them, if I recall correctly, denied knowing him at all.

24 Secondly, at least one piece of the information,
25 it turned out Goldman Sachs had made public to their

1 clients prior to their making it public in an analyst
2 report.

3 MR. KEMERER: Okay.

4 And those developments occurred after June 15,
5 2006?

6 MR. KREITMAN: I'm not sure when they occurred.
7 Those were the reasons that we became less concerned
8 about the Microsoft aspect of the case.

9 MS. MIDDLETON: Could you talk about that for a
10 minute? Goldman Sachs had made it public to their
11 clients and, therefore -- one of their clients being
12 Pequot?

13 MR. KREITMAN: I'm not sure that they did make
14 it -- Pequot did receive it that way.

15 MS. MIDDLETON: Was Goldman Sachs making it
16 public to their clients, so that meant it was no longer
17 material nonpublic information?

18 MR. KREITMAN: It did damage to our argument
19 that it was nonpublic.

20 MS. MIDDLETON: Okay.

21 And was there something about Goldman Sachs
22 making it public to their clients before they made it
23 public in an analyst report? Is there something
24 troublesome about that to you?

25 MR. KREITMAN: Do you mean personally, or --

1 MR. KREITMAN: Yeah. They're hard to try.
2 MS. MIDDLETON: So --
3 MR. KREITMAN: From my trial experience, I
4 thought that it was a case you couldn't try. First of
5 all, there was an ethical issue as to whether or not -- I
6 mean, it was in my mind, whether or not, you know, you
7 bring a case and try to essentially extort a settlement
8 when you're not prepared to put the case to a neutral
9 trier. But even if you don't have that qualm, it's very,
10 very unlikely that you would be able to settle a case on
11 that kind of evidence.
12 MS. MIDDLETON: Now, the Microsoft case was
13 something that the U.S. Attorney's Office was working on
14 with you, correct?
15 MR. KREITMAN: Yes.
16 MS. MIDDLETON: And so did they agree with that
17 assessment?
18 MR. KREITMAN: Yes. They lost interest as soon
19 as they got a taste of Zilkha, unfortunately. They were
20 very enthusiastic at first, and that's what Gary got the
21 big Perry for, his presentation to the U.S. Attorney,
22 getting them interested in Microsoft.
23 But, you know, once -- one of the people that he
24 said -- that Zilkha said he got the information from, I
25 believe, had moved to Brazil. They couldn't get ahold of

1 that person. One said he or she didn't tell him.

2 The other, as I recall, said I don't even know
3 the guy. So, we lost the support of the U.S. Attorney in
4 the case, and I think rightfully so. I think it became a
5 civil case you couldn't try, much less a criminal case.

6 MS. MIDDLETON: So was there a proffer? I mean,
7 Zilkha made a proffer?

8 MR. KREITMAN: Yes. I think there were a couple
9 of proffers from Zilkha, if I recall. Both -- I think
10 they were joint proffers between us and the U.S. Attorney
11 in the Minnesota District. I was in favor of it. That's
12 my recollection.

13 MR. KEMERER: Does that make him a cooperating
14 witness, or no, the proffer?

15 MR. KREITMAN: I don't know. I don't know much
16 criminal procedure.

17 MR. KEMERER: Does one go through a proffer
18 without a cooperating witness? I mean, you can't force
19 their testimony. It's up to the grand jury.

20 MR. KREITMAN: It's done with a "queen for the
21 day" letter. Both we and the U.S. Attorney give a "queen
22 for the day" letter, which says that anything you say we
23 can't use against you, except to impeach.

24 MR. KEMERER: Uh-huh.

25 MR. KREITMAN: So that's the quid pro quo.

1 MR. KEMERER: You talked about trying insider
2 trading cases and mentioned that they're largely
3 circumstantial. Was this a case where you had more
4 direct evidence than you typically do?

5 MR. KREITMAN: Yes. We had Zilkha. That's why
6 we thought it was a great case.

7 MR. KEMERER: But you had e-mail.

8 MR. KREITMAN: That's right. The e-mail is --

9 MR. KEMERER: Not circumstantial.

10 MR. KREITMAN: No, it's not circumstantial, but
11 it's a little vague. You know, we had Zilkha. That's
12 why we loved this case, we loved Microsoft.

13 MR. KEMERER: Okay.

14 MR. KREITMAN: When I said that's
15 circumstantial, the reason is because if they have direct
16 evidence, they don't go to trial. Rarely -- I mean,
17 usually, then they settle. If it's circumstantial, then
18 it's a shot for the defense and they take it to trial
19 sometimes.

20 MS. MIDDLETON: Did you meet with Mr. Samberg's
21 lawyers to discuss the evidence against him in the
22 Microsoft trading?

23 MR. KREITMAN: I did not.

24 MS. MIDDLETON: Someone from your staff did. Is
25 that right?

1 to stay with us indefinitely. He had told me at one
2 point that he would stay on until September. And since I
3 say here "staying on until December", that must have had
4 some significance, but I don't remember what.

5 MR. FOSTER: So you don't recall whether you had
6 an understanding or not that he intended to stay on at
7 that point after receiving this e-mail?

8 MR. KREITMAN: I knew that he was not going to
9 stay on indefinitely, but I could never get a commitment
10 to him as to how much time I could plan on him being
11 here.

12 MS. MIDDLETON: And you knew that because he
13 just kept threatening to quit?

14 MR. KREITMAN: He did quit.

15 MS. MIDDLETON: Did quit.

16 MR. KREITMAN: And he repeatedly said that he
17 could not continue to work in this kind of a structured
18 environment, and I took him at his word.

19 MS. MIDDLETON: Could I jump back to the
20 Microsoft investigation? Could you have issued a Wells
21 notice to Mr. Samberg based on the evidence, including
22 the e-mails, between him and Zilkha such that it was
23 placed squarely before him and that there was -- isn't
24 that the purpose of a Wells notice?

25 MR. KREITMAN: This wasn't nearly enough

1 evidence for a Wells notice. In a Wells notice, the
2 purpose of a Wells notice is to advise an entity or a
3 party or a person that we intend to make a recommendation
4 to the Commission to bring a Federal injunctive lawsuit
5 against you or an administrative proceeding.

6 We never got to that point, so it would be
7 inappropriate and an abuse of the Wells process to do
8 that. And Wells are very expensive. I mean, you know,
9 to get a Wells prepared is a very expensive proposition,
10 so we don't do it lightly. In fact, it's also --

11 MS. MIDDLETON: Why?

12 MR. KREITMAN: Not for us, but to the defense
13 point.

14 MS. MIDDLETON: Oh.

15 MR. KREITMAN: And nowadays, most defense
16 lawyers consider that Wells as a disclosable event. So
17 there's a lot of negotiation in many cases before you
18 Wells somebody. Sometimes it's lots of meetings,
19 sometimes people make pre-Wells submissions.

20 From our point of view, that's very troublesome
21 because it delays cases and we feel as though it may be a
22 little bit abusive. But receiving a Wells is -- you
23 know, that's likely to be in the paper and it's almost
24 always disclosed if you have disclosure obligations.
25 It's a serious step.

1 Commission to sue Pequot or Samberg, so I would not Wells
2 them. I consider that to be abusive.

3 MR. PODSIADLY: Does the SEC use the Wells
4 process as leverage for anything?

5 MR. KREITMAN: No, that's not its purpose. Its
6 purpose is to afford a potential respondent or defendant
7 the opportunity to persuade us not to go to the
8 Commission to seek authorization to bring an action
9 against them. I think it would be inappropriate to use
10 it as a lever for any purpose.

11 MR. PODSIADLY: So you wouldn't use a Wells
12 notice, or the threat of a Wells notice, as part of a way
13 to perhaps get a tolling agreement?

14 MR. KREITMAN: No. Oh. You may not know it,
15 but Wells are discretionary.

16 MR. PODSIADLY: Uh-huh.

17 MR. KREITMAN: We don't have to Wells somebody.
18 So if we want a tolling agreement --

19 MR. PODSIADLY: Uh-huh.

20 MR. KREITMAN: And I've never had a request for
21 a tolling agreement refused, because what's unsaid is
22 that if you don't agree to a tolling agreement, at which
23 time you can persuade us not to sue you, you force us to
24 sue you, we're not going to let the statute expire. So
25 everybody always agrees to tolling agreements. And, as I

1 MR. KREITMAN: Yes. I can't remember
2 specifically what I discussed. I discussed -- I know I
3 discussed generally with him his performance and his
4 conduct, but I don't have notes of the conversation and I
5 can't say specifically what was discussed.

6 MS. MIDDLETON: Okay.

7 So you don't know whether you discussed
8 organizational skills, the subpoenas, or any other
9 specifics that you can recall.

10 MR. KREITMAN: That's right.

11 MS. MIDDLETON: As you understand it, what's the
12 purpose of having that discussion and this form, and
13 people signing this form?

14 MR. KREITMAN: To alert an employee to areas in
15 which their performance and/or conduct needs to improve.

16 MS. MIDDLETON: Okay.

17 So are you saying this document, where
18 everything is rated "Acceptable" -- strike that.

19 MR. KREITMAN: Okay. "Acceptable" is a pretty
20 low threshold, in practice.

21 MS. MIDDLETON: But the reason you did not check
22 anything "Unacceptable" is you believe it would have led
23 to a Performance Improvement Plan, correct?

24 MR. KREITMAN: Yes, I think it would.

25 MS. MIDDLETON: Or termination.

1 MR. KREITMAN: Well, probably both. Yeah. I
2 mean, it was too heavy a hammer at that point, it seemed
3 to me.

4 MS. MIDDLETON: And then what happened after
5 June 1, '05 that --

6 MR. KREITMAN: Well, his behavior continued to
7 deteriorate and it was clear to me that he was not going
8 to be able to work in the environment that he was
9 required to work in, as he himself said.

10 MS. MIDDLETON: When it became clear to you, did
11 you put him on a Performance Improvement --

12 MR. KREITMAN: I did not. He was a probationary
13 employee so it wasn't necessary.

14 MR. KEMERER: That's a legal conclusion. Right?
15 I mean --

16 MS. MIDDLETON: Well, you just said if you had
17 checked "Unacceptable" you would have had to have put him
18 on a Performance Improvement --

19 MR. KREITMAN: Correct. That's my
20 understanding. But he was on probation anyway. His
21 first year was probationary, so it was -- to put him on a
22 Performance Improvement Plan -- I mean, he was already on
23 probation.

24 To take that step would essentially be saying,
25 at this point in time, it was very difficult to conceive

EXHIBIT NUMBER 15

Hardy, Melinda

From: Ribelin, Eric
Sent: Friday, February 25, 2005 11:26 AM
To: Fay, James
Subject: RE: MHO -9818 -- email production

You may be right, but I'll tell you a record is getting built.

-----Original Message-----

From: Fay, James
Sent: Friday, February 25, 2005 11:25 AM
To: Ribelin, Eric
Subject: RE: MHO -9818 -- email production

I have faith that you will stay the course, but let me say this: I have seen these enf. Lawyers get all huffy before. They are empty suits. When push comes to shove, no one in the SEC is going to take on FF or any other major player. Not going to happen. Witness the touchy feely "conference" you are going to have next week. When FF gets a handle on the email, they will produce them, and not before...sorry, not what you want to hear...

-----Original Message-----

From: Ribelin, Eric
Sent: Friday, February 25, 2005 11:22 AM
To: Fay, James
Subject: RE: MHO -9818 -- email production

I will continue to be outraged and I will be heard. Meanwhile, this investigation ain't going away.

-----Original Message-----

From: Fay, James
Sent: Friday, February 25, 2005 11:19 AM
To: Ribelin, Eric
Subject: RE: MHO -9818 -- email production

I think you are dead on; That FF doesn't realize that they are supposed to search back up tapes? That is absurd. Anyone from FF who actually says that should be the subject of a criminal referral. These guys are the most sophisticated guys around. Back up tapes? That is like not knowing that you have to search your garage...and we are letting them get away with it.

-----Original Message-----

From: Ribelin, Eric
Sent: Friday, February 25, 2005 11:10 AM
To: Fay, James
Subject: RE: MHO -9818 -- email production

3 or more former employees of Broadcourt are at Pequot. Direct line of info perhaps. What do you think about "it's a lie. And we're the ones being lied to?" We need to start whacking these hacks with 102(e). That'll stop the obstruction.

-----Original Message-----

From: Fay, James
Sent: Friday, February 25, 2005 10:57 AM
To: Ribelin, Eric
Subject: RE: MHO -9818 -- email production

I am not so sure I followed the K&L guy's email. They don't save email, unless they do? And there is 30K of Pequot email? Of course, depending on

how they search, there may be tremendous repetition. For example, if I have 3000 emails on my system today, and one year from now you ask for all my email. I would give you 3000 for Feb. 3000 plus the 100 added in March, 3100 plus the 100 added in April...see what I mean? I have no idea how many people are writing back and forth, but that is a lot of email!! Oh, Baby...

-----Original Message-----
 From: Ribelin, Eric
 Sent: Friday, February 25, 2005 10:00 AM
 To: Fay, James
 Subject: FW: MHO -9818 -- email production

-----Original Message-----
 From: Ribelin, Eric
 Sent: Friday, February 25, 2005 9:56 AM
 To: Aguirre, Gary J.; Hanson, Robert; Foster, Hilton
 Cc: Kreitman, Mark J.
 Subject: RE: MHO -9818 -- email production

"Privilege" is a red herring. It's a lie. And we're the ones being lied to.

-
 From: Aguirre, Gary J.
 Sent: Friday, February 25, 2005 5:59 AM
 To: Hanson, Robert; Ribelin, Eric; Foster, Hilton
 Cc: Kreitman, Mark J.
 Subject: FW: MHO -9818 -- email production

Is there another reason Pequot has straight armed our efforts to get its e-mails and schedule exams to the point it appears to accept the risks of Commission proceeding? Is Pequot waiting to get the 31,000 Pequot-Broadview-Jeffries e-mails from Jeffries so they can be considered before exams proceed? I think so. I suspect that Pequot-Fried Frank thought these e-mails were going to stay buried.

At the risk of being repetitive, having 31,000 Pequot e-mails pop up is startling. That's something like 80 e-mails a day between Pequot, Broadview and Jeffries. These e-mails are all before the splash about e-mails in 2003.

For those that don't recall the history, Broadview, a B-d, was the adviser to Elite when it was acquired by the Thomson Company. Broadview itself was later acquired by Jeffries. I have always believed the Elite acquisition, all facts considered, is the strongest SRO referral. It was the first matter discussed in the formal action memo. Jeffries-Broadview are now represented by Kirkpatrick-Lockhart (Eilleen Clavere). A number of Broadview graduates are now with Pequot, including both [REDACTED] (suspected tippee) whose exams are scheduled for April.

[REDACTED] has frequent meetings with Broadview and for sure knows what's going on with the case. I have also believe Clavere is coordinating the Broadview defense with Audrey.

Both Jeffries and Pequot have been playing the "I didn't know you wanted us pull e-mails from backup tapes game." Jeffries also claimed until this week that it had no incoming e-mails and thus no Pequot incoming e-mails. The Jeffries version of the game ended when we included the backup tapes in our recent subpoena and began asking who the compliance officer was for the period in question. Clavere asked me several times whether I really wanted the backup tapes. Each time I said yes unless she convinces me that we have everything.

Pequot must be petrified by Broadview's breaking ranks and producing 31,000 Pequot-Broadview e-mails to us. The e-mails Jeffries produces may include some

of the Pequot "double deletes." I would also assume that Pequot or Fried-Frank has made arrangements to get them or already has them.

In the e-mail below (sent yesterday), Kirkpatrick-Lockhart is trying to buy some more time to restore the e-mails. This is also the first time they reveal to us the existence of the 31,000 Pequot e-mails they're holding. Is it appropriate to ask Clavere if she has any reason to believe her client is providing or intends to provide the 31,000 e-mails to Pequot? If this is going on, it is more likely being done under the cover of "privilege," like the one Pequot is asserting in connection with its own e-mails. The review by Fried-Frank of the Broadview e-mails would be privileged, but not the delivery of the e-mails by Kirkpatrick or Jeffries-Broadview to Fried-Frank.

Gary

-----Original Message-----

From: Guo, Xinxin
 To: Aguirre, Gary J.
 Cc: Clavere, Eileen
 Sent: 2/23/2005 9:43 PM
 Subject: MHO -9818 -- email production

Dear Mr. Aguirre,

I'm sending out a box of documents and 1 CD to you via FedEx tonight. I wanted to give you a status report on Jefferies' email search efforts and would like to request an extension of the February 24th document production deadline accordingly.

As you are aware that prior to December 1, 2003, as a matter of its email retention policy, Broadview did not retain any incoming and internal emails of its employees. Consequently the incoming and internal emails during the specified periods were not archived. However, as we later found out, certain incoming and internal emails may have been saved under certain circumstances. For example, if a Broadview employee had saved the incoming or internal emails in his or her mailfile, then such emails can be retrieved. However, this search of individual employee mailfile is very labor intensive and time consuming. As of today, Jefferies IT staff has performed the following searches:

#1 - Searching all officially archived emails from 01/01/2002 through 06/30/2003 for select keywords:

- * For "pequot" OR "pequotcap.com" OR "pcm" there were 31,159 emails that were returned.
- * For "elite" OR "elite.com" there were 40,997 emails that were returned.

Because Jefferies and Broadview share the same archive, Jefferies IT staff is in the process of separating Broadview's emails from the search results.

#2 - Searching all Broadview mailfiles that still exist from 01/01/2002 through 06/30/2003 for select keywords:
 This search was performed as follows:

* On the Broadview mail servers, an agent was run that went through every mailfile where a person document existed and pulled a copy of any email still in their mailfile from 01/01/2002 through 06/30/2003 and put it in a separate Notes database [REDACTED]

* On the Broadview mail servers, an agent was run that went through every mail-in database and pulled a copy of any email from 01/01/2002 through 06/30/2003 and put it in a separate Notes database (mailsearchjanelle2.nsf).

* On the Broadview mail servers, an agent was run that went through every orphaned database and other files, and pulled a copy of any email from 01/01/2002 through 06/30/2003 and put it in a separate Notes database (mailsearchjanelle4.nsf).

* The above 3 new databases were indexed and keywords searched.

* In the above 3 new databases, "pequot" OR "pequotcap.com" OR "pcm" were searched and the results placed in another database called BVMailsearchPequot. There were 509 emails found.

* In the above 3 new databases, "elite" OR "elite.com" were searched and the results placed in another database called BVMailsearchElite. There were 1,897 emails found.

#3 - Calendar Entry search found in Broadview Mailfiles:
This search was performed as follows:

* On the Broadview mail servers, an agent was run that went through every mailfile where a person document existed or an orphaned mailfile, and pulled a copy of any calendar entry still in their mailfile from 01/01/2002 through 06/30/2003 and put it in a separate Notes database (mailsearchjanelle3.nsf).

* The above database was indexed.

* All 51 names of Attachment A Non-Exclusive List of Pequot Employees was searched, and there were no calendar entries found for any of these people.

* Searches for "pequot" OR "pequotcap.com" OR "pcm" were performed. 5 calendar entries were found and placed in a folder on BVCalendar5. "elite" OR "elite.com" was also searched for and 49 calendar entries were found and placed in a different folder.

#4 - A search of all Jefferies' official archived emails for the individuals and timeframes specified in Exhibit C of the Subpoena.

#5 - A search of all the Broadview mailfiles for the individuals and timeframes specified in Exhibit C of the Subpoena.

On the Broadview mail servers, an agent was run that went through every mailfile where a person document existed and pulled a copy of any email still in their mailfile from 01/01/2002 through 06/30/2003 and put it in a separate Notes database (mailsearchjanelle.nsf). This database was indexed. A search was done for each person's name and it had to be present in any one of these fields - From; SendTo; BlindCopyTo; CopyTo; Recipients; Principal. Their last name was used as well as their internet email address. Results of the search were placed in a new database called BVMailfileSearch5 with a folder for each person.

#6 - CD search of [REDACTED] Mailfiles.

Due the extensive number of searches involved here, we expect to receive the CDs that contain the search results in the next few days. I will

promptly forward them as soon as I finish reviewing their contents. I understand that, based on your conversations with Eilileen Clavere, a Lotus Notes format of the emails would be acceptable to you.

Thanks very much for your patience and understanding. Please feel free to call me if you have any questions. As always, if there are any additional documents that we found responsive to the Staff's request during this process, we will promptly forward them to the Staff.

Regards,

Xinxin Guo, Esq.
Kirkpatrick & Lockhart Nicholson Graham LLP
Four Embarcadero Center 10th Flr
San Francisco, CA 94111
Direct: 415-249-1013
Fax: 415-249-1001
www.klmg.com

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EXHIBIT NUMBER 16

Humes, Richard M.

From: Aguirre, Gary J.
Sent: Friday, May 20, 2005 10:06 AM
To: Kreitman, Mark J.
Subject: RE: Pequot immediate goal

Thanks.

Gary

From: Kreitman, Mark J.
Sent: Friday, May 20, 2005 9:55 AM
To: Aguirre, Gary J.
Cc: Berger, Paul; Hanson, Robert; Ribelin, Eric; Foster, Hilton; Eichner, Jim; Conroy, Thomas
Subject: RE: Pequot immediate goal

Sounds like Gary's strategy outsmarted (or terrified) Audrey and is resulting in real progress. Excellent!

From: Aguirre, Gary J.
Sent: Friday, May 20, 2005 9:49 AM
To: Kreitman, Mark J.; Hanson, Robert
Cc: Ribelin, Eric; Foster, Hilton; Eichner, Jim; Conroy, Thomas
Subject: Pequot immediate goal

I will be working out details on subpoena production with Audrey today and Monday.

The bottom line:

1) March 22 subpoena. E-mails for 27 Pequot employees immediately, remaining 7 within two weeks. Not produced: 200,000 being held for privilege review. I will get criteria used by FF for attorney-client term search on Monday, including names of attorneys on list. I expect to cut this down to something realistic during Tuesday phone call. Have some issues to work out with our IT staff.

2) February 7 subpoena. Three types of e-mails sought: issue related, trader related, and compliance related. Trader related produced during week of May 6. Issuer related and compliance related was the toughest nut. Relevant e-mails will go up on Iconnect as we designate: 60 employee years of e-mails per month until subpoena satisfied or we call it off. We can do this weekly as case development dictates. Again, the tricky part is privilege material which I am dealing with on Monday and Tuesday.

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EXHIBIT NUMBER 17

From: Aguirre, Gary J.
Sent: Tuesday, June 28, 2005 5:46 AM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Ribelin, Eric
Subject: GE-Heller: Obstacles and proposed next steps

This memo summarizes the proposed steps for advancing the investigation of the GE-HF investigation. I have other thoughts regarding how we might advance the investigation of other SRO referrals (e.g., Elite Information and Blue Coat Systems) as well as the efficient identification of other insider trading activity.

I assume you have reviewed memo 1 which summarizes Samberg's testimony on why he traded in HF and GE. His explanation of his HF trading lacks credibility and he has none on GE. Still, we need to establish the likely path through which the material nonpublic information (MNI) flowed to Samberg. Proposed below are five avenues for establishing that path.

A. Documents-Testimony from the five investment bankers (CSFB, Morgan Stanley, JP Morgan, Lehman and Merrill Lynch) or the two principals (GE and HF).

I discuss these possible tip sources in ascending order, given what we know now, of probability.

The least likely sources *at this point* are Heller, Merrill Lynch, and Lehman. We have no evidence of any Samberg-HF contacts. Samberg denied having any contacts with HF. He could not identify any of the HF employees involved in the acquisition. Merrill was consulted by Fuji Bank very early, was not hired, and was not heard from again. Yesterday, Merrill produced documents pursuant to our subpoena on a CD which I will review when they have been posted to Iconnect. Hence, its status could change if something shows up. Samberg did testify that he might have spoken with someone from Merrill. Also, there were a huge amount of hard and soft dollar commissions that went to Merrill from July 1, 2001, through June 30, 2002 (approximately \$16 million). The chronologies indicate that Lehman, which had investment banking ties with Heller, did not become involved until just before the announcement of the acquisition in late July 2001. I have not as yet served a subpoena on Lehman.

JP Morgan is up on notch as a source of a tip. It consulted with Fuji from beginning to end. However, Samberg testified he knew no one on the JP Morgan acquisition team. JP Morgan's counsel wrote that there were no e-mails between Morgan's and Pequot. Additionally, Samberg testified that he does not recall anyone having any contacts with anyone from JP Morgan in 2001. In short, we have no leads.

Up another notch as a tip source is GE. Samberg knows two members of the GE acquisition team, [REDACTED] and [REDACTED]. [REDACTED] was an outside director and there are few e-mails between him and Samberg in 2001. One e-mail suggests

0000321

that ██████ and Samberg met in January 2001. Samberg testified he was not certain he knew ██████ in 2001. However, his testimony regarding ██████ was a little suspicious (RT II p. 28, l. 20-p. 31 l. 14). Samberg has a much stronger relationship with ██████, CEO of GE Asset Management. It dates back to the late nineties. He attends basketball games with ██████. When I asked Samberg if he ever discussed GE business with ██████ in these games he responded, "What do you mean by discuss 'GE businesses?'" However, GE's chronology indicates that both Myers and ██████ did not learn about the HF acquisition until just before it was announced. However, there is no accuracy warranty with the chronos; Chrysakos—the GE VP that went to prison as a tipster on GE-HF—was not even mentioned in the GE chronology to the NYSE. I have asked GE, represented by Wilmer-Cutler, to submit a more complete chrono in view of the Chrysakos omission.

The second highest probability of the tip would be Morgan Stanley (MS), which consulted with GE, for two reasons. First, MS is Pequot's prime broker. Samberg rattled off about ten names of higher echelon MS people he knew in 2001, though he denied knowing any of the individuals on the acquisition team that consulted with GE. More importantly, there is the Mack connection. The rub is that Mack left MS in March or April 2001, before MS knew about GE-HF. However, Mack came from the institutional side of MS and had been expected by the media to bring many of its bankers with him to CSFB, implying the depth of his relationships with MS bankers that might have known about GE-HF. It later became public that there was a contractual prohibition in Mack's severance agreement precluding him from hiring away MS staff. Yesterday, we received a packet of Samberg-MS e-mails from MS for the period before Mack left MS. The more interesting e-mails would be those after he left and after MS learned about GE, which have not as yet arrived. I doubt we will find anything like a tip, but we find him being chummy with somebody who knew about GE-HF.

The top spot goes to CSFB, which consulted with HF, for reasons you know. This could of course change if it turned out that Mack had no significant contacts at CSFB until after July 2. As you know, we have subpoenaed communications between Mack and Pequot from June 1, 2001, until June 2004, when he left CSFB. My view is that we should broaden the subpoena to obtain (1) all communications between Mack (we now have his e-mail address just before he started with CSFB) and CSFB for the two months before he began with CSFB and (2) all documents relating to his phase in as CEO at CSFB generated during June and July 2001. Further, I think we need to take Mack's testimony and simply nail down whether he will admit that he knew about the GE/HF acquisition from any source. Obviously, he could have learned this at either CSFB or MS. Since the GE-HF info could have been communicated to him in the regular course of business from CSFB, and thus third parties would be innocently involved, he might actually tell us if this occurred. If this was the tip path, the question would be when: the closer to June 29 or the morning of July 2, the stronger the case that he was the tipster. As discussed in my first memo, please keep in mind that Samberg was a heavy purchaser of HF on July 2 and tried to buy more than twice the amount he actually executed. I have asked Tom Conroy to get BOA

000322

██████████ trading tickets for July 2 so we can determine whether the trade was put in at the opening or during the day. If it was put in during the day, the tip could have come on the morning of July 2. If by any chance that is when Mack learned of the acquisition, he would look very much like the tipster.

It is also important whether Mack had his GE/HF information refreshed during July 2001. On July 9, Samberg, for some reason, only tried to buy 15,000 shares of HF. The next day, he directed his trader to purchase 455,300 shares of HF. What did he learn between his July 9 order and his July 10 order? Did Mack have his information refreshed at this time?

In short, the broadened subpoena and Mack's testimony could (1) point to Mack as the tipster or (2) eliminate Mack as the tipster and thus suggest we eliminate CSFB and look closer at the other candidates.

B. Production of additional e-mails.

A second possible source of evidence indicating the tipster for GE/HF is the yet un-produced e-mails of Pequot. There are two possibilities. First, Pequot is holding a now unknown number of e-mails and instant messages for privilege review. Fried Frank has represented that there are no e-mails to or from Samberg for the period of April 15, 2001, through July 31, 2001, among the withheld e-mails and IMs. I do note that there are several e-mails to and from Pequot's General Counsel at the critical time relating to "investment decisions."

A second possible source, and probably the only realistic one for GE/HF, is the backup tapes. There are four classes: the Andor tapes, the missing tapes, the damaged tapes, and the non-exchange server tapes. Irvine Pollock and Larry Storch have been hired for the task of ascertaining what happened to the missing tapes, locating any other non-exchange server tapes with e-mails, and retrieving any e-mails from the damaged tapes. I see Pollack-Storch as PCM's protective wall of integrity around the tapes. Shame on anyone who suggests Pollack-Storch is not getting to the bottom of backup tape brouhaha. As you know, I have written Audrey Strauss regarding the newly discovered non-exchange server tapes and got a reply from Larry Storch, which did not respond to my questions, e.g., which Pequot employee had possession of the recently discovered non-exchange server tape from which e-mails were retrieved. I think Audrey has the best of all worlds right now regarding these three categories of tapes: the Pollock-Storch wall of integrity and my inability to press them for answers to pertinent questions. Mark's call last week to Fried Frank may get Pollack-Storch to concede they simply represent Pequot.

The circumstances involving the backup tapes may be an obstruction of justice case. How and when did some of the tapes get damaged? How did some get lost? If I have to take this on without some guidance, it is a very big job.

000323

That leaves us with the Andor tapes. I understand that Audrey will send me a response next week to my request from legal authorities supporting Pequot's assertion of privilege.

C. *Peter Dartley.*

So far, outside of Samberg, Pequot e-mails/documents indicate only one other Pequot employee knew anything about the GE/HF trades, Peter Dartley. On July 11, 2001, Samberg wrote Dartley, "Where are we on HF?" Dartley was Samberg's chief trader in July 2001. Samberg dealt directly with him and often gave him directions to make trades. The quote above suggests that this was done on HF. Dartley posted the HF trades and the GE trades to the handwritten Pequot trade blotter.

Dartley was also an intermediary when Samberg needed information about engaging in an arbitrage transaction on GE-HF after the announcement of the acquisition but before the close. Other e-mails suggest that Dartley was Samberg's confidante on investment decisions and other matters.

Pequot's employment list indicates that Dartley started work with Pequot in 1994 and never left. This is not accurate. The Chief Trader at MS told me that Dartley left (I think retired from) Pequot and later rejoined Pequot some time in 2003 in his current position as a "Managing Director." His new assignment was to restructure Pequot, an assignment that says volumes about Samberg's trust in Dartley. If any incriminating e-mails exist, I suspect they would be between Samberg and Dartley.

I think we should issue a subpoena for all e-mails to and from Dartley from January 1, 2001, to the present, as we have with 34 other Pequot employees. He should also go to the top of the testimony list.

D. *The emerging mosaic of Samberg's activities during June and July 2001*

As you know, Nancy has been working on an Excel spreadsheet that includes key e-mails to and from Samberg, including those to/from or mentioning Mack. It also contains trading info and info from the GE-HF chronologies. Relevant data from phone records and credit cards will be entered as it arrives. This mosaic, especially with input from CSFB or MS regarding Mack, could become a clearer and clearer picture of the path of the tip.

E. *Calls to former Pequot employees*

2001 was a turbulent year at Pequot. Many people left with Dan Benton to form Andor. Others simply left. Some appear to have been fired. Eric and I have frequently discussed questioning former Pequot employees. Of course, the closer they were to Samberg in June or July 2001, the better. One obvious candidate is ██████████ ██████████ Samberg's secretary in June and July of 2001. She left in mid-October 2001, which means she could have gone to Andor. Among other things, she kept his

daily calendar. There is a dilemma here: if we call former Pequot employees, they may not talk because of the confidentiality agreements they signed; if we take their testimony, they may get "lawyered up" by Fried Frank selections before they testify.

Mack Pequot Holdings		
		Current Investor
Fund/Managed Account	Client Name	in Fund?
Pequot Credit Opportunities Fund, L.P.	Christy K. Mack	Yes
Pequot Endowment Fund, L.P.	C.J. Mack Foundation	Yes
Pequot Healthcare Fund, L.P.	Christy K. Mack	Yes
Pequot Healthcare Venture Fund, L.P.	John J. Mack	Yes
Pequot Partners Fund, L.P.	John J. Mack	Yes
Pequot Private Equity Fund II, L.P.	Christy K. Mack	Yes
Pequot Private Equity Fund III, L.P.	C.J. Mack Foundation	Yes
Pequot Private Equity Fund III, L.P.	Christy K. Mack	Yes
Pequot Scout Fund, L.P.	Christy K. Mack	Yes
Pequot Special Opportunities Fund, L.P.	John J. Mack	Yes
Pequot Telecommunications and Media Fund, L.P.	Christy K. Mack	No
Pequot Telecommunications and Media Fund, L.P.	John J. Mack	No
Pequot Telecommunications and Media Offshore Fund, Inc.	C.J. Mack Foundation	No
Pequot Venture Partners II, L.P.	John J. Mack	Yes
Pequot Special Opportunities Fund II, L.P.	John J. Mack	Yes

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Samberg-Mack Key E-mails		
Date	Action	Description
12/23/00	Email JJM to AS	JJM to invest \$5 mil, possibly in scout, telecomm and h/c
02/13/01	Email JJM to AS	"Should Christy sell her Nelegity stock or keep it?"
02/13/01	Email AS to JJM	"Larry and I are keeping ours. Big things ahead."
04/11/01	AS Calendar Item	John Mack uses AJS office @PCNY
04/18/01	Email AS to Poch	JJM to use NY office for mtg "next Tuesday"
04/26/01	Email Jennings to AS	"JJM called, will try you at home tomorrow"
05/08/01	Email JJM to AS	JJM wants to put additional 5mil with PCM
05/09/01	Email AS to JJM	Asking JJM to put \$ into BabyC ("direct investment opp.")
05/11/01	Email AS to SC	JJM to put "\$mm to partners, and \$ into scout"
05/17/01	Email WC to AS	JJM wants to put 1 mil in co buying BabyC (healthtech)
05/19/01	Email JJM to AS	JJM confirms 1 mil in co buying BabyC
05/28/01	Email JS to AS	Should JS accept JJM +1 mil (2 mil total) even though surplus?
05/28/01	Email AS to JS	"I'd definitely take John's money."
05/28/01	Email AS to JS	"I'd definitely take John's money."
05/30/01	Dinner with J. Mack	JJM would be "great board member" re BabyC Acq. Co.
05/30/01	Email AS to Poch, Lentihan	Dinner at San Pietro, New York City
05/30/01	Email AS to JJM	JJM as board member for Freshstart?
06/04/01	AS dinner with JJM, McGinn	"Freshstart are very interested in you coming aboard"
06/20/01	Email D. Bucco to other admins	JJM hasn't received Freshstart materials yet
06/26/01	Email AS to Poch on 6/30	Earliest email mention of 07/19 JJM lunch re pyp hc
06/29/01	Email JP to AS	Presumed conversation between JJM and AS
06/30/01	Email Poch to AS	JJM to put \$6mil into Freshstart
06/30/01		"great call with John Mack last night."

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EXHIBIT NUMBER 18



DIVISION OF
ENFORCEMENT

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F St. NE, Mail Stop 4628
Washington, DC 20549

Jim Eichner
Staff Attorney
Telephone: (202) 551-4928
Facsimile: (202) 772-9238

October 20, 2005

VIA FAX AND REGULAR MAIL

Audrey Strauss, Esq.
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza
New York, NY 10004-1980

Re: In the Matter of Trading in Certain Securities, File No. HO-09818

Dear Ms. Strauss:

We appreciate the update you and Mr. Harnisch provided (in separate letters dated October 19, 2005) regarding the compliance of Pequot Capital Management ("Pequot") with the outstanding subpoenas it was issued in the above-referenced matter. I write to respond to the issues raised in the letters.

In your letter, you represent that Pequot has already produced eight months of Mr. Samberg's e-mail from non-exchange backup tapes for 2001 and that Pequot has been "unable to locate the non-exchange tape relevant to Mr. Samberg for one month in 2001." You propose providing the staff with Mr. Samberg's e-mail for the remaining three months of 2001, and restoring exchange databases from the non-exchange tapes for 2001 to determine whether they contain e-mail files for Mr. Samberg. Without prejudice to the staff's ability to request additional production from the non-exchange backup tapes, we accept your proposal. We do ask, however, that you identify the month covered by the tape Pequot is unable to locate.

We seek clarification of your representation regarding the production of e-mail from February 2005 to the present. Your letter states that you believe your productions "constitute substantial compliance with the subpoenas seeking email for February 2005 or later." We are unclear what "substantial compliance" means in this context. Please explain whether or not Pequot has produced all responsive e-mail from the period February 2005 to the present.

In regard to the Andor Capital Management tapes, we understand from Mr. Harnisch's letter that three of the six tapes were found to be duplicative of tapes already produced by Pequot, two did not contain e-mail from individual mailboxes and the final tape contained information that was not from the mailboxes or any individuals covered

SEC 00006765

by the staff's subpoena. Please let me know if we have misunderstood Pequot's representations on this issue. If we have understood them correctly, we agree that no further efforts are required in regard to these tapes.

With the exception of the issues discussed above and the subpoena that is not due until October 28, 2005, we understand that only the following documents have not been produced in response to the outstanding subpoenas: 1) a limited number of e-mails and hard copies that are being reviewed by counsel for individual defendants for privilege; 2) two sets of documents that were supposed to be released to the SEC database but were not; 3) approximately 8,800 documents from back up tapes and 19,636 documents from other sources that were marked in Fried Frank's databases for production but were not produced. Please let us know if we have correctly understood your representations on these issues.

As we have discussed previously, the staff requests the setting up of a protocol for the SEC On-Site database to obviate the need to re-search the entire database each time additional e-mails are added. Thus, we request that you freeze the current On-Site database as of November 1, 2005, that no additional e-mails be added to this database after that date, and that the current database be given a designation that includes the word "original" in the name. Furthermore, we request that after the date the current database is frozen, e-mails be produced every two weeks, rather than on a rolling basis, and that each such release be housed in its own database, and all such subsequent database be clearly labeled to indicate the time period they cover.

Please confirm by October 26, 2005 that these arrangements can be made in time to freeze the current database as of November 1, 2005. Also by October 26, 2005, please respond to the other issues raised by this letter including: 1) providing the month from 2001 for which Pequot is unable to locate the non-exchange tape; 2) stating when you will produce any responsive e-mail from the non-exchange backup tapes and the exchange databases from the non-exchange tapes; 3) clarifying the status of e-mail production from February 2005 to the present; 4) informing us when counsel for individual defendants will finish their privilege review; 5) stating when you will be releasing documents that were supposed to be released to the SEC database but were not; and 6) providing a timetable for the documents that were marked for production but were not produced.

There is one more issue I would like to draw to your attention. On September 13, 2005, Liban Jama wrote Mr. Harnisch pointing out that the assertions made in Fried Frank's letters regarding confidential treatment are inconsistent with the notice your client was given concerning the Commission's routine uses of information produced during investigations. However, you have continued to make these same assertions, including in both October 19, 2005 letters. We ask that you immediately revise your assertions to reflect the notice given to your client. Moreover, as stated in Mr. Jama's letter we will not be bound by the procedures set forth in your letter or any other letter

concerning the processing of requests for information in the staff's files. The staff will follow the Commission's procedures for processing such requests.

If you have any questions, please telephone me at (██████████) or Robert Hanson, Branch Chief, at ██████████

Sincerely,

Jim Eichner
Staff Attorney

cc: Kevin Harnisch, Esq.
Fried, Frank, Harris, Shriver
& Jacobson LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505

EXHIBIT NUMBER 19

1 UNITED STATES SECURITIES AND EXCHANGE COMMISSION

2

3 In the Matter of:)

4) File No. HO-09818-A

5 TRADING IN CERTAIN SECURITIES)

6 WITNESS: Arthur J. Samberg

7 PAGES: 1 through 168

8 PLACE: Securities and Exchange Commission

9 100 F. Street, N.E., Room 1590

10 Washington, D.C. 20549

11 DATE: Tuesday, June 7, 2005

12

13 The above-entitled matter came on for hearing, pursuant
14 to adjournment, at 10:22 a.m.

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24 Diversified Reporting Services, Inc.

25 (202) 467-9200

COPY

1 A That is also correct.

2 Q Do you recall any specific newspaper articles that
3 you read in July 2001 or before relating to Heller Financial?

4 A In preparation for testimony, as we discussed last
5 time, I have been shown articles that were written. I cannot
6 at this point remember if I saw those at the time or just in
7 preparation.

8 Q Do you recall any new facts at all since your
9 testimony on July -- excuse me -- May 3 regarding your
10 investment or the reasons for your investment in Heller
11 Financial in July of 2001?

12 A No, I do not.

13 MR. AGUIRRE: Can we go off the record for just a
14 moment.

15 (Whereupon, at 12:15 p.m., a luncheon recess was
16 taken.)

17 A F T E R N O O N S E S S I O N

18 1:29 p.m.

19 MR. AGUIRRE: We're back on the record. It is --
20 well, I've already said it's 1:29. We're back on the record.

21 EXAMINATION (Resumed)

22 BY MR. AGUIRRE:

23 Q Mr. Samberg, I would like to go over the reasons
24 that you purchased Heller Financial in July of 2001. I've
25 reviewed your prior testimony, and I would like to identify

1 those reasons succinctly one by one.

2 Would it be fair to say that one of the reasons
3 that you felt Heller was attractive in July 2001 was because
4 of the credit climate that existed in 2001, which was
5 favorable for Heller Financial?

6 A Yes. It would be.

7 Q Was another reason Heller's strong financial model?

8 A Yes.

9 Q Was another reason the speculation within the
10 industry that Heller could be involved in further
11 consolidation?

12 A Yes.

13 Q Was an additional reason the analyst reports that
14 described the attractiveness of the Heller franchise?

15 A I don't remember reading them, so it's hard for me
16 to answer decisively.

17 Q I'm going to show you an excerpt from your
18 testimony -- well, I'll just read you an excerpt of your
19 testimony.

20 MR. MARTIN: What page are you on?

21 MS. STRAUSS: What page, please?

22 MR. AGUIRRE: Page 67.

23 MR. MARTIN: I would request, if you would, if you
24 can start at the page actually where the area starts, at
25 page 65.

1 MR. AGUIRRE: Well, I really don't want to read two
2 pages into the record, Counsel.

3 MR. MARTIN: Well, I mean, you are asking him in
4 the very area of the question, and he's provided a very
5 cogent explanation. And you're only picking up a portion of
6 it.

7 MR. AGUIRRE: That's an objection that's noted.

8 MR. MARTIN: May he read his own testimony?

9 MR. AGUIRRE: I'm just going to ask him a question.
10 We're not going to delay it for that. If he cannot recall
11 the testimony, then we'll take it from there.

12 BY MR. AGUIRRE:

13 Q Do you recall saying that one of the factors was,
14 "There were also many analyst reports that described the
15 attractiveness of the franchise"? Does that sound familiar?

16 MS. STRAUSS: Could you please tell us what page
17 and what line you're reading from? I'm sorry, because I'm
18 not finding -- did you say page 67?

19 MR. MARTIN: Just a second. It's on the bottom of
20 66 and the top of 67.

21 BY MR. AGUIRRE:

22 Q Reading from the bottom of page 66 --

23 MS. STRAUSS: All right now. Thank you.

24 BY MR. AGUIRRE:

25 Q -- "There were also many analyst reports that

1 described the attractiveness of the franchise."

2 Does that sound familiar?

3 A Yes.

4 Q And did you also believe that the relative
5 performance of Heller Financial versus other financial stocks
6 was a factor?

7 A Yes.

8 Q Now, can you think of any other factors that I have
9 not mentioned that caused you to purchase Heller Financial in
10 July 2000?

11 A The ones you have mentioned, just so I'm clear, are
12 conditions of the credit markets, the financial model of the
13 company, the fact that it would -- it had been speculated on
14 that it would be a good part of another company, and the
15 stock action relative to other financial services stocks.

16 Q Yes. I just realized I skipped on in referring you
17 to the analyst reports. There was a second one. Analyst
18 reports that Heller was growing 10 percent, and it was
19 projected to continue that growth.

20 A That it had strong earnings in this environment.

21 Q Right.

22 A Yes. I can't think of any others.

23 MR. AGUIRRE: I'm going to ask that -- did we mark
24 this already? Oh, here it is.

25 (SEC Exhibit No. 19 was marked for

1 identification.)

2 BY MR. AGUIRRE:

3 Q I'm going to show you Exhibit 19, which is a packet
4 of information that was provided to me by your counsel. And
5 I was informed that this was information or the information
6 that you were shown regarding Heller Financial relating to
7 the time frame of July 2001.

8 MR. MARTIN: I just wonder if I could hear that
9 back because I think I may have missed something you said,
10 with all due respect.

11 MR. AGUIRRE: I can just say it again.

12 MR. MARTIN: Thank you.

13 BY MR. AGUIRRE:

14 Q I understand that these were documents, or were the
15 documents, that you were shown by your counsel relating to
16 Heller Financial in July of 2001.

17 A The documents related to my trading?

18 Q Well, no. No, these were not --

19 A Oh, there's more in here. I'm sorry. I'm looking
20 at the first page.

21 Q They were not related to your -- I do not believe
22 they were related to your trading. I believe these were
23 documents that --

24 A Well, this is. I'm sorry. I was focusing on the
25 first page. I don't know what's in this.

1 Q I requested documents from your counsel that you
2 were shown. I believe these were the documents that your
3 counsel gave me that were shown to you relating to the time
4 frame in question.

5 MR. MARTIN: I think your request was with respect
6 to -- and you can get the subpoena -- item C(5) that
7 refreshed the witness's recollection.

8 MR. AGUIRRE: I think that's probably a valid
9 amendment of my question, and I will incorporate it.

10 MR. MARTIN: Thank you.

11 THE WITNESS: And so I'm supposed to give you a yes
12 or no to -- I'm sorry. I'm getting confused. This a simple
13 question, but --

14 BY MR. AGUIRRE:

15 Q Yes. I've asked you to look at these questions,
16 and I'm telling you that these are documents that your
17 counsel has given to me and I understand were shown to you.

18 A Right.

19 Q I will have to see the subpoena myself, but I think
20 it did say that refreshed your recollection.

21 A I believe that is a true statement.

22 Q Now, did you read in these documents that the
23 credit climate in 2001 prior to the GE acquisition was
24 favorable for Heller?

25 A In these -- I'm sorry. When these -- when the

1 reports first came out in these documents?

2 Q No. I'm asking you: Did you read in these
3 documents -- do you recall reading in these documents that
4 the credit climate in July 2001 was favorable for Heller?

5 MS. STRAUSS: The witness's confusion is you're
6 asking whether he's read it recently in preparation. That's
7 what your question is?

8 BY MR. AGUIRRE:

9 Q Yes. When you considered it recently, did you read
10 in there -- let me pause for a second. I don't believe
11 you've seen any of these documents -- did you see any of
12 these documents in July 2001?

13 A I don't remember if I did or didn't.

14 Q So I'm asking you, when you saw these documents
15 recently, did you find information in there to the effect
16 that the time frame we're talking about, before July 2001,
17 was a favorable credit climate for Heller?

18 A I don't know.

19 Q I'd ask you to turn to the document titled "Equity
20 Research."

21 A Equity -- the Legg Mason report?

22 Q Yes. And I'm going to call your attention to the
23 second paragraph, and the third sentence in that paragraph.
24 "In addition, the weaker economic environment" --

25 A I'm sorry.

1 Q Can you find it there? After "CIT Group."

2 MR. MARTIN: I think it's the wrong page.

3 MR. AGUIRRE: I'm sorry.

4 MS. STRAUSS: Yes. I think we're all looking at
5 the first page.

6 MR. MARTIN: You said the first page.

7 MR. AGUIRRE: Oh, I'm sorry. It's the fourth page.

8 MS. STRAUSS: Maybe it would help if we could get
9 the Bates number to the page that you're --

10 BY MR. AGUIRRE:

11 Q Well, it's Bates 03685. And I'd call your
12 attention to the second paragraph after "Industry Overview."

13 A After or in that section?

14 Q In the middle of it, where it says, "In addition."

15 A In the section. I'm sorry. I thought you said
16 after. "In addition." Yes.

17 MS. STRAUSS: Maybe we could read this for the
18 record, the operative language that you're focusing on,
19 Mr. Aguirre.

20 MR. AGUIRRE: I was about to read it.

21 MS. STRAUSS: Okay. Thank you.

22 BY MR. AGUIRRE:

23 Q "In addition, the weaker economic environment has
24 created an opportunity for well-capitalized finance companies
25 such as Heller to take advantage of their wide-reaching

1 origination platform credit expertise and funding
2 capabilities to build market share, gain further scale,
3 increase efficiency, and cross-sell in order to generate
4 profitable quality growth, particularly as their primary
5 competitors, banks, deal with the greater than expected asset
6 quality problems and pull back under the scrutiny of nervous
7 regulators."

8 Is that essentially saying, sir, that the credit
9 climate was favorable for Heller at that time?

10 A Yes.

11 Q Now, the second point you made was that Heller had
12 a strong financial model. Correct?

13 A Uh-huh.

14 THE REPORTER: Is that yes?

15 THE WITNESS: Yes. Sorry.

16 BY MR. AGUIRRE:

17 Q What do you mean by a strong financial model?

18 A The company had been in the -- started as an
19 account's receivable factoring company. Had many sales people
20 in offices that called on medium-sized companies. And in
21 times of distress, people had to use -- had to use inventory
22 and receivables financing to provide liquidity when banks
23 pulled back C&I lending.

24 And they had a great gathering mechanism. They had
25 a great reputation in the industry. They were associated

1 with the business. That's what I meant.

2 Q Do you have in mind what was said in the Legg Mason
3 report relating to that?

4 A Yeah.

5 Q I'm calling your attention to the first page.

6 MR. MARTIN: Of the Legg Mason report?

7 MR. AGUIRRE: Yes.

8 MR. MARTIN: Bates number?

9 MR. AGUIRRE: 3682.

10 BY MR. AGUIRRE:

11 Q Now, let me first try to isolate what you've just
12 described from what you described earlier. In the prior
13 question, I was asking about the credit climate at that time.
14 Now I'm asking you about the financial model of Heller
15 Financial.

16 A Okay.

17 Q And do you distinguish between the financial model
18 and -- let me withdraw that.

19 If you would, how would you describe how you
20 distinguish in your mind between Heller's ability to deal
21 with the credit climate in July 2001 and having a strong
22 financial model?

23 A How do I differentiate between the climate and
24 their approach to the business?

25 Q Well, we had among the factors that Heller -- that

1 we had identified the fact that the credit climate in July
2 2001 was favorable for Heller, given its business. And that
3 was the first factor that I just described.

4 A Right.

5 Q Now I'm trying to isolate what the second factor
6 is. And so I'm asking if you can distinguish that second
7 factor from the first factor so we don't blur them together.

8 A In my mind, it's one of focus. The other players
9 in the market were either banks, who had a variety of
10 different businesses, or other financial services companies,
11 that had specialized in sub-prime auto loans and other things
12 that were not focused in this company's breadbasket.

13 By focusing on -- well, the companies that paid did
14 focus on, and by devoting all of their resources to that
15 market, I thought they had better marketing, better sourcing
16 of deals. They had a capital structure that was appropriate
17 to the risks inherent in this business.

18 So I think the whole company was oriented towards
19 doing business in that environment, whereas other companies
20 were spread across many different businesses and therefore
21 their financial characteristics were different.

22 Q So they were focused on certain --

23 A Asset-based lending businesses.

24 Q Not the full spectrum, but specific areas within
25 there. Is that correct?

1 A To my knowledge. I am not the ultimate expert on
2 all the businesses they were in. They were well known for
3 inventory and receivable financing.

4 Q And aren't those very special focuses of Heller
5 Financial described beginning on page 13 under "Business Line
6 Overview," specifically the focus on corporate finance?

7 A Where are we, now?

8 Q Page 13.

9 A Of this report?

10 Q Yes.

11 MS. STRAUSS: What Bates number is that, please?

12 MR. AGUIRRE: 03694.

13 BY MR. AGUIRRE:

14 Q I believe it describes the focused areas in which
15 Heller was engaged, the first one being corporate finance.

16 A Corporate finance, right.

17 Q The second one on the next page being leasing.

18 A Asset-based. Right.

19 Q In short, sir, just to keep the question simple,
20 aren't you simply telling us what was described on pages 13,

21 14 --

22 A I'm describing what the business was.

23 Q -- and 15? All right. And that's what's done on
24 pages 13, 14, and 15 in this report, is it not, sir?

25 A I just told you what the businesses were.

1 Q And, sir, isn't that what's described on pages 13,
2 14, and 15?

3 A I don't know. I've only read one paragraph on one
4 page. Should I read all of it?

5 Q As you'd like, sir.

6 A (The witness examined the document.)

7 MR. MARTIN: This is missing pages, this copy.

8 MS. STRAUSS: Mine as well. I don't know
9 whether -- mine goes from 03694 to 03697. We're missing
10 pages 14 and 15.

11 MR. AGUIRRE: I recognize that, so I'll let you
12 have mine. Let me know the pages that you're missing.

13 THE WITNESS: We're missing pages 14 and 15.

14 MR. AGUIRRE: Now, for the record, you're talking
15 about the copies of --

16 MS. STRAUSS: 03695 and 03696. Our copy goes from
17 PCMAJS-03694 directly to 03697.

18 MR. AGUIRRE: Yeah. I'm going to mark this. Let's
19 have this marked as an exhibit instead and we'll just use
20 mine. Keep the same number. You know what? Let's make that
21 19A. Why don't you make it 19A.

22 (SEC Exhibit No. 19A was marked for
23 identification.)

24 BY MR. AGUIRRE:

25 Q Now if you'll turn to page 13 --

1 THE WITNESS: What do we start on?
2 MS. STRAUSS: We start on 03694.
3 BY MR. AGUIRRE:
4 Q Sir, this is the one I'd like you to use. May I
5 see that one?
6 A Sure.
7 MS. STRAUSS: Here, "Business Line Overview."
8 THE WITNESS: Right. (The witness examined the
9 document.)
10 Actually, I left some things out.
11 BY MR. AGUIRRE:
12 Q I'm sorry, sir?
13 A I left some things out. They're in leasing
14 services. They were invested in over 600 private -- funded
15 investments spread across 80 private equity funds. But in
16 general, yeah, this is much more detailed than what I said.
17 Q So it covered what you said?
18 A In much more detail.
19 Q Now, do you recall reading in the materials that
20 comprised Exhibit 19 any information about the speculation
21 that Heller would be involved in an acquisition?
22 A Do I remember reading --
23 Q All of these questions I'm asking you now are --
24 A In conjunction with --
25 Q The documents that were shown to you by your

1 counsel. And I'm asking you, in reading these documents, did
2 you come across materials that described the possibility that
3 Heller would be acquired specifically by GE?

4 A Yeah. And at the first testimony, I read the
5 headline of the Wall Street Journal article into the record.

6 Q And I'm simply saying to you, sir, that that was
7 shown to you by your counsel before you testified.

8 A As we -- yes.

9 Q Now, Exhibit 19, the -- 19A also describes the
10 attractiveness of the Heller franchise in exactly those
11 terms. Correct, sir?

12 A It does.

13 Q Now, Exhibit 19 also included documents relating to
14 the performance of Heller from September 2000 to August 31,
15 2001, did it not, sir?

16 MR. MARTIN: By the word "performance," you mean
17 stock prices?

18 MR. AGUIRRE: Stock prices, yes.

19 THE WITNESS: Yes.

20 BY MR. AGUIRRE:

21 Q Now, can you think of anything that you have
22 testified to regarding your reasons for purchasing Heller in
23 July 2001 that was not contained in the documents shown to
24 you by your counsel before you testified the last time?

25 A I'm sorry. Say that so I can completely

1 understand --

2 Q Can you think of any reason that you brought Heller
3 in July 2001 that was not discussed in the documents shown to
4 you by your counsel before you testified in May 3?

5 A I can talk to the backdrop of what was going on at
6 that point. I can talk to the fact that I was an advisory
7 director of a hedge fund, which I alluded to last time,
8 called Second Curve, which strictly invested in financial
9 services securities. That on that board were the founders of
10 Capital One, and on that board was the Fed Reserve chairman.

11 That I had many conversations in this area with
12 many people. I don't remember all of those things, but they
13 were part of a mosaic and a framework of knowledge that I had
14 in that industry.

15 I can attest to the fact, as I mentioned the last
16 time, that because of what was happening in credit markets,
17 we started a distressed debt fund at Pequot within six months
18 of this. And I had been actively seeking managers for that
19 fund, so I understood the credit markets.

20 I can attest to the fact that I consider myself a
21 highly regarding figure in the investment world who
22 understands the workings of many markets. So I don't know
23 everything that I knew that, but I had a deep knowledge of
24 the -- I had a good knowledge of the area. Not a deep
25 knowledge, a good knowledge of the area.

1 MR. AGUIRRE: May I have that answer read back,
2 please?

3 (The reporter read back the question.)

4 MR. MARTIN: Mr. Aguirre, could the witness just
5 merely correct, as he indicated he misspoke when he made
6 reference to the Federal Reserve chairman, but he intended to
7 indicate member.

8 THE WITNESS: Was a member of the Richmond Fed.
9 And there are other figures.

10 BY MR. AGUIRRE:

11 Q Now, when you testified on May 3 and I asked you
12 the question, why did you buy Heller, you did not mention
13 either item 1 or item 2, did you, sir?

14 MS. STRAUSS: What is item 1 and what is item 2,
15 Mr. Aguirre?

16 MR. AGUIRRE: Item 1 is the advisory -- being on
17 the advisory board of Second Curve.

18 MS. STRAUSS: That is in the testimony,
19 Mr. Aguirre. It's in the testimony.

20 MR. AGUIRRE: Listen to my question.

21 BY MR. AGUIRRE:

22 Q My question was not whether it's in the testimony.
23 I'm going to come to that. My question was, when I asked you
24 the reasons that you bought Heller Financial -- would you
25 like to take a look? I'll have you take a look at it.

1 Now, on page 66, I asked you the question: "I
2 would like for you to tell us, sir, in whatever manner you
3 feel comfortable how you made the decision that PCM should
4 invest in Heller Financial in July 2001."

5 Now, would you take a look at that and read your
6 answer and see if you see a reference in your answer to
7 Second Curve.

8 A (The witness examined the document.)

9 MR. AGUIRRE: I know where he testified about
10 Second Curve and we're going to cover it in a moment, but
11 it's not here.

12 MS. STRAUSS: I would just, Mr. Aguirre, object for
13 the record to referencing one part of a witness's testimony,
14 directing their attention to it, and suggesting that --

15 MR. AGUIRRE: Don't --

16 MS. STRAUSS: If I may just make my objection. You
17 may do whatever you want in response to it.

18 MR. AGUIRRE: So long as it's not a speaking
19 objection.

20 MS. STRAUSS: I'm just making an objection for the
21 record, that I think for the witness to be directed to one
22 part of the testimony and not to another part that references
23 the very thing that you're asking about --

24 MR. AGUIRRE: Your objection is noted.

25 MS. STRAUSS: I hadn't finished my objection.

1 THE WITNESS: What is the exact question?

2 BY MR. AGUIRRE:

3 Q When I asked you what the factors were that I just
4 read to you, did you describe your experience on Second --
5 with Second Curve on the board of directors?

6 A I thought we were talking about the answer to this
7 question. Now --

8 Q Yes. Did you refer to Second Curve?

9 A You asked me, in whatever manner I feel
10 comfortable, how made the decision that PCM should invest in
11 Heller Financial in 2001.

12 Q Right.

13 A Right. So I listed a number of things that were
14 specific to the financial industry. I mentioned things that
15 were specific to Heller. At a later point, which I guess you
16 will get to, I talked about knowledge I had of the industry
17 through my participation in markets.

18 Those are different, in my mind -- perhaps not
19 yours, and perhaps I'm misinterpreting those -- than the
20 specific decision-making process that went -- that I think
21 went on in my mind to buy Heller. That was more of an
22 environmental situation.

23 So I don't see any inconsistency, at any rate.
24 That's the way I read this testimony.

25 Q Now, you did describe two people, I believe, that

1 were on the board of Second Curve when you testified last
2 time as people that you could have spoken with. Is that
3 correct?

4 A I don't know. I'd have to read it.

5 Q Do you recall as you sit there ever speaking with
6 either individual -- any of the individuals on Second Curve
7 regarding your investment in Heller Financial?

8 A I do not.

9 Q Was there ever a discussion of Heller Financial at
10 any of the meetings of Second Curve?

11 A I don't recall.

12 Q How often did you attend Second Curve meetings?

13 A Quarterly.

14 Q Now, do you recall that there were two employees
15 that had previously been with Pequot that were on the board
16 of Second Curve?

17 A There was one.

18 Q And what was her name?

19 A Not on the board.

20 Q That were employed by Second Curve?

21 A It was a he, not a she.

22 Q Well, what was his name?

23 A Celil Matah.

24 Q Did you ever talk with Mr. Matah about Heller
25 Financial?

1 A Not to my knowledge.

2 Q Now, can you tell us anything specific about your
3 experience on the board of Second Curve that related to the
4 decision that you made to invest in Heller Financial?

5 A Specific?

6 Q Specific?

7 A No.

8 Q Now, the second item you mentioned was that you
9 were becoming involved in a distress-related fund within six
10 months after your decision to invest in Heller Financial.

11 Correct?

12 A Correct.

13 Q Do you recall the first moment that you began to
14 look at that -- those credit markets for this fund?

15 A At those credit markets for this fund?

16 Q Well, when did you first begin to consider this
17 fund?

18 A I can't answer that with any great accuracy.

19 Q Does the phrase "distressed guys" bring anything
20 back to you? Distressed guys?

21 A Distressed guys?

22 Q Yeah.

23 A What do you mean by that?

24 Q Well, it's a phrase that appears in your e-mail,
25 sir. Does that refresh your -- do you ever recall referring

1 to distressed guys?

2 A That's too vague.

3 Q Who was involved in this fund, the fund that you're
4 talking about?

5 A Who was or who is?

6 Q Who was at that time? Who was first involved with
7 this fund that related to credit markets?

8 A I hired two gentlemen to start a distressed debt
9 fund at Pequot. I don't remember exactly when I started
10 talking to them, but my memory is that it was in the fourth
11 quarter, maybe the end of the third quarter/beginning of the
12 fourth quarter of 2001.

13 The gentlemen's names; who are still Pequot
14 employees, having very successfully invested in distress and
15 having raised a second fund, are Robert Webster and Paul
16 Mellinger.

17 Q So this was -- you began looking at this fund at
18 what point in time?

19 A I began thinking about this fund earlier in 2001.

20 Q Did you have any communications with anybody at
21 Pequot regarding this new fund?

22 A Yes.

23 Q Who was involved in it?

24 A The executive committee of the firm.

25 Q And who are they?

1 A It's been reconstituted. I will have to think
2 here. There was Mark Broach. There was Larry Lenihan.
3 There were other people who met them -- Jerry Shendell. I
4 believe Kevin O'Brien. That's all I can remember.

5 Q Was Peter Dartley involved?

6 A I think he was.

7 Q Who were the people that you brought in externally
8 to do the distress fund?

9 A Robert Webster and Paul Mellinger.

10 Q And that was in late '01?

11 A Correct.

12 Q Would it have been as early as October of '01?

13 A I don't believe so, but it might have been. That's
14 easy to ascertain.

15 MR. AGUIRRE: I'm going to have marked as
16 Exhibit 20 a document, an e-mail from Mr. Samberg dated
17 June 30th to Jerry Poch.

18 (SEC Exhibit No. 20 was marked for
19 identification.)

20 BY MR. AGUIRRE:

21 Q I'm going to ask you if this was the beginning of
22 your consideration or whether -- let me withdraw that.

23 You refer in the first paragraph to "I'd really
24 like you to meet the distressed guys I've uncovered."

25 Now, to whom were you referring?

1 A I'd have to check my calendar. Perhaps I was
2 talking to them as early as June 30.

3 MR. AGUIRRE: I'd like to have marked as Exhibit 21
4 another e-mail from Mr. Samberg to most of the people that
5 you just identified a moment ago, sir -- that's for your
6 counsel. This one is for you, sir -- dated July 2nd.

7 (SEC Exhibit No. 21 was marked for
8 identification.)

9 THE WITNESS: It looks like I was a quarter off,
10 doesn't it?

11 BY MR. AGUIRRE:

12 Q So this is the beginning of your contacts
13 internally, is it not, sir, with --

14 A It appears to be.

15 Q Now, this e-mail is dated July 2nd. That's the
16 same day that you began to trade Heller Financial. Correct,
17 sir?

18 A I guess so.

19 Q Well, you remember that, do you need, sir?

20 A I remember that by looking at the sheet.

21 Q It states, "It looks like the best day to meet the
22 distressed guys I talked about will be in New York on
23 Thursday, July 19th. If you can't make a meeting on that
24 day, please let Wendy know. I will try to get some info on
25 them before we meet."

1 That was your e-mail, was it not, sir?

2 A Yes, sir.

3 Q Now, this went to Mr. Broach. Correct?

4 A Yes.

5 Q You were asking him for your help in connection
6 with this new fund, were you not?

7 A No.

8 Q No? Why were you asking him to meet with them?

9 A It was far more complex.

10 Q Well, tell us then why you wanted Mr. Broach to
11 meet the distressed guys in New York on July 19th and take
12 him away from what he was normally doing?

13 A My firm was going to split in three months. These
14 people were my other managing director partners. Times were
15 fragile. I needed their approval to do whatever I wanted to
16 do or they might walk. So I wanted them to meet anybody that
17 I was interested in talking to to building out the platform.

18 Did I really want their help? That's an open
19 discussion. But I did need their approval or their
20 consensus. So I was trying to build consensus.

21 Q Now, is everyone on this list on your executive
22 committee?

23 A No. We formed it recently. They were all managing
24 directors. They were the remaining -- are there eight of
25 them, or seven, without me? One, two, three, four, five,

1 six, seven -- those are the remaining managing directors in
2 Pequot going forward, besides myself.

3 Q Mr. Dartley was a managing director?

4 A He was.

5 Q Did they meet with the distressed guys?

6 A I don't remember who met with them. I know
7 Mr. Lenihan did. I believe Mr. Dartley did. And I have no
8 recollection -- I'm not saying they didn't, but I remember
9 those two meeting with them. I remember Mr. Lenihan met with
10 them out in Los Angeles.

11 Q Had you normally -- let me withdraw that.

12 And this new fund was something you had been
13 thinking about for a while?

14 A Correct.

15 Q Had you discussed it with anyone, any of the
16 individuals listed here, before June 30th of 2001?

17 A I don't remember.

18 Q So I'm going to come back to my question that I'd
19 addressed to you a few minutes ago, sir. Is there -- I'm
20 going to phrase it this way: Can you think of any specific
21 information relating to Heller Financial that was on your
22 mind in July 2001 when you began buying Heller Financial that
23 was not contained in Exhibit 19 that I just showed you?

24 A I'm sorry. We've shifted course. I thought we --
25 could you repeat the question, please?

1 Q Sure. I'm asking you: Is there any specific
2 information regarding Heller Financial that you say caused
3 you to purchase Heller Financial in July 2001 that was not
4 contained in the information shown to your counsel that we've
5 just gone over?

6 A Not that I can recall.

7 Q Now, sir, in part you considered the analyst report
8 that -- analyst reports, as I understand, that you saw back
9 in July 2001. Is that correct?

10 A Is there more than one?

11 Q Let me pause for a second. Your testimony is that
12 you saw some reports back in July 2001, or before, that you
13 considered when you purchased Heller Financial.

14 A I know. But you gave me a packet where there was
15 one. So I can testify to this because I've seen it. I'm not
16 sure I understand when or -- I said reports?

17 Q Let me try to clarify it because I think it needs
18 clarification.

19 Are you aware of ever seeing Exhibit 19A, the Legg
20 Mason report, before it was shown to you by your counsel
21 recently?

22 A I don't remember. This came into our possession
23 because Mr. Sokol, who wrote the report, subsequently was
24 employed by Pequot, as I think you know. And it was in his
25 employee file.

1 Q And that was long after you purchased the stock in
2 Heller Financial. Correct, sir?

3 A That is correct. So I don't know if I read it when
4 it came out or I don't know if I read it in conjunction with
5 this. I certainly read it in conjunction with this.

6 Q How do you normally receive analysts' reports, sell
7 side reports?

8 A Either it's a written or an e-mail form.

9 Q Are they more -- do you do research on First Call
10 yourself?

11 A No. Rarely.

12 Q Is it customary for you to receive these reports by
13 e-mail?

14 A Yes.

15 Q Have you seen this report in any e-mail dated
16 before July 30, 2001?

17 A I don't recall seeing it.

18 Q Do you have a high regard for sell side analysts?

19 A I have a high regard for them as people. I don't
20 have a high regard for using their reports to make investment
21 decisions.

22 Q It would have been very unusual for you to rely on
23 a sell side report, would it not, in making an investment
24 decision?

25 A Historically, that is true.

1 Q In fact, isn't it true, sir, that you don't think
2 they're worth a damn?

3 A In general, I don't think their reports are worth a
4 damn. The people can be, but not the reports.

5 Q Right. And you've made that statement publicly,
6 have you not?

7 A I have.

8 Q Sell side reports are not worth a damn?

9 A And I've very proudly built up one of the best
10 research departments in the business at Pequot as a
11 consequence of your statement.

12 Q You were, were you not, an analyst yourself for a
13 period in your career?

14 A I absolutely was. Proud of it.

15 Q Do you remember telling Fortune Magazine in October
16 1998 that the analysts don't believe Wall Street research is
17 worth a damn?

18 A And I think I was proven correct over the next
19 three years.

20 Q So this is -- Exhibit 19A is sell side research, is
21 it not, sir?

22 A Sure is.

23 Q Exactly what you said isn't worth a damn. Correct?

24 A You bet.

25 Q So is it fair to say that the research you saw in

1 July 2001 about Heller Financial also wasn't worth a damn?

2 A I really don't know what I saw.

3 Q But in general, it wasn't worth a damn, was it,
4 sir?

5 A I don't understand why you're applying it to that
6 time period. I think the record is clear. I don't believe
7 in sell side research as a way to manage money in a fiduciary
8 way for other people.

9 Q Can you remember anything unique about the research
10 you saw in July 2001 that --

11 A No.

12 Q Can you think of any reason why this one should
13 have been considered, whereas your basic opinion is it isn't
14 worth a damn?

15 A I don't know if it was.

16 Q I'm just asking.

17 A It seems to be a very good report.

18 Q I'm not asking you about this report, sir, because
19 there's no evidence that you ever saw this report. Okay?

20 A Correct.

21 Q I'm asking you about the reports that you say you
22 saw in July 2001.

23 A I say I saw? You said, how do I normally receive
24 reports. I believe I answered, in hard copy or in e-mail
25 form. I didn't say I read them. I didn't say anything about

1 them.

2 Q So you don't recall seeing any reports in July
3 2001. Is that correct?

4 A Seeing any -- no. I don't remember seeing any
5 specific report in July '01.

6 Q And of course we're talking about Heller Financial.
7 Correct?

8 A I'm talking in general. I don't remember anything
9 about July '01 when it comes to research reports.

10 Q You don't remember seeing anything in July 2001
11 that related to Heller Financial. Is that correct, sir?

12 A I don't recall seeing anything about Heller
13 Financial in July of 2001.

14 Q Now, do you recall purchasing GE in July 2001?

15 A No.

16 Q Do you remember selling GE in July of 2001?

17 A No.

18 Q Do you remember shorting GE in July 2001?

19 A No.

20 MR. AGUIRRE: I'd like to have a portion of the
21 trade blotter produced by Pequot Capital Management in this
22 matter relating to trading in GE in 2001 marked as next in
23 order.

24 (SEC Exhibit No. 22 was marked for
25 identification.)

315

EXHIBIT NUMBER 20

UNITED STATES SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

-----	x	
	:	
In the Matter of:	:	
	:	
TRADING IN CERTAIN SECURITIES,	:	Number HO-9818
and SEC's TERMINATION OF EMPLOYMENT	:	
OF GARY AGUIRRE	:	
	:	
-----	x	

Friday,
September 1, 2006

The interview of Jim Eichner, Staff Attorney,
Enforcement Division, SEC, was convened, pursuant to
notice, at 10:00 a.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, Esq.
Investigative Counsel
U.S. Senate Committee on Finance

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Counsel to the SEC Chairman

SAMUEL M. FORSTEIN
ASSISTANT GENERAL COUNSEL
SECURITIES AND EXCHANGE COMMISSION

JIM EICHNER
Staff Attorney, Enforcement Division
Securities and Exchange Commission

1 wasn't asked about them collectively. And so, the
2 discussion --

3 MR. FOSTER: Focus on Heller.

4 MR. EICHNER: Okay. The discussion about Heller
5 that I remember was that he had a belief that the banking
6 stocks in the financial sector were going to be hot or
7 profitable and that it was based on that and that his
8 firm was undergoing a lot of change at the time and they
9 were looking for new areas to get into. Now, some of
10 that was sort of -- there was an issue where -- sort of
11 the first testimony that I wasn't at, but that I would
12 review the transcript, he didn't have much of an answer
13 as to why he bought Heller. And then, at the second
14 testimony he had more of an answer. And so, that to me
15 was significant. But what I'm saying is for his answer
16 as of the second testimony.

17 MR. FOSTER: Okay. Would you take a look at the
18 exhibit now?

19 MR. EICHNER: Sure.

20 MR. FOSTER: This would be Exhibit 2.

21 (Whereupon, the documents referred to
22 as Exhibit 2 were marked for
23 identification.)

24 If you could please look at the second page, SEC
25 872.

26 MR. EICHNER: Okay. Can I take a look at it first?

1 MR. FOSTER: Sure. Just take your time. This is
2 an email from Gary Aguirre, Monday, June 27, 2005 to
3 Robert Hanson, cc to Mark Kreitman and to Eric Ribelin;
4 subject, Samberg's trading in HF and GE. I'd
5 particularly like to call your attention to the top of
6 the second page. This is --

7 MR. EICHNER: I'm sorry, I'm still just reading the
8 first page. Okay.

9 MR. FOSTER: At the top of the second page sub-
10 point A, just to refresh your recollection on the reasons
11 that were given for -- that Mr. Samberg gave during his
12 testimony.

13 MR. EICHNER: Right.

14 MR. FOSTER: Now, is it your understanding that
15 these were the reasons he gave during his first testimony
16 or during his second testimony?

17 MR. EICHNER: There's a reference here to spoon-
18 feeding him by the attorneys and I think there was a --
19 as I said, I thought that a lot of this came at the
20 second testimony and there was a sense that he had --
21 that it was at the second testimony when he had a chance
22 to prepare and it seemed reasonable to think that he had
23 sort of -- I mean, spoon-fed is not, in my mind, an
24 inaccurate characterization.

25 MR. FOSTER: Okay. And in this summary of the
26 evidence Mr. Aguirre contends that he was able to

1 demonstrate that his lawyers had provided him with
2 documents which contained each of these six data points
3 that are listed under A there. Is that correct? I'm
4 just trying to verify the representations that Mr.
5 Aguirre has made.

6 MR. EICHNER: I think -- I mean, demonstrate
7 conclusively, but I think that's a fair assumption that
8 -- I mean, if you ask me what I thought, I would say that
9 Samberg was spoon-fed this information after the fact by
10 his attorneys. I think Gary was right on that, but I'm
11 just --

12 MR. FOSTER: And in fact, in point D he actually
13 cites the testimony where Mr. Samberg admits that he had
14 not seen the documents which cited those six reasons by
15 the time he made the trades.

16 MR. EICHNER: Right. There was a Legg Mason report
17 that these reasons were in. And so, I think that's the
18 report you're talking about.

19 MR. FOSTER: Yes.

20 MR. EICHNER: I think that's entirely correct, that
21 Mr. Samberg had a suspiciously clearer recollection in
22 the second examination than he did in the first about
23 Heller.

24 MR. FOSTER: And is it accurate to say that Mr.
25 Aguirre was able to establish in that deposition that his
26 lawyers had provided him with those exact

1 rationalizations after the fact, after the trade -- years
2 after the trades?

3 MR. EICHNER: Yeah, I think -- as I said, I think
4 that was established in the second testimony, and Gary
5 took the testimony, so.

6 MR. FOSTER: Yes. If you look at the first page,
7 the third paragraph goes through and summarizes various
8 characterizations of the evidence by Mr. Aguirre, and I
9 just want to ask you if your understanding is that these
10 representations are accurate? Is it true that Samberg
11 attempted buy 223,700 shares of Heller on July 2, 2001
12 but was only able to fill an order for 100,000 shares?

13 MR. EICHNER: Are you asking me what I knew during
14 Gary's tenor or at any point?

15 MR. FOSTER: I'm asking you what's true.

16 MR. EICHNER: Okay. I don't -- generally, I know
17 that this is correct and I have no reason to believe the
18 numbers are wrong, but I don't have the specific numbers,
19 but there was a pattern of Mr. Samberg directing his
20 chief trader to buy blocks of Heller and those not being
21 completely filled.

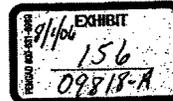
22 MR. FOSTER: And they weren't completely filled
23 because there simply wasn't enough volume that day to
24 fill that large of an order?

25 MR. EICHNER: I don't -- I think it was -- well,
26 the explanation that was given, which I credit, is that

EXHIBIT NUMBER 21

From: Samberg, Art
Sent: Friday, May 11, 2001 2:31 PM
To: Clancy, Sheila

john mack would like to put \$5mm into partners at the 1st available opening. he'd also like to put more \$ into scout, if that's possible, and would like a recap of what he has where. you want to call him?



PCM-06-125553

SEC 0003742

EXHIBIT NUMBER 22

From: Samberg, Art
Sent: Wednesday, June 20, 2001 9:22 PM
To: Poch, Jerry
Subject: RE:

Wow - didn't know anything about [redacted]. I'm getting very involved with parkinson's through the michael fox fdn, so if there is anything I can do let me know.

I know next mon is crazy, but if there is some way we can squeeze john and rich into the calendar I think it would be very much worth it.

I became concerned about the endowment funds ability to do the \$15mm when I realized that all the watchmark and tellium had gone into that acct. Let's talk tomorrow about alternatives.

-----Original Message-----

From: Poch, Jerry
To: Samberg, Art
Sent: Wed Jun 20 19:53:19 2001
Subject: RE:

first, i know by now that john loves to bust your chops. second, we didn't forget john, we just wanted to send him the most accurate cut of the nbs and the buss. marty and i are there tomorrow afternoon and we should have info to john's house by sat. third, i need your help tomorrow since acctng says you can only do 10mm instead of 15mm--help-this is serious. fourth, yeh i'd love to hear about a new fund. and finally and i know you have lived thru this with [redacted] he was incredible [redacted]

[redacted] so, we get up everyday and make things happen and are thankful!!!!!!!!!!!!!!!!!!!!!!

-----Original Message-----

From: Samberg, Art
Sent: Wednesday, June 20, 2001 7:41 PM
To: Poch, Jerry
Subject:

I'm sitting here with john mack and rich mcginn and john is busting my chops cuz he hasn't gotten the freshstart material yet. True? Btw, they've got an idea for a fund that could be fantastic. Can we set up a mtng next tues?

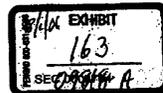


EXHIBIT NUMBER 23

MR. NATHAN MORRIS
Professional Staff Member

MS. STEPHANIE MIDDLETON
U.S. Committee on the Judiciary

MS. JANE COBB
Director
Office of Legal Affairs

MR. SAMUEL M. FORSTEIN
Assistant General Counsel
Litigation and Administrative Practice
U.S. Securities and Exchange Commission

MR. JOSEPH J. CELLA, III
Chief, Office of Market Surveillance
Division of Enforcement
U.S. Securities and Exchange Commission

1 MR. CELLA: Joseph Cella, C-E-L-L-A, Division of
2 Enforcement at the SEC.

3 MR. KIM: That is just one L?

4 MR. CELLA: Two.

5 MR. KIM: C-E-L-L-A. Okay. Mr. Cell, can you tell
6 us what your current position is at the Securities and
7 Exchange Commission?

8 MR. CELLA: I am the Chief of the Office of Market
9 Surveillance in the Division of Enforcement.

10 MR. KIM: How long have you held that?

11 MR. CELLA: Since July of 1994.

12 MR. KIM: And where were you before July of 1994?

13 MR. CELLA: For approximately a year and a half, I
14 was the Deputy Chief of the Office of Market Surveillance
15 at the Division of Enforcement. Prior to that, for three
16 years I was the Co-Director of Compliance at Jeffries and
17 Company in Los Angeles, a registered broker dealer.

18 MR. KIM: Can you tell us what market surveillance
19 does within the confines of the SEC? What are its
20 responsibilities and duties?

21 MR. CELLA: We have several principle
22 responsibilities. The primary responsibility is to be
23 the principal point of contact between the enforcement
24 program at the SEC and the Market Surveillance
25 departments at the various marketplaces in the United

1 members of his branch working on it.

2 MR. KEMERER: How long have you known Mr. Ribelin?

3 MR. CELLA: Since 1992.

4 MR. KEMERER: Do you find him to be a contentious
5 employee?

6 MR. CELLA: Yes, I do.

7 MR. KEMERER: Is Mr. Ribelin truthful and honest in
8 your opinion?

9 MR. CELLA: He is.

10 MR. KEMERER: Has Mr. Ribelin given into
11 unprofessional outbursts?

12 MR. CELLA: No.

13 MR. KIM: Do you have any reason to believe that he
14 is not credible?

15 MR. CELLA: No.

16 MR. KEMERER: Has Mr. Ribelin ever asked to be
17 removed from a particular investigation?

18 MR. CELLA: Yes.

19 MR. KEMERER: How many different investigations has
20 he asked to be removed from?

21 MR. CELLA: One that I'm aware of.

22 MR. KEMERER: Was that investigation concerning
23 Pequot?

24 MR. CELLA: Yes, it was.

25 MR. KEMERER: Did he give you the reasons why he

1 in which he explained to you that his attempts to take
2 Mr. Mack's testimony were being squelched by people above
3 him in the chain of command?

4 MR. CELLA: I don't remember that specifically.

5 MR. FOSTER: Do you recall something similar?

6 MR. CELLA: No. What I recall is that at some
7 point, and it was probably in this time frame, Gary had
8 prepared some memo in which he laid out some facts which
9 supported his contention that Mack should be brought in.

10 I think I had a conversation with him about the
11 contents of that memo at some point, but I couldn't tell
12 you when that was.

13 MR. FOSTER: Did you express an opinion to him
14 about the ultimate issue of whether Mr. Mack's testimony
15 should be taken?

16 MR. CELLA: I believe I did.

17 MR. FOSTER: And what was that?

18 MR. CELLA: I didn't think that there was anything
19 wrong with bringing Mack in.

20 MR. KEMERER: Who is John Mack? Just to clarify.

21 MR. CELLA: Well, a former head of a major
22 brokerage firm. I think he's a current head of a major
23 brokerage firm. He may have been in transition at this
24 period of time. He had some relationship with Pequot as
25 an investor, I believe.

1 MR. CELLA: I don't recall how specifically. It
2 seemed to me that it was a reasonable thing to do to
3 bring Mack in and have him testify.

4 MR. FOSTER: Were you aware of anyone else within
5 SEC staff raising objections to bringing Mack in?

6 MR. CELLA: At any time?

7 MR. FOSTER: Yes.

8 MR. CELLA: Yes.

9 MR. FOSTER: And who and what were the objections?

10 MR. CELLA: Bob Hanson and Mark Kreitman.

11 MR. FOSTER: And what was your understanding of why
12 they did not want to bring in Mr. Mack?

13 MR. CELLA: I had a conversation with the two of
14 them about the issue in Mark's office. They explained at
15 that point in time they were unable to put the material
16 of public information in their hands. They had really
17 nothing to confront him with other than the fact that he
18 had a business and personal relationship with Samberg.

19 While bringing him in was a distinct possibility, at
20 that time it was not in their view tactically the right
21 thing to do. And I understood that.

22 MR. FOSTER: That conversation occurred before or
23 after you expressed your view to Mr. Aguirre?

24 MR. CELLA: Probably afterwards, but again, I'm
25 just not certain of times.

1 MR. FOSTER: So did it change your mind? That
2 conversation?
3 MR. CELLA: I understood why they weren't bringing
4 Mack in at that time. I still didn't think it would have
5 been a bad idea to bring him in, but I understood why
6 they weren't, and it was a reasonable position to take.
7 MR. FOSTER: So would it be fair to say that there
8 was no down side in your mind? In other words, it would
9 do no harm to bring him in?
10 MR. CELLA: In my mind there was no down side,
11 correct.
12 MR. KEMERER: Were you ever present when Mr.
13 Aguirre took testimony from witnesses during the Pequot
14 investigation?
15 MR. CELLA: No.
16 MR. KEMERER: Who is Arthur Samberg?
17 MR. CELLA: The is the principal of Pequot, is my
18 understanding.
19 MR. KEMERER: Have you reviewed any transcripts of
20 Mr. Aguirre taking Mr. Samberg's testimony?
21 MR. CELLA: I don't recall.
22 MR. KEMERER: Have you reviewed the trade blotter
23 in the GE Heller deal for Pequot's trades?
24 MR. CELLA: Not that I remember, no.
25 MR. KEMERER: Have you reviewed any summaries that

1 on at least one.

2 MR. KEMERER: Was it an email from Mr. Ribelin to
3 somebody?

4 MR. CELLA: You know, I don't remember.

5 MR. KEMERER: Did you take umbrage of whatever was
6 in there that referred to you?

7 MR. CELLA: Not in the least.

8 MR. KIM: How would you describe your relationship
9 with Gary Aguirre?

10 MR. CELLA: Strictly professional.

11 MR. KIM: Did you ever have any disputes with Gary
12 Aguirre during his employment at the SEC?

13 MR. CELLA: Not that I recall, no.

14 MR. KIM: Did you ever hear criticisms about Gary
15 Aguirre's work?

16 MR. CELLA: Prior to his termination?

17 MR. KIM: At any time.

18 MR. CELLA: Yes.

19 MS. MIDDLETON: Could you tell us about those?

20 MR. CELLA: Again, I don't recall a time, but I
21 believe that Bob Hanson told me that some of the files
22 that he kept were not in order and there may have been
23 some missing documents, and that every time there was a
24 dispute about tactics on a case, that if he disagreed
25 with Bob, he would take it to Mark, and if he disagreed

1 competent attorney at the SEC?

2 MR. CELLA: From the little I know, yes.

3 MR. KEMERER: Was he industrious and hard working?

4 MR. CELLA: By reputation, yes.

5 MR. KEMERER: Was he a zealous advocate of
6 enforcing SEC laws? Laws that the SEC enforces?

7 MR. CELLA: I don't know Gary well enough to answer
8 that question.

9 MR. KIM: You said by reputation. What do you mean
10 by that?

11 MR. CELLA: Eric Ribelin spoke very highly of his
12 testimony skills, his ability to take testimony, and his
13 organizational skills.

14 MR. KIM: So before Gary Aguirre was terminated
15 from the SEC, and to refresh your recollection, that was
16 around September of 2005, did you hear from anyone with
17 the SEC that Gary Aguirre was a substandard employee?

18 MR. CELLA: Prior? No.

19 MR. KEMERER: Among the members of your group, the
20 people who report to you directly, did any of them
21 express any problems in their dealings with Mr. Aguirre?

22 MR. CELLA: No.

23 MR. FOSTER: Did they have frequent contact with
24 Mr. Aguirre?

25 MR. CELLA: I assume so. I mean, they were working

1 investigators, any other terminations you're aware of in
2 your history?

3 MR. CELLA: None come to mind right now.

4 MS. MIDDLETON: When you had the discussion with
5 Mr. Aguirre about the taking of John Mack's testimony,
6 did he say anything to you about reasons that were given
7 to him, or reasons that he suspected were behind the
8 decision by Mr. -- did he say whose decision it was to
9 not take Mack's testimony?

10 MR. CELLA: I believe he said it was a collective
11 decision with Paul Berger, Mark Kreitman, and Bob Hanson.

12 MS. MIDDLETON: And so back to where I started with
13 that question. Did he say whether any of those people
14 expressed reasons for not taking Mack's testimony, or his
15 belief as to what their reasons were?

16 MR. CELLA: I don't recall him saying that, no.

17 MS. MIDDLETON: Did he say anything about that Mr.
18 Mack had political juice or connections or anything about
19 his status or stature as an individual?

20 MR. CELLA: I don't ever recall discussing that
21 with Gary Aguirre.

22 MS. MIDDLETON: Did you discuss that with anyone
23 else? With Eric or anyone else?

24 MR. CELLA: Eric Ribelin brought that up, yes.

25 MS. MIDDLETON: And what did Eric say?

1 MR. CELLA: Again, I don't recall -- I don't recall
2 the timing, but he believed that because of Mack's and/or
3 Samberg's political connections, that that is why Mack's
4 testimony was not going to be taken.

5 MS. MIDDLETON: And did you ask him his basis for
6 that belief? Or did you just say --

7 MR. CELLA: I more or -- I think I was more
8 listening than talking. I was skeptical that that was
9 the case. I believe I expressed that to him.

10 MS. MIDDLETON: Okay.

11 MR. CELLA: I certainly believed --

12 MS. MIDDLETON: Did you ask any of those people who
13 made the collective decision if that was the case?

14 MR. CELLA: No.

15 MR. KIM: Why were you skeptical of Mr. Ribelin's
16 belief?

17 MR. CELLA: I've worked at the commission for a
18 long time, and there has been any number of prominent
19 people who have been brought in to testify. I just found
20 it very hard to believe that political pressure would be
21 brought to bear to prohibit somebody from testifying.

22 I also have a great deal of professional respect for
23 Mark Kreitman and Bob Hanson and their integrity.

24 MR. KIM: But don't you also have a great deal of
25 professional respect and believe in the credibility and

1 integrity of Mr. Ribelin, who is your direct employee?
2 MR. CELLA: I do, but I believe in this instance he
3 was just wrong.
4 MR. KIM: And you told him that?
5 MR. CELLA: I did.
6 MR. KIM: And you told him that before talking to,
7 or trying to confirm with Craig or Hanson?
8 MR. CELLA: Yeah, I believe so.
9 MR. FOSTER: And your basis for your belief was
10 what exactly?
11 MR. CELLA: My years of experience at the SEC and
12 my respect for Mark Kreitman and Bob Hanson's
13 professional integrity.
14 MR. KEMERER: Can I ask you about Paul Berger? Mr.
15 Berger doesn't work at the SEC anymore, right?
16 MR. CELLA: That's correct.
17 MR. KEMERER: He left around May 31st, 2006?
18 MR. CELLA: That sounds right.
19 MR. KEMERER: Do you know where he works now?
20 MR. CELLA: At a law firm, I believe, here in town.
21 MR. KEMERER: Do you happen to know if it is
22 Debevoise and Plimpton?
23 MR. CELLA: I think so.
24 MR. KEMERER: Okay. Now, you said a couple of
25 times, I think, you said that you have a sort of profound

EXHIBIT NUMBER 24

U.S. SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

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:
In the Matter of: :
:
TRADING IN CERTAIN SECURITIES, :
No. HO-0818, and the SEC's :
TERMINATION OF EMPLOYMENT OF :
GARY AGUIRRE :
:
----- -x

Monday,
September 25, 2006

The interview of MARY JO WHITE, ESQ., Debevoise
and Plimpton, LLP, pursuant to notice, at 2:00 p.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, ESQ.
Investigative Counsel
U.S. Senate Committee on Finance

HAROLD H. KIM, ESQ.
Chief Civil Counsel
U.S. Senate Committee on the Judiciary

HANNIBAL G. WILLIAMS II KEMERER, ESQ.
Counsel
U.S. Senate Committee on the Judiciary

STEPHANIE MIDDLETON
U.S. Senate Committee on the Judiciary

MARY JO WHITE, ESQ.
Debevoise and Plimpton, LLP

BRUCE E. YANNETT, ESQ.
Debevoise and Plimpton LLP

LISA DENNIS COURT REPORTING
(410) 729-0401

1 MS. WHITE: Yes.

2 MR. KIM: And in what capacity did that
3 conversation--

4 MS. WHITE: Yeah, I mean, essentially what I was
5 trying to do for the Board was, whatever sources of relevant
6 information might be accessible to me as their counsel, to
7 figure out whether--what there was to this with respect to
8 Mr. Mack, if anything, what vulnerability he might have in
9 the SEC insider trading investigation.

10 So one of the sources of information that I tried
11 to tap into was to call the SEC, in particular Linda
12 Thomsen, to see what, if anything, she could say about his
13 exposure or not, and, you know, conveyed that the last thing
14 this board wants to do is "step in it" if he has got some
15 issue.

16 I also, as part of that retention, talked to the
17 lawyers for Pequot, talked to the lawyers for CSFB, who also
18 been subpoenaed recently for John Mack--as you probably
19 know, John Mack e-mails between him and Art Samberg, the
20 Chair of Pequot, and also obviously talked to the Morgan
21 Stanley lawyers, too, just to learn whatever I could within
22 a rather short time frame. At least I had to assume it was
23 a short time frame.

24 The other thing that I did for the board to gather
25 what information I could on that time frame was to interview

1 John Mack himself.

2 MR. KIM: When did that interview occur?

3 MS. WHITE: It occurred on Sunday, June 26th.

4 MR. KIM: Precise.

5 MS. WHITE: Another wasted weekend, another lost
6 weekend.

7 [Laughter.]

8 MR. KIM: During the five-day engagement, you said
9 that you spoke to Ms. Thomsen. Do you remember which day?

10 MS. WHITE: Yeah, I actually spoke to Ms. Thomsen
11 twice. I spoke to her on the Monday, which would have been
12 June 27th, and then I spoke to her on Tuesday, June, 28th.
13 I think just two calls with her. Do you want me to tell you
14 what--

15 MR. KIM: Sure. Can you elaborate on your first
16 call?

17 MS. WHITE: Yeah. I mean, basically the first
18 call was to inform her that I had been retained by the
19 board, you know, to do due diligence on John Mack, that they
20 were--just what I've said to you, they were on the verge of
21 appointing him as CEO and Chairman. As she, you know,
22 probably knew, recently the SEC had served subpoenas on
23 Morgan Stanley for the e-mails between Mack and Samberg of
24 Pequot.

25 I also told her, by the way, that I had the

1 think, there had been--I think at least a New York--or maybe
2 it was the Wall Street Journal. But there had been
3 publicity that prior week that ended in that Friday, the
4 24th of June, about the board likely appointing John Mack.
5 So you have got a destabilizing event and all of that, and
6 they were--you know, I can't tell you now but for this when
7 they had in mind to announce the appointment, whether it was
8 the following Monday--it may well have been. I mean, they
9 really were on the verge of it. And so, you know, they were
10 concerned about, as we all know, government investigations
11 can take a very long time, you know, years, months, you
12 know, what do they do kind of thing.

13 But I think what--you know, and clearly everybody
14 went into full gear on this. You know, we worked over the
15 weekend, you know, and if we had found something that
16 troubled us--and this is us, now. You know, we interviewed
17 him. I basically caused John Mack to be summoned back from
18 wherever he was in London so we could interview him. And,
19 you know, we accelerated getting e-mails, reviewed them,
20 talked to the--you know, looked at the other e-mails at
21 Pequot--

22 MR. KIM: Who exactly do you mean by "us"?

23 MS. WHITE: Debevoise.

24 MR. KIM: Okay.

25 MS. WHITE: Debevoise. If in our representation

EXHIBIT NUMBER 25

URGENT

Page 1 of 1

[REDACTED]

From: White, Mary Jo [REDACTED]
Sent: Sunday, June 26, 2005 7:46 PM
To: Thomsen, Linda
Subject: URGENT

Linda, if you possibly can would you give me a call this evening before 9 (or after as late as you like), at either [REDACTED] Thank you very much.

Mary Jo White
Debevoise & Plimpton LLP

Sent from my BlackBerry Wireless Handheld

EXHIBIT NUMBER 26

UNITED STATES SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

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:
In the Matter of: :
:
TRADING IN CERTAIN SECURITIES and : Number HO-9818
SEC'S TERMINATION OF EMPLOYMENT OF :
GARY AGUIRRE :
:
:
----- x

Friday,
September 8, 2006

The interview of LINDA CHATMAN THOMSEN,
Branch Chief, Office of Market Surveillance, Enforcement
Division, SEC, was convened, pursuant to notice, at
10:35 a.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, Esq.
Investigative Counsel
U.S. Senate Committee on Finance

HAROLD H. KIM, Esq.
Chief Civil Counsel
U.S. Senate Committee on the Judiciary

HANNIBAL G. WILLIAMS II KEMERER, Esq.
Counsel
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MR. NATHAN MORRIS
Professional Staff Member
U.S. Senate Committee on the Judiciary

MS. EMILIA DiSANTO
U.S. Committee on Finance

MS. STEPHANIE MIDDLETON
U.S. Committee on the Judiciary

MS. JANE COBB
Director
Office of Legal Affairs

ANIL ABRAHAM, Esq.
Counsel to the SEC Chairman

SAMUEL M. FORSTEIN
Assistant General Counsel
Securities and Exchange Commission

MS. LINDA CHATMAN THOMSEN
Director, Division of Enforcement

1 subpoena, the subpoena would not have been issued because
2 his supervisors would have recognized it as they did when
3 they saw it that it was inappropriate subpoena.

4 MR. FOSTER: If an employee believes that his
5 supervisors are preventing him from taking someone's
6 testimony for an improper purpose and he wishes to appeal
7 that decision up his chain of command to his supervisor's
8 supervisor and so forth, is that failure to work within
9 the chain of command?

10 MS. THOMSEN: No.

11 MS. MIDDLETON: When Mr. Aguirre was terminated

12 --

13 MS. THOMSEN: Yes.

14 MS. MIDDLETON: -- you are aware that he was
15 having a dispute about taking the testimony of Mr. Mack,
16 correct?

17 MS. THOMSEN: I was aware of that, yes.

18 MS. MIDDLETON: Were you concerned that it might
19 appear that his termination was related to that or in
20 reprisal for his being adamant on that?

21 MS. THOMSEN: Yes. Yes. We all were.

22 MS. MIDDLETON: What were your discussions --
23 when you say we all were, what discussions did you have?

24 MS. THOMSEN: The discussions among Mr.
25 Kreitman, Mr. Berger, Mr. Hanson and myself were about
26 terminating Mr. Aguirre. There was unanimity on their

1 or not Mr. Mack had engaged in any improper, illegal,
2 disputed behavior and had concluded that he had not, but
3 they wanted to know whether we had any information that
4 we could share with them to the contrary. And I think
5 that's the upshot of what she initially said to me. I
6 told her that I didn't know whether I could tell her
7 anything, that, as I sat there, I didn't know enough one
8 way or another to even know whether there was anything I
9 could tell her if I could tell her and that I'll get back
10 to her.

11 MS. MIDDLETON: And did you?

12 MS. THOMSEN: Oh, if you want me to the whole
13 story -- I'm sorry. After I got off the phone I talked
14 to Mr. Berger and learned that we just didn't have enough
15 information one way or the other with respect to Mr.
16 Mack, that where things stood at that point was that we
17 didn't have anything to indicate that he had engaged in
18 any illegal or improper behavior, but that we weren't at
19 a stage to be confident that he hadn't and that we
20 weren't likely to be at that stage any time soon.

21 And so, you know, I then got back to Ms. White
22 and said I can't tell you anything. What was going
23 through my mind at the time was, how am I going to handle
24 this if we have something negative on Mr. Mack? And I
25 didn't have to cross that bridge because I still had
26 concerns about how, if at all, I could communicate that.

1 now, is that correct?

2 MS. THOMSEN: Yes, he does.

3 MS. MIDDLETON: Do you have any idea about the
4 timing of his initial contacts with that firm with
5 respect to his employment or partnership there?

6 MS. THOMSEN: I heard about it from him close in
7 time to a couple of months before he left and I believe
8 he left in the spring of 2006. I believe his reasons to
9 look for employment outside of the agency occurred in the
10 fall of 2005, like the end of October, when there were
11 decisions made about the deputy directors and Mr. Berger
12 was not selected as one of the deputy directors. And so,
13 it was my expectation -- both my expectation and I think
14 -- Mr. Berger and I talked about it that at some point
15 after that decision was made that he was probably going
16 to leave the agency. I urged him not to. I urged him to
17 think about it because I knew he loved what he was doing
18 and he was quite good at it.

19 So I think the precipitating event was the
20 variant of October, early November, I'm not quite sure
21 when that was announced and then I expect he probably did
22 take some time to think about things and may have started
23 looking in earnest at the beginning of the year, but I
24 don't know the process.

25 MS. MIDDLETON: Did the non selection of Mr.
26 Berger have anything to do with the Gary Aguirre

1 it's a non starter or understood it to be a non starter,
2 extending the probationary period for a brief period of
3 time so that we could, you know, do this in a way that
4 was a little more -- took a little more time and could
5 afford him an opportunity to get back from vacation and
6 whatnot. But I'm reasonably confident that that can't be
7 done, having tried that in other circumstances. And we
8 talked about the fact that -- I polled everyone and asked
9 whether they had any doubts and they all agreed this was
10 the right course.

11 They advised that they expected this to be
12 potentially litigious given the fact that Mr. Aguirre had
13 been litigating with us before, that he was unhappy about
14 the Mack testimony issue. The substance included that he
15 could not work with supervisors and he could not work
16 with peers and it was clear to me that the management
17 toll of having Mr. Aguirre in our employ was too high
18 when we had an opportunity to discharge him.

19 MR. KEMERER: Did the fact that his wife or fiancée
20 was pregnant come up when you talked about the --

21 MS. THOMSEN: I believe it did in terms of, you know

22 --

23 MR. KEMERER: Unfortunate timing.

24 MS. THOMSEN: -- unfortunate timing and
25 circumstances, I believe it did.

26 MS. MIDDLETON: And at that meeting did you ask

1 MS. THOMSEN: I don't remember.

2 MR. KEMERER: Let me just show it to you while we
3 have it. It's Exhibit 25.

4 (Whereupon, the documents referred to
5 as Exhibit 25 were marked for
6 identification.)

7 MR. KEMERER: Is this the termination notice?

8 MS. THOMSEN: Yes.

9 MR. KEMERER: I just wanted to give you an
10 opportunity to correct -- for the record, you said you
11 reviewed it and signed it. It looks like it was signed
12 by --

13 MS. THOMSEN: It was signed by Mr. Berger for me.
14 It was something that I told him to sign, so I deem it to
15 have been signed by me.

16 MR. KEMERER: Let me just ask you maybe three or
17 four questions about this document.

18 MS. THOMSEN: Of course.

19 MR. KEMERER: And then I was going to suggest we
20 maybe take a break because I think that there's -- I'm
21 going to have to negotiate to keep our room and I know
22 you mentioned lunch, so is 1:30 a good time for a break?

23 MS. THOMSEN: That's fine.

24 MR. KEMERER: Okay. Directing your attention to the
25 third paragraph down which begins with several --

26 MS. THOMSEN: Yes.

1 MR. KEMERER: -- okay, the second sentence. This is
2 from you to Mr. Aguirre.

3 MS. THOMSEN: Beginning with however?

4 MR. KEMERER: Starting with you -- you were
5 permitted to transfer from one assistant director to --

6 MS. THOMSEN: Oh, I'm sorry. Yes. Okay.

7 MR. KEMERER: -- another after assuring your
8 associate director that the problems that had occurred,
9 including personality conflicts and resistance to
10 standard supervision would not recur. Do you have any
11 personal knowledge of that or -- well, let me just leave
12 it at that -- do you have any personal knowledge of that?

13 MS. THOMSEN: The assurance?

14 MR. KEMERER: Yes.

15 MS. THOMSEN: I do not other than the fact that Mr.
16 Aguirre's performance was discussed with me from time to
17 time.

18 MR. KEMERER: And the first transfer was based upon
19 personality conflicts and resistance to standard
20 supervision. Do you have personal knowledge of that?

21 MS. THOMSEN: My understanding of the first transfer
22 was as described -- as I described it earlier through Mr.
23 Berger -- that he requested being moved and that he had
24 conflicts with his supervisors.

25 MR. KEMERER: Okay. Beginning at however -- you
26 have continued to have conflicts with other staff

1 attorneys, your branch chief and a trial unit attorney
2 assigned to your primary case responsibility. Is that
3 what it says in the next sentence?

4 MS. THOMSEN: I think you read it right.

5 MR. KEMERER: Okay. Do you have personal knowledge
6 of that other than what was communicated to you through
7 your subordinates that were his supervisors?

8 MS. THOMSEN: If your question is did I see him
9 having conflicts --

10 MR. KEMERER: Right.

11 MS. THOMSEN: -- I did not see him having conflicts.

12 MR. KEMERER: Okay. Prior to September 1 had you
13 reviewed email from him?

14 MS. THOMSEN: I had received an email, as I believe
15 I mentioned, from him asking for -- asking me whether I
16 had an open door policy and it may have said other
17 things, but that's the email I remember from Mr. Aguirre.

18 MR. KEMERER: Okay. I mean, had you -- okay, so had
19 you observed either through email or just observing him
20 with his supervisors them not getting along -- personally
21 observed?

22 MS. THOMSEN: I'm sorry I'm not trying to be dense.
23 I don't exactly -- I did not see Mr. Aguirre have
24 conflicts with anyone. I did not read any email or other
25 documents that demonstrated conflicts or reported
26 conflicts. I heard from Mr. Berger and ultimately others

1 about the conflicts that people had with Mr. Aguirre and
2 that Mr. Aguirre had with other people.

3 MR. KEMERER: Is it fair to say that sort of the
4 remainder of this paragraph beginning with, you have
5 continually expressed dissatisfaction -- that your answer
6 that you just gave me would be accurate with respect to
7 the remainder of the paragraph as well -- I mean, because
8 you are at such a higher level than Mr. Aguirre?

9 MS. THOMSEN: I don't know whether it's because, but
10 let me finish reading it and see whether --

11 MR. KEMERER: Sure.

12 MS. THOMSEN: I think that's fair. But leaving
13 aside the issue of why, I simply did not personally
14 observe or review documents that support what's said in
15 this -- the third paragraph of Exhibit 25.

16 MR. KEMERER: Fair enough. And the fourth paragraph
17 beginning with during, is it fair to say that, you know,
18 you don't have personal knowledge of that and that that's
19 all based essentially on reports that you got from your
20 trusted managers?

21 MS. THOMSEN: That is based on the reports I got
22 from others, yes.

23 MR. KEMERER: And the first sentence on page 2 of
24 this exhibit -- since those meetings your conduct has not
25 improved to the level that warrants retention beyond your
26 trial period. Is it fair to say that once again that's

1 based upon reports that you received from Messrs. Hanson,
2 Kreitman and Berger?

3 MS. THOMSEN: Yes.

4 MR. KEMERER: So while you made the decision to
5 terminate Mr. Aguirre, you did it pretty much based upon
6 the recommendations, like you said, of those three
7 gentlemen and their concurrence that they all agreed that
8 it was the right thing to do and the right time to do it?

9 MS. THOMSEN: Yes.

10 MS. MIDDLETON: Do you know whether -- you had
11 mentioned that you had asked Mr. Berger to -- well, let
12 me ask you this, in connection with the termination
13 itself, did you personally speak to HR?

14 MS. THOMSEN: I did not.

15 MS. MIDDLETON: Do you know whether Mr. Berger or
16 Mr. Hanson or Mr. Kreitman consulted with HR to get some
17 advice?

18 MS. THOMSEN: I believe they did. I believe they
19 had consulted with Human Resources on more than one
20 occasion about Mr. Aguirre --

21 MS. MIDDLETON: Okay. But in connection --

22 MS. THOMSEN: -- and I do believe that they
23 consulted with them specifically about the termination.

24 MS. MIDDLETON: And did they tell you what -- did
25 any of them tell you what it was they said to HR and what
26 HR said to them?

1 MS. DI SANTO: Uh huh.

2 MR. FORSTEIN: On the last point -- were you here
3 where she discussed for maybe 45 minutes to an hour the
4 situation involving Mr. Berger and Morgan Stanley?

5 MS. DI SANTO: I -- I -- I was briefed briefly
6 before.

7 MR. FORSTEIN: All right. Because if you weren't --

8 MS. DI SANTO: But it's still troubling me.

9 MR. FORSTEIN: If you weren't here to hear that, I
10 mean -- or if you haven't gotten a full briefing, it
11 would be helpful to us to know what still troubles you
12 about that situation.

13 MS. DI SANTO: I understand. Because I don't
14 believe that neither you or Linda knows exactly when Mr.
15 Berger made the first introduction to the firm of
16 interest or someone made it to him because I don't
17 believe you have that knowledge.

18 MR. FORSTEIN: Well, she's --

19 MS. DI SANTO: I don't believe you have personal --
20 I do not believe --

21 MR. FORSTEIN: She's given you circumstantial
22 evidence as to --

23 MS. DI SANTO: I understand.

24 MR. FORSTEIN: -- when it would have been made.

25 MS. DI SANTO: I'm just saying I don't believe that
26 you have that information, and I also don't believe that

EXHIBIT NUMBER 27

U.S. SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

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:
In the Matter of: :
:
TRADING IN CERTAIN SECURITIES, : Volume II of II
No. HO-0818, and the SEC's :
TERMINATION OF EMPLOYMENT OF :
GARY AGUIRRE :
:
----- -x

Tuesday
November 7, 2006

The interview of PAUL R. BERGER, Esquire,
was convened, pursuant to notice, at 10:33 a.m.

APPEARANCES:

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1 possible. When did you yourself begin looking for
2 employment outside of the SEC?

3 MR. BERGER: Well, let me be clear about it. I
4 was approached at some point in the fall of '05 by one firm,
5 which we just talked about before, Goodwin Procter. And I
6 talked with them for a little bit in the fall. Their office
7 is based in Boston. I did not visit them in Boston until,
8 say, the second week of December. In the middle of the
9 fall, I didn't do much else. I had some other reasons not
10 to pursue things. And then--

11 MR. KEMERER: What were those reasons?

12 MR. BERGER: They were health concerns. And then
13 I, perhaps more specifically answering your question, did
14 not reach out to anyone until I started in January.

15 MR. KEMERER: Who contacted you on behalf of
16 Goodwin Procter? Or was it a headhunter?

17 MR. BERGER: No. It was, I think I mentioned last
18 week, Chris Palmer, a friend of mine.

19 MR. KEMERER: Directing your attention back to the
20 Dinallo call--

21 MR. FOSTER: Hannibal, before we go on, let me
22 stay on this for a second, please.

23 MR. KEMERER: Sure.

24 MR. FOSTER: So you said on Thursday, I believe,
25 that you remember Hannibal Kemerer calling you on or about

1 MR. FOSTER: Do you have any explanation as to why
2 you didn't tell him about those contacts during that call?

3 MR. BERGER: Well, primarily because I was very
4 concerned about having any discussions without first talking
5 with the SEC and getting authorization to discuss anything.
6 And I think I pointed out to Hannibal on that phone call
7 that I was very uncomfortable with that, and I think he
8 acknowledged and said, "I understand that." And he asked me
9 a few more questions, and I tried to be--you know, I tried
10 to answer questions, but I also was very uncomfortable
11 having any further conversation until I had my conversations
12 with the SEC.

13 MR. FOSTER: So did you tell him that you began
14 reaching out to firms and they began reaching out to you in
15 January of 2006?

16 MR. BERGER: I don't remember. That would be true
17 that I didn't start reaching out until January, but I don't
18 remember.

19 MR. FOSTER: Well, you just told us about that
20 Goodwin Procter reached out--

21 MR. BERGER: Right. They reached out.

22 MR. FOSTER: --prior to January.

23 MR. BERGER: They reached out to me prior to that,
24 right.

25 MR. FOSTER: You didn't tell him about that?

1 MR. BERGER: I don't remember.

2 MR. FOSTER: Would you have any reason not to tell
3 him about those earlier contacts?

4 MR. BERGER: You know, I was concerned about
5 having any kind of discussions with someone outside of the
6 SEC at that point, and so I don't know if--you know, why I
7 did or didn't say something. I mean, I really don't
8 remember what I said. About the only thing I remember very
9 vividly is Mr. Kemerer said something to the effect, "Did
10 they ask you"--meaning the Commission, "Did they ask you to
11 leave?" And I remember laughing at that. That's the most
12 vivid part of the conversation that I remember.

13 MR. FOSTER: So do you think that you were
14 completely honest and forthcoming with him during that
15 conversation?

16 MR. BERGER: Yes, I think I was completely honest.

17 MR. FOSTER: But not forthcoming?

18 MR. BERGER: I was concerned about providing any
19 information without authorization from the Commission so
20 that I would not violate any rules, and I told Hannibal that
21 in that conversation. And he acknowledged that and, in
22 fact, said, "Okay. I understand that, and we don't want you
23 to violate any rules." So I didn't have any discussions. I
24 didn't know what the parameters were for me to be able to
25 have any discussions with Hannibal in that conversation, and

1 MR. KEMERER: Can we turn to the Dinallo
2 conversation? After the conversation with Mr. Kreitman in
3 which you said, "No. I'll call Mr. Dinallo," or words to
4 that effect, you called Mr. Dinallo back. What precisely
5 did he ask you?

6 MR. BERGER: He asked, as I discussed last week--
7 he identified the fact that the Board of Directors of Morgan
8 Stanley was considering hiring John Mack, and they were
9 concerned about whether or not he had any issues with the
10 SEC and its investigation.

11 MR. KEMERER: Did you tell him anything about the
12 status of the Pequot investigation?

13 MR. BERGER: I told him that we were roughly in
14 the middle of the investigation.

15 MR. KEMERER: Did you tell him anything with
16 respect to Mr. Mack in particular?

17 MR. BERGER: I don't recall saying anything with
18 respect to Mr. Mack, other than--he was inquiring whether or
19 not Mr. Mack had problems in terms of--with respect to the
20 SEC and potential violations, and I told him that it was
21 premature for us to evaluate. We were roughly in the middle
22 of our investigation. I didn't know where it was going to
23 go. I think I said something to the effect, "Like any other
24 insider trading investigation, we don't know where it's
25 going to go until we've finished it."

1 and we took Mr. Samberg more than once, several times, I
2 think, and I can't remember which one it was. But I
3 believe--and I can't remember--I know I saw excerpts from
4 the testimony. I don't remember when that was in
5 relationship to Mr. Dinallo's call.

6 MR. FOSTER: Prior to Mr. Dinallo's call, had you
7 read any e-mail traffic between Mr. Mack and Mr. Samberg?

8 MR. BERGER: I don't remember.

9 MR. FOSTER: During the case with Mr. Dinallo, did
10 you characterize the state of the evidence that Mr. Mack may
11 have been involved in insider trading?

12 MR. BERGER: I'm not sure what you mean by
13 "characterize the state of the evidence," but I can tell you
14 what I told him, which was the point of my phone call was to
15 adhere to the Commission policy by not disclosing any
16 information about an investigation and to make sure that the
17 Commission, particularly the Commission staff, did not
18 inject itself into a business decision of an entity that
19 wasn't even a part of the investigation. And so those being
20 the reasons that I would, you know, have that conversation
21 with Mr. Dinallo, I told Mr. Dinallo, as I've said before,
22 that the investigation was ongoing, it was an insider
23 trading investigation, and I didn't know where it was going
24 to end up, and you often don't know that until the end of an
25 insider trading investigation; that it was premature for us

1 actually do a memo at one point. I just don't remember what
2 point that was.

3 MR. KEMERER: So you don't recall whether it was
4 in order to get permission to issue a testimonial subpoena?

5 MR. BERGER: Well, we were talking about taking
6 some testimony from individuals fairly prominent, a Senator
7 or a former Senator, and some other individuals, and we
8 wanted to see what we had. So I think that--I remember
9 reading something in advance of the testimony that would
10 support--that supported taking their testimony.

11 MR. FOSTER: You mentioned prominence just now.

12 MR. BERGER: Uh-huh.

13 MR. FOSTER: Is it the case that you're more
14 likely to require a memo such as this in a case where the
15 proposed testimony is of someone prominent?

16 MR. BERGER: No, I don't think so. We've done
17 this, we've done memos in advance of people that no one
18 would know.

19 MR. FOSTER: Can you give us an example?

20 MR. BERGER: Not off the top of my head.

21 MR. FOSTER: Can you get back to us on that?

22 MR. BERGER: I can think about it. I mean, I was
23 there for 14 years. I was probably involved in maybe a
24 thousand investigations, brought 400 or so investigations.
25 I mean, that's a lot of people.

1 MR. FOSTER: Why did you mention prominence just
2 now, though?

3 MR. BERGER: I don't know why I mentioned
4 prominence.

5 MR. KEMERER: Directing your attention to page 2
6 of Exhibit II, the third full paragraph begins with,
7 "Further..." Do you see that line?

8 MR. BERGER: Yes.

9 MR. KEMERER: Mr. Aguirre appears to contend that
10 the SEC's operating in the dark with respect to whom Mack
11 spoke to while CSFB was wooing him to come on as the CEO.
12 Is that true?

13 MR. BERGER: I really don't know what was in Gary
14 Aguirre's head when he wrote this, so I can't tell you what
15 he was thinking. One of the reasons this is not a
16 particularly good memo is I have no idea what he's talking
17 about, operating in the dark. We were sending out
18 subpoenas. We were getting information. We were making
19 inquiries to Credit Suisse to get information concerning
20 contacts or possible contacts between Mr. Mack and others.
21 So I don't know what he's referring to here. He obviously
22 didn't make it clear enough for me to understand.

23 MR. KEMERER: Okay. Were you aware from reading
24 any of these memos ever that Mr. Mack was meeting with
25 people in Zurich or, you know, outside of the country?

1 doing that.

2 MR. FOSTER: Is it possible that you did?

3 MR. BERGER: I think it is very unlikely. I can't
4 imagine who I talked to outside of the SEC.

5 MR. FOSTER: Do you recall a conversation sometime
6 after Mr. Aguirre resigned, told you that he was resigning
7 in which he alleged to you that he was not being allowed to
8 take Mr. Mack's testimony because of Mr. Mack's political
9 clout or powerful political connections or something to that
10 effect?

11 MR. BERGER: We had a conversation--I think this
12 was earlier than the time that he came in to resign--where--
13 and I think this was the first conversation that I had had
14 with him where--I think I've talked to you about this on a
15 number of occasions now, where he was very heated, and he
16 had had a conversation, I think with Mark Kreitman, where he
17 was upset--

18 MR. FOSTER: Right. I don't need you to repeat
19 that. I understand. I'm asking you about--

20 MR. BERGER: I know, but I'm trying to put it--

21 MR. FOSTER: Okay, but I'm asking about the time
22 period after he had told you he was resigning.

23 MR. BERGER: I had two conversations that I can
24 remember with Gary where he mentioned Mack's influence,
25 neither one I think he mentioned political influence. Gary

1 presented it in terms of we were afraid to take his
2 testimony, and I think I've described to you on both
3 occasions where I talked to him about that and tried to
4 dispel the notion that anyone in the Division of Enforcement
5 would have been afraid to take someone's testimony, and, in
6 fact, someone like Mack's testimony we would be interested
7 in taking the testimony, more interested than not. So that
8 would never be the case for people in Enforcement. And I
9 tried to emphasize that we were talking about tactics here
10 or strategy, as opposed to--you know, in essence, timing as
11 opposed to being concerned about who this individual was.

12 MR. FOSTER: So in terms of political clout or
13 political connections--you used the word "political." Are
14 you saying you don't recall him--

15 MR. BERGER: Well, he--

16 MR. FOSTER: --telling you--let me finish the
17 question, please.

18 MR. BERGER: Yeah.

19 MR. FOSTER: That you don't recall him telling you
20 that Mr. Hanson had represented to him that the reason it
21 would be difficult to get approval to take Mr. Mack's
22 testimony was because of his political clout or political
23 connections or something to that effect?

24 MR. BERGER: I think that Gary put that in an e-
25 mail, but when we had the conversations, Gary's conversation

1 to me was--I don't remember him talking about Bob Hanson or
2 what Bob Hanson said, but I do remember him saying that, you
3 know, he felt that Mark and Bob were afraid to take this
4 guy's testimony, and I think he used the word "afraid," and
5 that Mack had a lot of influence. And I said, as I've
6 related now a few times, "Mack doesn't have any influence
7 with the Division of Enforcement. He can't stop us from
8 taking his testimony, and we will."

9 MR. FOSTER: So leaving aside his e-mail, which
10 we'll discuss in a minute, but his verbal conversations with
11 you, did you understand Mr. Aguirre to be alleging any
12 wrongdoing on the part of Mr. Kreitman or Mr. Hanson or
13 anyone at the SEC with regard to the decision about Mr.
14 Mack's testimony?

15 MR. BERGER: I didn't understand that it was
16 wrongdoing. I think my understanding was that there was a
17 strategy dispute over what to do and that we were trying to
18 say on a number of occasions to Gary, "Look, we're going to
19 take the testimony. Let's just do it when we think it is
20 the appropriate time." And Gary's response always was we're
21 afraid to take his testimony and we're stopping him. And I
22 don't think that was ever the case.

23 MR. KEMERER: Do you think that taking Mr. Mack's
24 testimony in June or July of 2005 had a detrimental effect
25 on the Pequot Capital Management investigation?

1 I talked with--I followed that up by talking with Mark. I
2 don't remember if I talked with Bob. It's possible that I
3 did, but I know I talked with Mark.

4 MR. FOSTER: So the more specific allegation
5 that's in here than you described earlier regarding the
6 words "powerful political connections," you don't see that
7 as different in time or in substance--is that not in a
8 different category than what you described earlier about
9 merely saying that you're afraid to take his testimony?

10 MR. BERGER: No, I mean, because as I said, Gary
11 was saying afraid to take testimony, that he had a lot of
12 influence. In essence, I gather it was the same thing.

13 MR. FOSTER: In your mind, does this constitute an
14 allegation of wrongdoing?

15 MR. BERGER: If someone was preventing someone
16 from taking testimony because of certain influence where we
17 thought it was appropriate to take the testimony, I think
18 it's something that is of concern, yes. But as I said, you
19 know, I talked with Gary about it, and I talked with Mark
20 about it. We all, you know, concluded that that's not what
21 was happening and, in fact, we were going to take the
22 testimony.

23 MR. FOSTER: Well, at the top of page SEC 0005, he
24 explicitly says that Bob--I assume that means Robert Hanson,
25 correct?

1 MR. BERGER: I assume that.

2 MR. FOSTER: "Bob told me that these decisions
3 were for Mark to make," and I'm assuming that means the
4 decision about whether to take Mr. Mack's testimony. Is
5 that correct?

6 MR. BERGER: I assume that's what he means. I
7 mean, Mark would know--or Bob would know best.

8 MR. BERGER: "...and, two, it would be an uphill
9 battle because of Mack's powerful political connections."
10 And I believe you said earlier that you didn't recall Mr.
11 Aguirre specifically telling you in your verbal conversation
12 in person alleging that Mr. Hanson had said that to him.
13 But here he fairly clearly alleges that in writing.

14 MR. BERGER: That's right.

15 MR. FOSTER: And my question to you is: Do you
16 believe that's an allegation of wrongdoing that needed to be
17 brought to someone else's attention? And what, if anything,
18 did you do to bring it to anyone else's attention?

19 MR. BERGER: Well, I think I've told you now
20 several times what I did is I had a conversation with Gary
21 about this. We talked about it. I told him that we weren't
22 afraid to take anyone's testimony, that no one--

23 MR. FOSTER: I understand that.

24 MR. BERGER: Well, let me answer the question.
25 That no one would influence whether the Division of

1 Enforcement was going to take someone's testimony or not,
2 and that he had to understand that we felt, based on our
3 experience--and he had no experience doing these
4 investigations or doing an insider trading case--that the
5 best thing to do is to take Mack's testimony at the end, and
6 that's what we wanted to do.

7 What I did subsequent to that was I talked with
8 Mark about this again. I had more than one conversation
9 with Mark about the influence issue. And, you know, Mark
10 assured me there is nothing about influence that was
11 preventing us from taking testimony. In fact, we agreed
12 that we would likely take the testimony at the end of the
13 investigation. And I think I also said before that I may
14 have mentioned this to Linda Thomsen. I don't remember
15 that. And I may have also talked with Bob Hanson. I just
16 don't have a memory of talking with Bob about that.

17 MR. FOSTER: Did you forward this e-mail to Linda
18 Thomsen?

19 MR. BERGER: I don't remember if I did or not.

20 MR. FOSTER: Either electronically or--

21 MR. BERGER: Yes, I just don't remember.

22 MR. FOSTER: --any other way? No?

23 MR. BERGER: I don't remember.

24 MR. FOSTER: Did you refer it to the Inspector
25 General?

1 MR. BERGER: No.

2 MR. FOSTER: Did you consider referring it to the
3 Inspector General?

4 MR. BERGER: No.

5 MR. FOSTER: Why not?

6 MR. BERGER: Because I took the actions that I
7 thought were appropriate. One, I talked with Gary and
8 explained to him that that simply wasn't the case, and that
9 our intention was to take the testimony at the end, and that
10 there was no influence brought to bear, nor would we
11 countenance any influence being brought to bear. And then I
12 talked with his two supervisors--well, I talked with Mark,
13 which would have been his ultimate supervisor, and Mark
14 assured me that that wasn't the case. And as I said, I'm
15 not sure if I talked with Bob or Linda Thomsen about it.
16 And so I felt that I had taken the appropriate steps,
17 including with the person who was making the allegations to
18 explain to him that that simply wasn't the case and
19 providing to him what the blueprint was for the
20 investigation, which should have sufficed for anyone to
21 understand that we will do this, it's just not at the timing
22 that he wanted or pursuant to the time that he wanted.

23 MR. FOSTER: Have you ever referred other
24 allegations of wrongdoing to the Inspector General?

25 MR. BERGER: No, I don't think so.

1 MR. BERGER: Okay.

2 MR. FOSTER: Does that help you, refresh your--

3 MR. BERGER: I'm sure it was after this. It was
4 sometime later in August. I just don't know.

5 MR. KEMERER: At this meeting between you and Mr.
6 Kreitman and Mr. Hanson, did the issue of Mr. Aguirre's
7 insistence upon taking John Mack's testimony sooner rather
8 than later come up?

9 MR. BERGER: I don't remember that it did. I
10 thought the focus was mostly on Gary's conduct and his
11 inability to function within, you know, a hierarchical
12 program.

13 MR. KEMERER: Do you contend, as you sit here
14 today, that Mr. Aguirre's repeated insistence upon taking
15 Mr. Mack's testimony did not play a role in the decision to
16 terminate him?

17 MR. BERGER: I think that his inability to listen
18 to his supervisors and, you know, make decisions based on
19 strategy and judgment and the experience that they had
20 played a factor. And so I think that the fact that he
21 simply wouldn't listen with respect to Mack must have played
22 some part in Mark and Bob's assessment of his conduct. But
23 that went to--the issue was--and it was the primary issue--
24 his conduct. It wasn't, you know, what he was--whether we
25 were going to take Mack's testimony or not, because we had

1 pretty much decided we were going to take the testimony, so
2 it wasn't the issue. The issue was that he couldn't listen
3 and he didn't want to listen, and he was, I think as you
4 say, Bob who said it, a loose cannon.

5 MR. FOSTER: Well, he alleged to you in writing
6 that Mr. Hanson had told him that the reason for his
7 supervisor's decision was because of Mr. Mack's political
8 clout, correct?

9 MR. BERGER: He did allege that, yes, and--

10 MR. FOSTER: So would it be appropriate in that
11 situation--

12 MR. BECKER: Wait--

13 MR. FOSTER: --if that were true, for him--

14 MR. BECKER: Wait a minute. You cannot cut him
15 off. Let him finish his answer.

16 MR. FOSTER: Go ahead. Finish your answer.

17 MR. BECKER: And you can then ask a question.

18 MR. BERGER: I think what happened was that, as I
19 said before, Gary made the allegations and that we tried to
20 address it in an appropriate and cordial manner with him by
21 saying, "Look, no one's afraid to take his testimony. We
22 will take his testimony. We're doing this strategically at
23 a different time."

24 If you look at the e-mail that Gary sent at that
25 time, it says in there, Gary says, "We are still getting in

1 insistence upon his own way or the highway?

2 MR. BERGER: Right. I think I do understand the
3 question, and I think, you know, last Thursday I discussed a
4 number of instances where there were issues with Gary
5 sending out subpoenas without running them by his
6 supervisor, taking actions--I think Bob Hanson had come to
7 my office on a number of occasions complaining that Gary was
8 taking actions without consulting with him or even having
9 just a conversation to say this is what he wanted to do.

10 There were complaints that were voiced by counsel
11 about Gary. I received at least one phone call that I
12 remember from general counsel at Credit Suisse, Gary Lynch,
13 complaining about Gary, where Gary was apparently telling
14 Credit Suisse that there was a new policy at the Commission
15 on secrecy, which was not accurate. There were all of these
16 instances, and then, of course, I think that, you know, the
17 bottom line is the immediate supervisors were hearing this
18 on a regular basis and having to deal with this. And, you
19 know, they came to me on a number of occasions. I don't
20 remember all of the situations. But those are some of the
21 items.

22 MR. KEMERER: Okay. Just let me ask some follow-
23 up questions.

24 MR. BERGER: Sure.

25 MR. KEMERER: I think that's a good laundry list.

1 MR. BECKER: --and consider it or directed him to
2 go back and draft. Those are two different things.

3 MR. FOSTER: Draft. Go back and draft.

4 MR. BERGER: Yeah. I think that I--I don't
5 remember directing them to do it. You know, I rely on Bob
6 and Mark on that, too, but my sense was I asked them to
7 think about it, because ultimately I couldn't write it.
8 They had the best information about individuals' conduct
9 that I didn't have. And so if something was going to be
10 written, it really had to come from the supervisors. And so
11 my sense was go back and think about it, and if you want to
12 do it, fine, and I will support you on that.

13 MR. FOSTER: Okay. So you don't know whether you
14 told the IG or someone from the IG's office that you told
15 Hanson to supplement the contribution statement that had
16 already been prepared for--

17 MR. BERGER: Well, there is a distinction there.

18 MR. FOSTER: Okay.

19 MR. BERGER: That is that in terms of drafting
20 this or actually creating a document, I left that up to Mark
21 and Bob as to whether or not they wanted to do it. But when
22 they did do it, I instructed them to make that part of the
23 evaluation. And I think that from what I just heard you
24 say, that--

25 MR. FOSTER: I'm sorry. Part of the existing

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EXHIBIT NUMBER 28

Mark Kreitman OIG-431

I spoke to Mark Kreitman by telephone on October 24, 2005, regarding Gary Aguirre. Kreitman told me that the evaluation process had 2 pieces to it. First, there was an initial evaluation of Aguirre by Bob Hanson that went to Berger around the end of June, and then second Kreitman did a supplemental evaluation because he felt that Hanson had not addressed problems. Kreitman said that he wrote the supplemental evaluation on August 1, 2005, before going to the Compensation Committee. Kreitman said that he later learned, upon inquiry, that only Hanson's evaluation went to the Compensation Committee in error. Kreitman said that he knows the date that he prepared the supplemental because it is a Word document that shows August 1, 2005. I asked Kreitman to send me something that showed it was created on August 1, 2005. Kreitman said that he may have discussed the supplemental evaluation with Berger, but does not recall. Kreitman was sure he discussed it with Bob. Kreitman said that it was not unusual for him to rate subordinates, and that he is directly responsible for rating Branch Chiefs, para-professionals and a couple of staff attorneys (not including Aguirre). Kreitman does not know if Aguirre received a copy of the supplemental rating, but he said that Aguirre was already terminated when he would normally meet with staff attorneys and their branch chief to give them their written evaluation and tell them their step increase.

Kreitman told me that he knew Aguirre as a student at Georgetown's LLM program where he taught and Aguirre was a student and had edited his law review article that was published. Kreitman also said that they were friends and him and his wife would visit Aguirre and his wife's houses. Kreitman said that Berger made the decision to transfer Aguirre from another Asst. Director Grimes to Kreitman.

When I asked Kreitman what the inquiry was regarding the supplemental evaluation he said that Berger checked to see if it went in Aguirre's personnel file, and it turned out that it did not. Kreitman said that he got advice from Linda Borostovik in HR and Lindy Hardy in GC. Kreitman said that there was some confusion and that he got conflicting advice.

Kreitman said that he concurred with Aguirre getting two steps as a merit promotion, even though he had problems with Aguirre's conduct. Kreitman said that there are few carrots in government work, and that he gives more leeway with conduct than with performance. Kreitman said that Aguirre worked out well in the beginning of coming to his group; Aguirre brought with him the Pequot case he developed which Kreitman described as a complicated, difficult insider trading case. Kreitman remembers telling Aguirre that he could have 5 weeks to see if the case was manageable given SEC resources. Kreitman said that after five weeks it was unclear if it was manageable but he let Aguirre continue. Kreitman said that it was clear that there were problems with how it was being investigated by Aguirre, because he was resistant to supervisors, especially his branch chief Hanson, he sent out subpoenas without going through his branch chief which violated protocol and criminal statutes resulting in the subpoenas being recalled.

Kreitman said that Aguirre did not conduct the investigation in the normal course; he

gathered "millions of e-mails" hoping to find the smoking gun. As to calling in John Mack for testimony, Kreitman said that there was insufficient evidence to call him in and that Enforcement does not drag in ordinary citizens on unfounded suspicion. According to Kreitman, Enforcement still does not have enough evidence after more investigation. Kreitman said that there is no doubt that Mack may be a tipper and that there is illegal insider trading in the case, but that none of the five potential tipplers have been called in. Calling in persons to give testimony is a serious matter, according to Kreitman, and is not done lightly. He also said that it is pointless to call in a witness if there is no evidence because they will just deny tipping and there is no where to go from there. Kreitman said that his reputation at the agency is that he is the most aggressive trial attorney (when he was in that position for many years) and Assistant Director, and that he has taken the testimony of many high profile persons. He said he is hardly afraid of taking anyone's testimony. Kreitman told me that him, Berger and Bob had many discussions about taking Mack's testimony.

Kreitman also said that it is a little out of the ordinary for Mary Jo White to contact Linda Thomsen directly, but that White is very prestigious and it isn't uncommon for someone prominent to have someone intervene on their behalf. Kreitman recalls that Thomsen called him to say that she received correspondence from White, and Kreitman went to get it.

I asked Kreitman whether he had given Aguirre a Perry Mason award for his good work. He laughed and said that it is a joke he does in the office, where he gives someone an 8 1/2 x 11 xerox of Raymond Burr's face. He said that he did give one to Aguirre after he went to meet with the SDNY USAO to see if they were interested in the Pequot case. Kreitman said that he was worried about Aguirre presenting the case to them because he said that Aguirre tends to talk "in a non-linear fashion". Aguirre reported back that the SDNY was very interested, so Kreitman was pleased and gave him the Perry Mason award.

Kreitman said that he fired Aguirre by telephone because Aguirre was in California on vacation and would not be back before his probationary period was over. He said that he had never had to fire anyone. Kreitman said that Aguirre and him were friends as of the summer when Kreitman believed that Aguirre was unhappy at work but still came to Kreitman's house for a party he has every year for staff. Aguirre felt that his investigation into Pequot was being thwarted, according to Kreitman. Aguirre told Kreitman that he wanted to report directly to him, but Kreitman told him that could not happen. Kreitman said that the Pequot case was staffed more heavily than any other case in his group. Kreitman told me that there was a consensus that Aguirre should be terminated by Thomsen, Berger, Hanson and himself and that he drafted the termination letter to Aguirre. When I asked Kreitman why Aguirre was fired, he told me that Aguirre refused to work in a structure, which presented possible dangers for the Commission, ~~he~~ *was over* was a loose canon (he had threatened to resign and Aguirre made it clear ~~he did not need to work~~ financially), Aguirre said that he would leave once the investigation but would not do the write up of the case, and he was uncooperative with the other 2 staff attorneys assigned to his case by being disrespectful and refusing to bring them in to the heart of the case, he would not take supervision from Hanson, and Berger received many complaints from opposing counsel about

EXHIBIT NUMBER 29

The document is subject to the provisions of the Privacy Act of 1974, and may require redaction before disclosure to third parties. No redaction has been performed in the Office of Inspector General.

MEMORANDUM

TO: File, OIG-431

FROM: Kelly J. Andrews, Associate Counsel to Inspector General

RE: Recommendation for Closing OIG-431; Abuse of Discretionary Authority

DATE: November 29, 2005

Background and Summary

We opened this investigation on October 6, 2005, after receiving a letter from Gary Aguirre addressed to Chairman Cox dated September 2, 2005 -- Aguirre's last day of employment with the Commission after being terminated during his probationary period. In that letter, Aguirre claimed that his supervisors in the Division of Enforcement (Enforcement) gave preferential treatment to former Chairman of a hedge fund Pequot Capital Management (Pequot) and now Chairman and CEO of Morgan Stanley, John Mack, who Aguirre believed may have been a tipper in the insider trading case involving Pequot that Aguirre was assigned. Specifically, Aguirre asserted that: (1) Enforcement supervisors would not take Mack's testimony because of his "powerful political connections"; (2) Mack's counsel, Mary Jo White, contacted Linda Thomsen, Director of Enforcement, bypassing him as staff attorney; and (3) his supervisors excluded him from conversations involving Mack. On October 11, 2005, Aguirre again wrote to Chairman Cox alleging that he believes that his personnel file was tampered with because his former Assistant Director "retroactively created" a supplemental negative evaluation of him to justify his termination after the fact. In the October letter, Aguirre claims that he had alleged in his earlier letter that he was terminated for unlawful reasons, including that he complained about the preferential treatment of Mack.

As discussed below, the evidence gathered did not show that Mack was given preferential treatment or that Aguirre was terminated because of his complaints about Mack's treatment. In addition, the evidence showed that Aguirre's former Assistant Director wrote the supplemental negative evaluation a month before Aguirre was terminated.¹

Scope of the Investigation

During the investigation I spoke to each of the Enforcement supervisors involved in the Pequot case, including Branch Chief Robert Hanson, Assistant Director Mark Kreitman, Associate Director Paul Berger, and Director Linda Thomsen. I also spoke to Enforcement's Administrative Contact Charles Staiger and Human Resource (HR) specialist Linda Borostovik. In addition, I reviewed Aguirre's Official Personnel File (OPF) and numerous e-mails and documents related to Aguirre's allegations.

¹ We did find deficiencies related to the performance evaluation documentation, outlined below.

0000001

Results of the InvestigationA. The Alleged Preferential Treatment of John Mack1. Not Taking Mack's Testimony

Hanson, Kreitman, Berger and Thomsen all said that the issue was not *whether* to take Mack's testimony, but *when* to take it, because they believed that it was premature to take Mack's testimony at the time Aguirre wanted to take it.

Branch Chief Hanson said that the Pequot insider trading case to which Aguirre was assigned had many potential tipsters, one of whom is John Mack. Hanson said that Aguirre wanted to take Mack's testimony in the summer of 2005, and that there was a lot of discussion in the office about whether to do so. Hanson said that he and the other Enforcement supervisors, including Director Thomsen, felt that they should get "their ducks in a row" first and figure out Mack's access and motive before taking his testimony. According to Hanson, at that point there was still an outstanding subpoena for documents in the investigation. Hanson said that Associate Director Berger asked Aguirre to write a memo about why taking Mack's testimony at that time was important. Hanson told me that Aguirre sent two different memos, one to Berger and one to himself, and that some of the assertions in the memos were not true. Hanson told me that he did not tell Aguirre that it would be "very difficult to obtain approval to take Mr. Mack's testimony because of his powerful political connections." Rather he tried to convey to Aguirre that he needed to be sure to "have his ducks in a row" and have the evidence lined up before attempting to take testimony from someone who would be well represented. Hanson believes that Aguirre may have misinterpreted his statement.

Associate Director Berger said that Aguirre came to his office four or five times to discuss the Pequot case. Berger also said that he received many e-mails from Aguirre, including one that contained a memo about why Mack's testimony should be taken at that particular time, but that he found it to be largely incomprehensible. According to Berger, Aguirre was supposed to give Berger a second memo about this but never did. Berger said that the issue was not whether to take Mack's testimony, since it likely will be taken, but when to take his testimony. Berger, along with Kreitman and Hanson, thought that it was not the right time to take Mack's testimony because there was no hard evidence that pointed to Mack. In addition, according to Berger, Enforcement still had an outstanding subpoena for documents and had not yet received telephone records in the case. Berger said that ordinarily they would take someone's testimony to lock them in, but that in this case the actions at issue were years old, so that if Mack denied insider trading the staff would have nothing left to ask him. Berger said that he did not have much confidence in Aguirre because Aguirre's supervisors told Berger that Aguirre would sometimes say that there was evidence to support something when there was not. Berger said that he is not afraid of taking testimony of people in high places, and that it is often done in Enforcement.

Assistant Director Kreitman said that there was insufficient evidence to call Mack in for

testimony, and that Enforcement does not drag in ordinary citizens on unfounded suspicion. Kreitman said that there is no doubt that Mack may be a tipper or that there is illegal insider trading in the case, but that none of the five potential tippers have been called in to date. Kreitman also said that it is pointless to call in a witness to testify without evidence of tipping because the witness would likely just deny the tipping and the testimony would end there.

Thomsen said that she heard about the disagreement in the Pequot investigation between Aguirre -- who thought it was important to take Mack's testimony at a particular time -- and Hanson, Kreitman and Berger, who all thought it did not make sense to take Mack's testimony until they received documents from a subpoena request. Thomsen said the issue was not whether to take Mack's testimony, but when to take it, and that the decision of when to take someone's testimony is one that Enforcement struggles with all the time. Thomsen also said that it was not an issue of Mack being a high level person.

All of Aguirre's superiors, including Thomsen, told us that there were legitimate tactical reasons to wait to take Mack's testimony, and not to take the testimony when Aguirre wanted. They also told us that Enforcement often takes the testimony of powerful, high-level persons. There is no evidence that Enforcement did not want to take Mack's testimony because of his "powerful political connections."

2. Counsel for Mack Contacting Thomsen Directly

Thomsen said that she was contacted by former United States Attorney for the Southern District of New York Mary Jo White during the process of vetting Mack for the CEO position at Morgan Stanley. Thomsen told us that White was representing either Mack or Morgan Stanley. According to Thomsen, White told her that she was aware of Enforcement's Pequot investigation involving Mack, and wanted some assurance that Mack would be in the clear. Thomsen said she gave White no assurances, but that it was during that vetting process that Thomsen and White talked about the outstanding subpoena for documents in the Pequot case. Thomsen said that it is not unusual for attorneys to call her about cases instead of calling Enforcement staff working on the case.

Hanson was aware that White had called Thomsen directly once around the time when Morgan Stanley was hiring Mack. Kreitman recalled that Thomsen called him to say that she had received correspondence from White related to the Pequot investigation, and he went to get it from her.

The evidence fails to show that White contacting Thomsen resulted in preferential treatment or affected any decision about taking Mack's testimony.

3. Alleged Exclusion from Meetings

The evidence shows that Aguirre was involved in many, often lengthy, discussions about whether and when to take Mack's testimony. For example, Hanson told us that Aguirre would

often work late and be discussing the case with Kreitman. In addition, according to Berger, Aguirre discussed the case with Berger at least four or five times and sent him e-mails regarding the case. The evidence fails to show that Aguirre was excluded from discussions about Mack's testimony.

B. The Alleged Tampering with Aguirre's Personnel File

Aguirre claimed that a supplemental evaluation of him written by Kreitman, which Aguirre received for the first time after he left the Commission, was "not prepared in the ordinary course of events." Aguirre suggested in his October letter to the Chairman that the supplemental evaluation was created on or about September 26, but made to look as if it were created before his termination on September 2, 2005.² The documentary evidence we obtained showed that Kreitman prepared the supplemental evaluation on August 1, 2005 -- one month before Aguirre's termination.

We reviewed a September 26, 2005 e-mail from Kreitman to Staiger which stated, "I don't know if the paragraph below, which was my evaluation of Gary (separate from Bob Hanson's), made it into his record. Paul [Berger] suggests that it should be so included." On October 5, 2005, Staiger sent Aguirre a memo with the September 26, 2005, e-mail attached, along with the supplemental evaluation by Kreitman. In that memo, Staiger stated that "[t]he attached supervisory summary from Mark Kreitman mistakenly did not go to the compensation committee."

Hanson told me that sometime around July or August of 2005, Berger told him to be honest in his evaluation of Aguirre, and suggested that Hanson and Kreitman prepare a supplemental evaluation of Aguirre. Hanson also told me that after this meeting with Berger, he went to Kreitman and told him that they needed to prepare a supplemental evaluation of both Aguirre and another employee. Hanson said that Kreitman wrote the first draft of a supplemental evaluation for both employees, including Aguirre. Hanson said that his computer shows that he made edits to Kreitman's draft of the supplemental evaluation on August 1, 2005 at 11:48 a.m., and that he forwarded those edits to Kreitman shortly thereafter at 12:13 p.m.

Berger said that he told Hanson to supplement the contribution statement he had already prepared for Aguirre to include constructive criticism, but that Hanson must have misunderstood

² We found several irregularities with the supplemental evaluation including: it was not dated or signed; it appears to have been created after the merit pay calendar deadline; it was not sent to, or considered by, the compensation committee; it was not in Aguirre's employee personnel file (EPF); and it was separate from the initial evaluation written by Aguirre's immediate supervisor, who should be the only one who prepares a summary on behalf of each employee, according to the merit pay process guidance. We are referring these issues to the audit staff.

him and instead wrote a separate statement.³ Berger told me that he is not sure if the separate evaluation was sent to the compensation committee, which Berger is on. Berger, however, does recall that he saw the statement before the committee made any decision.

Kreitman told me that he read Hanson's initial evaluation of Aguirre, which he believes was sent to Berger around the end of June. Kreitman said that he decided to write a supplemental evaluation because he felt that Hanson had not sufficiently addressed Aguirre's problems. Kreitman also said that he wrote the supplemental evaluation on August 1, 2005, before it went to the compensation committee. Kreitman added that he later learned that only Hanson's evaluation went to the compensation committee. Kreitman also said that he knows the date that he prepared the supplemental evaluation because it is contained in a Word document that shows it was created on August 1, 2005.⁴ Kreitman does not know if Aguirre received a copy of the supplemental rating, but said that Aguirre was already terminated when he would normally meet with staff attorneys and their branch chief to give them their written evaluation and inform them of their step increases.

Thomsen was not familiar with the September 26, 2005 e-mail from Kreitman to Staiger. However, she remembers that Staiger told her that Kreitman wanted to add something to the file. Thomsen said that she told Staiger to be sure that the new material reflected the date it was being added to the file.

The evidence shows that, while not evident on its face, the supplemental evaluation of Aguirre was prepared a month before he was terminated and during the same general time as his merit pay increase was decided. Therefore, there is no evidence that Aguirre's personnel file was tampered with by making it appear that the supplemental evaluation was created before it actually was.

C. The Alleged Unlawful Termination

According to his OPF, Aguirre began at the Securities and Exchange Commission (Commission) on September 7, 2004 as a General Attorney in Enforcement, and was terminated at the end of his probationary period on September 2, 2005. The September 1, 2005 notice of termination sent to Aguirre informed him that he was being terminated for inappropriate conduct, specifically for continuing to have conflicts with various Commission staff and for ignoring the supervisory structure. Hanson, Kreitman, Berger and Thomsen all said that Aguirre did not work well with others or within a supervisory structure.

³ Berger believed that Hanson wrote the separate statement of Aguirre, but Kreitman and Hanson told us that Kreitman wrote it.

⁴ We were able to confirm that Kreitman created, and last edited, the supplemental evaluation on August 1, 2005 at 6:14 p.m. by reviewing Word properties "metadata" information from the document.

Berger told me that the Pequot case insider trading case that Aguirre opened after he began work at the Commission, was a long and troubled investigation because of Aguirre's involvement. Berger said that Aguirre had become too difficult to work with because he did not work well in a supervisory structure or with others, including staff and outside counsel, and because he did not reason through his decisions. According to Berger, Aguirre seemed to think that he could conduct the entire investigation by himself with no supervision. In addition, Berger said that a couple of subpoenas Aguirre issued violated the law and that Berger received many complaints about Aguirre from outside counsel, including one from a former Chairman. Berger said that Aguirre was volatile and would often walk out of the office for the day. At one point, Aguirre announced that he would resign effective the end of September 2005. Berger said that Kreitman then told him that he thought Aguirre should be terminated before his probationary period ended.

Kreitman said that Aguirre worked out well when he began in his group in January 2005.⁵ Kreitman told us that Aguirre had developed and brought the Pequot case with him from another Enforcement group. Kreitman described the Pequot case as a complicated, difficult insider trading case. Kreitman said that there were problems with how the Pequot case was being investigated by Aguirre. For example, Kreitman said Aguirre: (1) refused to work in a supervisory structure, (2) was a loose canon who had threatened to resign, (3) was uncooperative with, and disrespectful to, the two staff attorneys assigned to the Pequot case after Aguirre told staff that he was resigning from the Commission at the end of September 2005, (4) would not take supervision from Hanson, and (5) sent out subpoenas which violated protocol and criminal statutes resulting in the subpoenas being recalled. In addition, Kreitman told me that Berger received many complaints from opposing counsel about Aguirre. Kreitman also told me that he, Thomsen, Berger, and Hanson reached a consensus that Aguirre should be terminated. Kreitman said that he drafted the termination letter and then called Aguirre, who was on leave, to fire him.

Hanson said that he supervised Aguirre from approximately January or February 2005, after Aguirre requested to be, and was, transferred from another Enforcement group, until Aguirre's termination.⁶ Hanson rated Aguirre "pass" and recommended him for a two-step increase on June 29, 2005. Hanson said that Aguirre's performance in his group before his June

⁵ Kreitman told me that he knew Aguirre before he began work at the Commission because Aguirre was a student in Georgetown's LLM program where Kreitman taught. Kreitman said that they were friends and would socialize while Aguirre was at the Commission, but that Berger made the decision to transfer Aguirre from Assistant Director Grimes' group to Kreitman's group.

⁶ The documentary evidence shows that Aguirre began working in Hanson's group on January 18, 2005, but Aguirre's transfer did not become effective until March 20, 2005.

29 rating was fine, but devolved after that.⁷ Hanson said that Aguirre was terminated during his probationary period because he did not work well with others, had poor writing and communication skills, and that, while he had some good ideas, he made serious mistakes. For example, Hanson said that former Enforcement Director Gary Lynch called him about an improper request Aguirre had made to Lynch to keep information confidential, which violates Enforcement policy.

Director Thomsen told me that she discussed Aguirre's termination with Berger, Kreitman and Hanson in her office. Thomsen recalled that Aguirre's termination process was accelerated because Aguirre had told Enforcement that he was resigning at the end of September, but then changed his mind. Thomsen said that Aguirre seemed unhappy working at the Commission both before and after he moved to Kreitman's group.

All of Aguirre's superiors stated that Aguirre had problems working within a supervisory structure and getting along with others. The evidence failed to show that Aguirre's complaints about Mack's alleged preferential treatment had anything to do with his termination.

Conclusion

Based on the work performed during our investigation, the evidence gathered failed to substantiate the allegations that Mack was given preferential treatment, that any Enforcement supervisor retroactively created an evaluation to support Aguirre's termination, or that Aguirre was terminated because of his complaints related to the alleged preferential treatment of Mack. Based on the foregoing, I recommend closing this investigation.

Concur: Mary Beth Sullivan Date: Nov. 29, 2005
Mary Beth Sullivan

Approved: W. Stachnik Date: 11/29/05
Walter Stachnik

⁷ Kreitman said that he concurred with Aguirre getting two steps as a merit promotion, even though he had problems with Aguirre's conduct, because he gives employees more leeway with conduct than with performance problems.

EXHIBIT NUMBER 30

Eichner, Jim

From: Eichner, Jim
Sent: Wednesday, July 19, 2006 4:59 PM
To: Hanson, Robert
Subject: FW: Pequot pemnding matters.

I assume Walter has this – not premature but prerequisite

From: Kreitman, Mark J.
Sent: Wednesday, August 17, 2005 11:26 AM
To: Aguirre, Gary J.; Jama, Liban A.; Eichner, Jim
Cc: Hanson, Robert
Subject: RE: Pequot pemnding matters.

Where are we on determining the date Mack was brought over the wall re GE-Heller deal – the necessary prerequisite to subpoena to Mack?

From: Aguirre, Gary J.
Sent: Wednesday, August 17, 2005 11:21 AM
To: Jama, Liban A.; Eichner, Jim
Cc: Kreitman, Mark J.
Subject: Pequot pemnding matters.

I summarize below a list of pending matters following up on our conversations over the past couple of days, yesterday with Liban alone. Thee items in bold will be the subject of phone calls this afternoon, if you would like to sit in.

Mark: since Bob is out, I am copying you on the list. I am leaving for vacation tomorrow, which I cleared with Bob.

- 1) **Confirm exam date for Benton in NY for week of 9/5; get exam room and reporter;**
- 2) **Confirm exam dates for Dartley for week of Sept. 19 in DC and Samberg for week of Sept. 26 for NY; get exam room and reporter;**
- 3) **Pequot subpoena: Press Harnish for compliance with July subpoena (lets discuss);**
- 4) **Get status from Storch on each class of back up tapes.**
- 5) **Morgan Staley: Get clarification from Ashley Wall on any soft spots in her letter re MS subpoena compliance; you can tackle this if you want while I'm out or I'll do when I'm back.**
- 6) Status of FBI contact with Zilkha; we want Samberg exam immediately after Zilkha interview; we're waiting agent's callback. Agent is David Markel, tel # [REDACTED]
- 7) Telephone company subpoenas: Any useful phone records produced of Samberg calls from mid-June through end of July?
- 8) CSFB: Get press on Patalino for the following:
 - a) July subpoena paragraph 1: Thornberg and Rady's e-mails with Mack; Mack-CS (as parent) e-mails;
 - b) July subpoena paragraph 2: Thornberg or Radis notes or memos re Mack; CS notes or memos re Mack
 - c) Letter to Patalino on above;

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- d) Look for August 30 production of items 3-8.
 - e) Remind Patalino next week if we do not have his letter re above.
 - f) August 17 subpoena: we need to work out; he will ID info flow; we make sure his doc review gets docs.
- 9) Andor backup tapes issue: See my memo raising construction issue on Pequot-Andor agreement (will send an e-mail on this today);
- 10) Other acquisition players have contacts with Pequot before Samberg trades? You can ask them to collect this info by request letter. However, I doubt any will admit w/o docs. GE and JP Morgan say no docs. You have Wall letter. Need to check with Merrill on Hughes.

9/13/2006

SEC 0002990

EXHIBIT NUMBER 31

Humes, Richard M.

To: Eichner, Jim; Hanson, Robert; Jama, Liban A.; Ribelin, Eric
Cc: Miller, Nancy B.; Eichner, Jim
Subject: RE: Developing other possible GE-HF tippers

The premise that another employees tipped Samberg is possible, but that path has so far been dry.

From: Eichner, Jim
Sent: Wednesday, August 03, 2005 9:02 AM
To: Aguirre, Gary J.; Hanson, Robert; Jama, Liban A.; Ribelin, Eric
Cc: Miller, Nancy B.; Eichner, Jim
Subject: RE: Developing other possible GE-HF tippers

My thoughts after reading Gary's memo.

It seems like our efforts so far have been based on the assumption that Samberg got the tip directly. While this seems like the most likely explanation, it may not be the only possibility. The Microsoft trading shows that Samberg wasn't that risk adverse in following tips (especially when they reflect inside information). As Gary astutely observed, the GE/Heller trade was at a time of desperation for Samberg given the impending break up of Pequot. The break up also may have given other Pequot employees the incentive to try and make hay with Samberg in an attempt to move up the corporate ladder when Pequot split (what better way to curry favor than inside information on GE/Heller).

To me this suggests broadening our focus from Samberg to Pequot as a whole. I have only a couple of thoughts of how to do this and would welcome others. Forgive me if these have already been done.

- 1) Have each person who knew about the deal at the five investment bankers and GE/Heller identify who they knew at Pequot at the time of the deal.
- 2) Search all Pequot email to everyone at the five investment bankers and GE/Heller
- 3) Try and identify anyone at Pequot who got promoted soon after the GE/Heller deal

Nancy had a very good idea which I will pass along. She suggested going through all the referrals we got on Pequot and looking for common people/entities.

From: Aguirre, Gary J.
Sent: Thursday, July 28, 2005 7:03 AM
To: Hanson, Robert; Jama, Liban A.; Ribelin, Eric; Eichner, Jim
Subject: Developing other possible GE-HF tippers

I circulated my June 28 memo yesterday to Jim and Liban, but later remembered that it explicitly assumes knowledge of my June 27 memo. I am therefore attaching that memo. I also thought I should put Eric and Bob on the recipient's list, so I am attaching both memos to this e-mail.

Following up on the discussion yesterday, I am also attaching the part of the Samberg exam where I asked him about his acquaintances at Morgan Stanley in 2001, to be distinguished from the questions about his contacts with anyone at MS who had any involvement in the acquisition. Like John Mack, most of these people are fairly prominent, e.g., Byron Wien. I did not run thorough searches on Onsite's or our databases for those on Samberg's Morgan Stanley acquaintance list. Although I have my doubts from my review of Samberg's e-mails, it is conceivably possible to develop the facts suggesting a

09/26/2006

SEC 0003641

possible tipper: trust relationship with Samberg, possible access to info, contacts with Samberg at key times, and motive to pass along tip.

However, if you get that far, there will remain another obstacle as I understand our current thinking--establishing evidence that the person "went over the wall" before you can take his or her exam. I suspect that will not be easy to do.

EXHIBIT NUMBER 32

TOLLING AGREEMENT

WHEREAS, the Division of Enforcement ("Division") of the United States Securities and Exchange Commission ("Commission") has notified Pequot Capital Management ("Pequot"), through its counsel, that the Division intends to recommend that the Commission authorize a civil enforcement action against Pequot with respect to the Commission's investigation entitled In the Matter of Trading in Certain Securities, File No. HO-9818 (the "investigation");

WHEREAS, the Division has informed Pequot, through its counsel, that it would seek the imposition of certain sanctions and other relief, including, but not limited to a permanent injunction, an advisor bar, disgorgement, prejudgment interest, and civil money penalties;

WHEREAS, Pequot, through its counsel, has expressed an interest in conducting discussions with the Division regarding possible settlement of the proceedings;

ACCORDINGLY, IT IS HEREBY AGREED by and between the parties that:

1. The time from and including April 1, 2006, and ending at 5:00 p.m. on October 1, 2006 (the "Tolling Time Period"), will not be included in computing the time limited by any statute of limitations that may be applicable to the proceedings or any other action or proceeding brought by or on behalf of the Commission or to which the Commission is a party arising out of the investigation ("any related proceedings") against or concerning Pequot, including any sanctions or relief that may be imposed therein;
2. Neither Pequot, nor any individual or entity acting on its behalf shall raise in any way in the proceedings or any related proceedings any argument or defense based on the running of any statute of limitations that includes the Tolling Time Period, nor any argument or defense of failure to commence the proceedings or any related proceedings on a timely basis, including laches, that includes the time elapsed during the Tolling Time Period;
3. Nothing in this agreement shall be construed as an admission by the Commission or Division relating to the applicability of any statute of limitations to the proceedings or any related proceedings, including any sanctions or relief that may be imposed therein, or to the appropriate length of any limitations period;

4. This instrument contains the entire agreement of the parties and may be changed only by an agreement in writing signed by all parties hereto.

**SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT**

By: _____ Date: _____
Mark Kreitman, Esq.
Assistant Director

PEQUOT CAPITAL MANAGEMENT

By: _____ Date: _____
Arthur Samberg
Chairman and CEO

On _____, 2006, there personally appeared before me
_____, known to me to be the person who executed the foregoing Tolling
Agreement.

Notary Public
Commission expires:

Approved as to Form:

_____ Date: _____
Audrey Strauss, Esq.
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza
New York, NY 10004-1980

Counsel to Pequot Capital Management

TOLLING AGREEMENT

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1. The time from and including April 1, 2006, and ending at 5:00 p.m. on October 1, 2006 (the "Tolling Time Period"), will not be included in computing the time limited by any statute of limitations that may be applicable to the proceedings or any other action or proceeding brought by or on behalf of the Commission or to which the Commission is a party arising out of the investigation ("any related proceedings") against or concerning Pequot, including any sanctions or relief that may be imposed therein;
2. Neither Pequot, nor any individual or entity acting on its behalf shall raise in any way in the proceedings or any related proceedings any argument or defense based on the running of any statute of limitations that includes the Tolling Time Period, nor any argument or defense of failure to commence the proceedings or any related proceedings on a timely basis, including laches, that includes the time elapsed during the Tolling Time Period;
3. Nothing in this agreement shall be construed as an admission by the Commission or Division relating to the applicability of any statute of limitations to the proceedings or any related proceedings, including any sanctions or relief that may be imposed therein, or to the appropriate length of any limitations period;

4. This instrument contains the entire agreement of the parties and may be changed only by an agreement in writing signed by all parties hereto.

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

By: _____ Date: _____
Mark Kreitman, Esq.
Assistant Director

PEQUOT CAPITAL MANAGEMENT

By: _____ Date: _____
Arthur Samberg
Chairman and CEO

On _____, 2006, there personally appeared before me
_____, known to me to be the person who executed the foregoing Tolling
Agreement.

Notary Public
Commission expires:

Approved as to Form:

_____ Date: _____
Audrey Strauss, Esq.
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza
New York, NY 10004-1980

Counsel to Pequot Capital Management

401

EXHIBIT NUMBER 33

Humes, Richard M.

From: Jama, Liban A.
Sent: Monday, July 24, 2006 12:38 PM
To: Kreitman, Mark J.
Cc: Hanson, Robert; Eichner, Jim
Subject: Testimony (Thursday)

Mark-

Since I have not been the lead investigator on the GE/Heller insider trading portion of the PCM investigation and given the critical nature of the testimony that is to be taken, the lack of preparatory time for the testimony which I understand from our meeting this morning is currently scheduled for this Thursday morning in New York, and my lack specific knowledge of the record regarding this portion of the investigation, I would not feel comfortable taking the testimony this Thursday. I understand that there may be a time sensitivity issue with respect to the testimony schedule that has been set, however, if I was given a sufficient period of time to familiarize myself with the documents produced with respect to this aspect of the investigation and sufficient preparatory time to develop an investigative strategy with respect to the testimony I would be willing to pitch in. My goal, as always, is to do complete and thorough job on any matter. Please let me know how you would like to proceed. Thanks.

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09/15/2006

SEC 0002877

403

EXHIBIT NUMBER 34

U.S. SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

-----x
:
In the Matter of: :
:
TRADING IN CERTAIN SECURITIES, :
No. HO-0818, and the SEC's :
TERMINATION OF EMPLOYMENT OF :
GARY AGUIRRE :
:
-----x

Wednesday,
October 11, 2006

The interview of LIBAN JAMA, Esq., Securities
and Exchange Commission, was convened, pursuant to notice,
at 10:03 a.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, ESQ.
Investigative Counsel
U.S. Senate Committee on Finance

STEPHANIE MIDDLETON
U.S. Senate Committee on the Judiciary

NATHAN MORRIS
U.S. Senate Committee on the Judiciary

JANE O. COBB
Director, Office of Legislative Affairs
U.S. Securities and Exchange Commission

SAMUEL M. FORSTEIN, ESQ.
Assistant General Counsel
Litigation and Administrative Practice
U.S. Securities and Exchange Commission

LISA DENNIS COURT REPORTING
(410) 729-0401

1 MR. JAMA: Correct, and working files that he had
2 in terms of his notes and what primarily the--what was
3 produced by outside counsel, defense counsel.

4 MR. FOSTER: What about the correspondence files?

5 MR. JAMA: Correspondence files, that was an issue
6 with respect to, I believe, later in August because I was
7 asked to assist in--this is going forward when Gary left--to
8 identify the correspondence files in his office. So the
9 office was pretty disorganized at the time, so I assisted
10 Jim Eichner to find those files. And at the time we could
11 not--I couldn't find the files. I didn't find any files.

12 MR. FOSTER: You said that is after he left. What
13 about before he left? Were you able to--when you needed in
14 the course of your duties to locate correspondence prior to
15 Gary Aguirre leaving, did you ever have any difficulty doing
16 that?

17 MR. JAMA: I don't think it ever arose. I never
18 requested from Gary personally files from him in the course
19 of my duties. Usually it would be, for example, I need--he
20 would say to me, "We need to issue a subpoena to Verizon,"
21 for example. I would say to him, "Do you have a sample
22 subpoena that I could use format-wise?" And he would
23 provide that to me electronically. So any documents that I
24 would need he would usually provide to me either a hard copy
25 or an electronic e-mail.

1 MR. FOSTER: So in that beginning period, if a
2 third party asked you how to locate correspondence in the
3 Pequot investigation, would you have been able to do that?

4 MR. JAMA: No. I wouldn't have been able to other
5 than going to Gary and asking him for the files. I do not
6 know where he kept them in his office.

7 MR. FOSTER: Okay. So you weren't aware of any
8 correspondence binders, 15 or so correspondence binders that
9 were kept in his office and labeled in chronological order?

10 MR. JAMA: No. I think--let me try and remember.
11 There are a number of binders in the office. I don't know
12 if they were correspondence binders. I think they were file
13 binders containing document, but I do not believe they were
14 actual letters or correspondence. Binders for documents
15 that were produced.

16 MR. FOSTER: Would you say that you were
17 frustrated with the way that Gary Aguirre managed the case
18 while you worked with him?

19 MR. JAMA: No, I didn't have a high level of
20 frustration. I think that at the time I was trying to gain
21 as much experience as possible on my cases. Gary answered
22 my questions. Whenever I asked him a question, he would
23 answer the question for me. So I did not have really at
24 that time a high level of frustration.

25 MR. FOSTER: Did you at a later time?

1 staff attorneys to see if this was a common request,
2 immediately after that or up until today?

3 MR. JAMA: I talked to Jim, and he said that is
4 not a common request. I spoke to--I don't remember who I
5 spoke to. I know I talked to other folks just to say, in
6 general, like, Hey, I got a request to take some testimony
7 and I have got, you know, a day and a half. Who did I talk
8 to? I don't remember exactly.

9 I do remember saying, "Is a day and a half enough
10 time, in your opinion, if you haven't been involved?" "No"
11 was the universal response. So, you know, I am a team
12 player. I am willing to do the work. And if I felt that it
13 was within my grasp to do it, then I would have done it.
14 But I just didn't feel I had enough time.

15 MR. FOSTER: Going back to the sentence where you
16 say, "My goal, as always, is to do a complete and thorough
17 job," did anyone ever suggest that that was not your goal or
18 that should not be your goal in this instance?

19 MR. JAMA: No one suggested it, but from my
20 perspective, I just did not know how--from my point of view,
21 I am coming in, I am trying to understand, how am I going to
22 do a complete and thorough job in a day and a half, not
23 involved in the case? So I guess I am trying to convey that
24 I don't feel like I can do a complete and thorough job and
25 do a proper job on behalf of the Commission in that kind of

1 you know, there is not much to prepare for.

2 MR. FOSTER: You don't believe that you suggested
3 to Steven Glasgow that Mark Kreitman had suggested to you
4 that it would be a good thing not to be prepared for this
5 interview?

6 MR. JAMA: I know Mark--I think Mark--I am trying
7 to remember. I mean, he was--I mean, he seemed to me
8 really--he really seemed to me not--to me he didn't seem
9 concerned. He said, "You don't need to prepare that much
10 for it," which I found to be strange, and I relayed that to
11 folks. So, yeah, he didn't feel like I needed to be prepped
12 or I didn't have to--I didn't need a lot of prep time for
13 it, which I thought was unusual in my mind. But then it
14 square with his thought of a day and a half should be a
15 sufficient period of time, so that's why he asked me. I am
16 trying to figure out why he asked me to do this in a day and
17 a half. It didn't make any sense to me. And I expressed
18 the fact that I didn't have enough prep time, and he did say
19 definitely, "Oh, you don't need that much prep time at all."

20 Now, whether he said, "It might be best that you
21 don't come in with a lot of prep," I don't remember. I do
22 know he said, "You don't need a lot of prep for this. There
23 is not much to prepare for." And then what else did he say?
24 "You don't need a lot of prep time." I expressed my
25 concerns about that. I think that is about it. I'm trying

1 to see...

2 I just thought it was an unusual request to make
3 of me--and, quite frankly, unfair. I thought he put me in a
4 difficult position.

5 MR. FOSTER: Is there anyone other than Steven
6 Glasgow that you remember talking to about it?

7 MR. JAMA: I talked to other colleagues about it
8 that were outside, yeah, definitely. And I talked--

9 MR. FOSTER: Such as?

10 MR. JAMA: In my group--who did I talk to? Who
11 would I have normally said something to? David Witherspoon,
12 Janine Smith.

13 I think that is about it. I may have mentioned it
14 to other folks, but I don't remember. But I know I talked
15 to people about it, definitely, because I was--I thought it
16 was an unusual request.

17 MR. FOSTER: Prior to Gary Aguirre's firing, did
18 you have any involvement in preparing monthly case summaries
19 that went from Mark Kreitman to Paul Berger?

20 MR. JAMA: When I first started, there was a case
21 summary system, yes, and I think there is still one there
22 today. It is monthly or quarterly, so it is on the J drive.

23 MR. FOSTER: Can you describe your involvement in
24 the process?

25 MR. JAMA: Well, the way it works is you provide a

410

EXHIBIT NUMBER 35

COPY

1 THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

2 (Amended 8-25-06)

3 In the Matter of:)

4) File No. HO-09818-A

5 TRADING IN CERTAIN SECURITIES)

6 WITNESS: John J. Mack

7 PAGES: 1 through 166

8 PLACE: Securities and Exchange Commission

9 Washington, D.C.

10

11 DATE: Tuesday, August 1, 2006

12

13 The above-entitled matter came on for hearing, pursuant
14 to notice, at 10:04 a.m.

15

16

17

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22

23

24 Diversified Reporting Services, Inc.

25 (202) 467-9200

1 APPEARANCES:

2

3 On behalf of the Securities and Exchange Commission:

4 JAMES EICHNER, ESQ.

5 PETER BRESNAN, Deputy Director.

6 ROBERT HANSON, Branch Chief.

7 Division of Enforcement

8 Securities and Exchange Commission

9 100 F Street, N.E.

10 Washington, D.C. 20549

11 (202) 551-4928

12

13 On behalf of the Witness:

14 CAREY R. DUNNE, ESQ.

15 DAVIS POLK & WARDWELL

16 450 Lexington Avenue

17 New York, New York 10017

18 (212) 450-4000

19

20 GARY LYNCH, ESQ.

21 Morgan Stanley

22 1585 Broadway

23 New York, New York 10036

24 (212) 761-7500

25

26

1 Switzerland. I don't remember who made the call. I don't
2 know if this is the call to set it up either.

3 Q You don't know whether that is the call?

4 A I don't know.

5 Q Do you have any recollection of what you discussed
6 with him on the 25th?

7 A The only thing I would think about, since it's the
8 25th and it's almost three weeks since I met with Mr.

9 Thornburgh, a trip to Switzerland, but I'm not sure of that.

10 It would have to be that, because she has Zurich on
11 the 27th.

12 MR. EICHNER: I'm going to ask the Court Reporter
13 to mark this document.

14 (SEC Exhibit No. 152 was
15 marked for identification.)

16 BY MR. EICHNER:

17 Q Mr. Mack, I'm going to hand you what's been marked
18 Exhibit 152. I'll note for the record Exhibit 152 is a four
19 page document Bates numbered JJM126 through 129. The title
20 on the first page is "Zurich June 26 - June 28."

21 Mr. Mack, can you identify this document?

22 A It appears to be my itinerary for Zurich and the
23 people I would see there.

24 BY MR. HANSON:

25 Q You said "appears."

1 A It is.

2 BY MR. EICHNER:

3 Q Turning to the second page, this is your agenda of
4 meetings in Switzerland?

5 A Yes.

6 Q If you turn to the 11:00 a.m. entry, can you read
7 that entry for the record, please?

8 A "Meeting with Walter Kielholz, chief executive
9 officer, Suisse Group. Chairman of the audit committee of
10 CSG. Please wait for him at the reception."

11 Q Did you in fact meet with Mr. Kielholz?

12 A I did.

13 Q What was discussed during that meeting?

14 A I wanted his view of what the problems were with
15 First Boston and Credit Suisse, what he thought my role
16 should be. I wanted him to talk about the issues and
17 problems they have had and why, why were there, I'd say,
18 egregious payments made to a lot of the staff there.

19 We may have spoken about the DLJ merger. I'm sure
20 that came up, but I don't remember what we said there.

21 It was all about Credit Suisse and Credit Suisse
22 First Boston.

23 Q Any discussion about the investment banking
24 operations of First Boston?

25 A Not specifically; no.

1 Q Any discussions generally?

2 A I'm sure I would like to get his view of First
3 Boston, you know. Did they have a strong investment banking
4 team, were they strong in sales and trading? How were they
5 viewed in Switzerland. I would have thought I would have
6 asked those questions.

7 Q Anything else that you remember discussing with him
8 about the investment banking operations?

9 A No.

10 Q Did you discuss any pending investment banking
11 deals with him?

12 A No.

13 Q Did you discuss GE or Heller with him?

14 A I did not.

15 Q Were there any meetings that you had in Switzerland
16 prior to this meeting with Mr. Kielholz that are not
17 reflected on this agenda?

18 A I think this is the agenda. I mean, maybe there is
19 a possibility I saw Lukas in the hotel when I arrived or
20 something like that. I don't remember.

21 Q Turning to 2:00 p.m. on the agenda, can you read
22 that for the record, please?

23 A "Meeting with Daniel Vasella, chairman and CEO,
24 Novartis, member of the compensation committee of CSG."

25 Q Did you in fact meet with Mr. Vasella?

1 A I did.

2 Q Why were you meeting with Mr. Vasella?

3 A He was a Board member and Lukas Muhlemann wanted me
4 to meet with some of the Board members.

5 Q What was discussed during your meeting with Mr.
6 Vasella?

7 A Same general conversation with Walter Kielholz. I
8 talked to him or Peter Brabeck, who we will come to later,
9 about the reporting structure that Lukas Muhlemann wanted to
10 have, and I was not prepared to accept that reporting
11 structure.

12 I just don't remember if I spoke to Vasella about
13 it or Brabeck, but I did talk to one of them about it.

14 Q Briefly, what's the issue with the reporting
15 structure?

16 A They wanted me to come in, run First Boston, and
17 then take Wellauer, who was already there, and make him, I
18 think, CEO, because Muhlemann wanted to become chairman. I
19 told them I had a problem with that.

20 Q What was your problem with that?

21 A I wasn't going to go to work for Thomas Wellauer.

22 Q Let me make sure I understand this. You did not
23 want to report to him, you wanted to report directly to
24 someone else; is that correct?

25 A Yes. I thought it was odd to be recruited by the

1 CEO and then make an announcement if I joined them, that in a
2 very short period of time, they would change the management
3 structure, and Wellauer would be the CEO. Muhlemann would be
4 the chair.

5 Muhlemann said, well, I understand you have a
6 problem with that, but you can report to me. I said I'm not
7 going to work that way.

8 Q Anything else you remember about your meeting with
9 Mr. Vasella?

10 A Only that he wanted a change at First Boston. He
11 didn't like what was going on.

12 Q Any discussion of First Boston's investment banking
13 operations?

14 A No.

15 Q Any discussion of how he feels about the investment
16 banking group at First Boston?

17 A No.

18 Q Any discussion of GE or Heller?

19 A No.

20 Q Turning to the 5:00 p.m. meeting with Thomas
21 Wellauer, did you have that meeting?

22 A I did.

23 Q Why were you meeting with him?

24 A I think Thomas was on the executive committee, and
25 he ran the Private Bank, I think. I just wanted to get his

1 view of the relationship between the Private Bank and the
2 investment bank.

3 Q What did you discuss about the investment bank with
4 him?

5 A Really about how it worked, who contributed in the
6 conversation, how decisions were made, did they cross sell
7 products, how they worked together, things like that.

8 Q Any other discussions about the investment banking
9 operations?

10 A No.

11 Q Did you discuss with Mr. Wellauer any pending deals
12 that the investment banking operation was working on?

13 A I did not.

14 Q Did you discuss with him GE or Heller?

15 A I did not.

16 Q Turning over to the 6:00 p.m. meeting, it says
17 "Meeting with Oswald Grubel." Who is Mr. Grubel?

18 A He's on the executive committee, but I don't
19 remember what he ran at the time.

20 Q Did you actually meet with him?

21 A I did.

22 Q What was discussed during that meeting?

23 A Again, same subject, problems. What was his view.
24 Why did they occur. Why was there such lack of management of
25 the business. He said he had met me a couple of years -- a

1 few years back, and that he tried to get Muhlemann then to
2 hire me when I was still at Morgan Stanley. He said that to
3 me, and expressed an interest, that I really need to come
4 over and run First Boston.

5 Q Any discussions with him about the investment
6 banking operations at First Boston?

7 A No.

8 Q Any discussions with him about pending deals that
9 the investment banking operation was working on?

10 A No.

11 Q Any discussion with him about GE or Heller?

12 A No.

13 Q The next entry says "Dinner with Lukas Muhlemann."

14 A Let me back up. I think Wellauer ran the insurance
15 company, and Grubel ran the Private Bank. I'm pretty sure
16 that's right.

17 Q Now that you remember that, does that help jog any
18 memories about what you discussed with either of them that
19 you haven't already shared with us?

20 A No.

21 Q Turning to the dinner with Mr. Muhlemann, did you
22 actually have dinner with Mr. Muhlemann?

23 A I'm sure I did, but I don't remember.

24 Q Was it just him or did other people attend?

25 A I don't remember.

1 Q What did you discuss with Mr. Muhlemann?

2 A I'm sure it was the reporting lines, and why I
3 wouldn't do that. That I was interested, but I wouldn't do
4 it under these terms. To try to get a better understanding
5 of how decisions were made at Credit Suisse. Again, it was
6 informative for me to get more information about how the
7 management team worked, what were the challenges, what he saw
8 the big problems were, how to return to profitability. I'm
9 sure we discussed the merger with DLJ.

10 Q Any discussions with him at this dinner about the
11 investment banking operations of First Boston?

12 A Not that I remember.

13 Q Any discussion about pending deals involving the
14 investment banking operations?

15 A Again, not that I remember.

16 BY MR. HANSON:

17 Q Is it that you don't remember one way or the other
18 or you think it happened or you don't think it happened?

19 A See, the problem is he could have brought up his
20 long term strategy and talked about what I'd really like to
21 do in the next two years is spin off the insurance company,
22 merge with one of the German banks.

23 I assume that's covered in the question, did you
24 talk about deals. That may have been discussed. I just
25 don't remember.

1 Q Any other aspect, like the inventory that CS First
2 Boston had at the time in terms of pending deals?

3 A No. There may have been discussion on real estate,
4 because they were up to their eyeballs in distressed real
5 estate, and that may have come out and we talked about that.
6 I just don't remember that.

7 These meetings were for me to get information about
8 the people, the structure, the management. They were not
9 there for me to figure out were they going to be number one
10 in IPOs or M&A. It was all about how did we get into this
11 problem, how are we going to solve it, what kind of support
12 did the Swiss have for the investment banking business,
13 because it was losing so much money. How difficult would it
14 be for an American to work with a Swiss bank.

15 Those were the nature of those discussions.

16 Q Sort of high level macro discussions?

17 A Yes.

18 BY MR. EICHNER:

19 Q Any discussion of GE or Heller with Mr. Muhlemann?

20 A No.

21 Q Were there any meetings that day that are not
22 reflected on here? Do you recall?

23 A No.

24 Q Were there written agendas for any of the meetings
25 that occurred that day?

- 1 A No.
- 2 Q Did you take notes at any of those meetings?
- 3 A I probably did.
- 4 Q What did you do with those notes?
- 5 A I threw them away.
- 6 Q When would you have thrown them away?
- 7 A During the last seven days after meeting with them.
- 8 I just made notes to jot down some of the things they said to
- 9 me.
- 10 Q When you say within "the last seven days," you mean
- 11 back in 2001, within seven days of meeting with them?
- 12 A Yes.
- 13 Q Were there any documents that you received or were
- 14 discussed with you during these meetings?
- 15 A No.
- 16 BY MR. HANSON:
- 17 Q Why did you throw the meeting notes out?
- 18 A Well, I just needed to refresh my memory of what we
- 19 talked about. I sat on the plane and refreshed my memory. I
- 20 didn't need them.
- 21 BY MR. EICHNER:
- 22 Q Is that your typical practice when you take notes?
- 23 A It is.
- 24 Q Why is that?
- 25 A Because I don't use them, and it clutters things

1 up. I do throw my notes away.

2 MR. LYNCH: Are we going to take a break relatively
3 soon?

4 MR. EICHNER: We can take one now if you want. We
5 are off the record at 10:50 a.m.

6 (A brief recess was taken.)

7 MR. EICHNER: We are back on the record at 10:55.

8 BY MR. EICHNER:

9 Q Mr. Mack, did we have any substantive discussions
10 about the case during the break?

11 A No.

12 Q I want to just go back for a second to the notes
13 you took during the meetings in Switzerland. Do you remember
14 anything that was reflected on those notes?

15 A No. I have to be clear. You asked did I take
16 notes. I said I may have taken some notes. I don't remember
17 specifically. I'm sure, you know, when you're talking to
18 someone, let's say if Lukas and I got into a compensation
19 discussion, which I don't think we did, I would have written
20 down this is what he's offering me or something like that.

21 Q Do you remember writing down anything about the
22 investment banking operations or investment banking deals?

23 A No.

24 Q Do you remember writing anything down about GE or
25 Heller?

1 A No.

2 BY MR. HANSON:

3 Q Do you not remember one way or the other, or do you
4 think you wrote something down or didn't?

5 A I did not write anything down.

6 Q About investment banking deals?

7 A About GE or Heller.

8 MR. DUNNE: I think the record will show from the
9 outset, he said he's not even sure he took notes or not, but
10 he may have. Correct?

11 THE WITNESS: Correct.

12 BY MR. HANSON:

13 Q Fair point. I guess I just wanted to make sure
14 from your best recollection, if you did take notes, whether
15 they would have reflected anything regarding Heller or
16 General Electric.

17 A They wouldn't, if they existed.

18 BY MR. EICHNER:

19 Q Turning back to the agenda, Exhibit 152, turning to
20 the entries for the 28th of June. The first entry is a 9:00
21 meeting with Mr. Muhlemann. Do you remember having that
22 meeting?

23 A I do not.

24 Q You don't remember whether you had it or you didn't
25 have it, or you don't remember anything about the meeting, or

1 both?

2 A I don't remember having it. I mean again, it's
3 five years ago, 9:00 a.m. in the morning. I saw him three or
4 four times evidently while I was there. Do I remember a 9:00
5 breakfast meeting with Lukas? I do not.

6 Q Do you remember anything that was discussed over
7 breakfast with Mr. Muhlemann?

8 A I do not. All these discussions with Lukas were
9 he'd go from whatever was said when I first saw him to
10 whatever we continued. It's hard to put a break in one
11 meeting versus the next, but with the Board members, since
12 they were boxed in one hour increments and I didn't meet with
13 them again, that's much more memorable.

14 Q Is there anything that you remember discussing with
15 Mr. Muhlemann during this trip that you haven't described for
16 us already?

17 A Not that I remember.

18 Q Turning to your 2:00 p.m. meeting, can you read
19 that entry?

20 A "Meeting with Peter Brabeck, CEO, Nestle SA, vice
21 chairman of CSG Board and chairman of the compensation and
22 appointments CSG."

23 Q Did you meet with Mr. Brabeck?

24 A I did.

25 Q Why were you meeting with Mr. Brabeck?

- 1 A He was a director of Credit Suisse.
- 2 Q What was discussed during that meeting?
- 3 A Same general discussion that I had with Mr.
- 4 Kielholz and Mr. Vasella. Told him, as I said earlier,
- 5 either to him or to Vasella, I didn't like this reporting,
- 6 and either Brabeck or Vasella said I don't blame you, I
- 7 wouldn't do that either.
- 8 Q What else was discussed with Mr. Brabeck?
- 9 A I don't remember.
- 10 Q Do you remember any discussion of the investment
- 11 banking operations at First Boston?
- 12 A I do not.
- 13 Q Did you discuss pending investment banking deals?
- 14 A No.
- 15 Q Did you discuss GE or Heller?
- 16 A I did not.
- 17 Q Were there any documents that were discussed or
- 18 provided to you as part of this meeting?
- 19 A I don't remember.
- 20 Q You don't remember if there were or were not?
- 21 A I do not.
- 22 Q Did you take notes during this meeting?
- 23 A Probably not.
- 24 Q Did anyone else attend your meeting with Mr.
- 25 Brabeck?

- 1 A I don't think so.
- 2 Q The other meetings that we have discussed in this
3 agenda, were they all one on one meetings, or were there
4 other people in attendance at any of them?
- 5 A I think the majority were one on one. I know the
6 ones with the Board members were one on one. The ones with
7 Grubel and Wellauer, I don't remember.
- 8 Q Do you remember meeting with anyone who we haven't
9 discussed, either one or one or as part of one of these
10 meetings that we have discussed?
- 11 A I don't remember.
- 12 Q Is it possible?
- 13 A It's possible.
- 14 MR. DUNNE: I'm supposed to object for the record
15 to that question.
- 16 MR. EICHNER: Okay.
- 17 BY MR. EICHNER:
- 18 Q Any other meetings you had in Switzerland that we
19 haven't discussed?
- 20 A Not that I remember.
- 21 Q Turning to the entry for July 2, 2001, can you read
22 that entry?
- 23 A "Meeting with Aziz Syriani in New York, president
24 of Holion Group, member of the compensation and appointments
25 committee of CSG."

1 Q Did you meet with Mr. Syriani?
2 A I did.
3 Q Why did you meet with Mr. Syriani?
4 A He's a Board member.
5 Q Did you meet in person?
6 A I did.
7 Q Where did you meet?
8 A I don't remember.
9 Q Was anyone else present for that meeting?
10 A I don't think so.
11 Q What was discussed during that meeting?
12 A Basically the same discussion I had with the other
13 Board members.
14 Q If you could just summarize that briefly for me.
15 A Tell me about the firm, tell me about governance.
16 Tell me about what you see the issues are. Tell me about
17 what you think I need to do. Talk to me about the Board and
18 interface with First Boston. Why did you do the DLJ merger.
19 I'm sure I asked one of them.
20 Q Was there an agenda for this meeting?
21 A There was not.
22 Q Were there any documents discussed or shared as
23 part of this?
24 A Not that I remember.
25 Q Did you take notes?

1 A I did not.

2 Q You did not?

3 A I did not.

4 Q Why are you sure?

5 A Because had I taken notes, it would be with

6 Muhlemann, trying to understand what he was laying out to me.

7 The Board members were really for me to get a chance to get

8 comfortable with the Board and for them to get comfortable

9 with me. There was no reason -- I mean, I wasn't talking

10 about compensation with these gentlemen. I wasn't talking

11 about structure. All that was with Mr. Muhlemann.

12 Q During your meeting with Mr. Syriani, did you

13 discuss anything about First Boston's investment banking

14 operations?

15 A I did not.

16 Q Did you discuss any pending investment banking

17 deals?

18 A I did not.

19 Q Did you discuss GE or Heller with him?

20 A No.

21 Q What is the next contact you remember related to

22 your employment or potential employment at Credit Suisse

23 First Boston?

24 A I don't remember specifically, but I'm sure I went

25 back to Lukas and said make me an offer and I'll look at it.

1 MR. EICHNER: I'll ask the Court Reporter to mark
2 this as the next exhibit.

3 (SEC Exhibit No. 153 was
4 marked for identification.)

5 BY MR. EICHNER:

6 Q I'm going to show you what's been marked Exhibit
7 153, which is an one page document, Bates numbered JJM130.

8 Mr. Mack, can you identify that document?

9 A It's a telefax from Credit Suisse with Lukas' phone
10 numbers.

11 Q Have you seen this document before?

12 A I'm sure I have.

13 Q Does this help you at all in terms of when you may
14 have spoken to Mr. Muhlemann again?

15 A It does not.

16 Q Do you remember -- you described at some point you
17 had a discussion or conversation with Mr. Muhlemann about
18 your potential employment; correct?

19 A Yes.

20 Q Do you remember whether that was a telephone call
21 or an in person meeting?

22 A I don't.

23 Q Do you remember what was discussed with Mr.
24 Muhlemann?

25 MR. LYNCH: I'm sorry. I'm a little lost now.

1 Which conversation or meeting are we talking about?

2 MR. EICHNER: I believe Mr. Mack said that he
3 remembers some time after his trip to Switzerland and the
4 breakfast with Mr. Syriani, he had another conversation with
5 Mr. Muhlemann. I'm just asking about that.

6 MR. LYNCH: It's the conversation with Mr.
7 Muhlemann after the breakfast with Aziz Syriani?

8 MR. EICHNER: Correct.

9 THE WITNESS: Not specifically. I'm sure it's the
10 same things we have been talking about, structure,
11 compensation, contract. We had a discussion about airplanes.
12 They were buying -- I don't remember -- Falcons or something
13 like that, having access to a plane. I don't remember which
14 conversation that took place in.

15 BY MR. EICHNER:

16 Q The discussion about planes was about your access
17 to a plane?

18 A Right.

19 Q Not a deal they were involved in regarding planes?

20 A That was about access to a plane.

21 Q Anything else you remember being discussed?

22 A No.

23 Q During this conversation, was there any discussion
24 about the investment banking operations of First Boston?

25 A Not that I remember.

1 Q Is there anything that makes you think you did or
2 you didn't have that conversation?

3 A The question is in any conversation on investment
4 banking of First Boston, he may have said I don't like Tony
5 James running investment banking. I don't know. Maybe he
6 said that.

7 Q Any discussion about deals that the investment
8 banking operation of First Boston was involved in?

9 A No.

10 Q Any discussion of GE or Heller?

11 A No.

12 Q Any other -- what other contacts do you remember
13 regarding your potential employment at Credit Suisse First
14 Boston before you actually went to work there?

15 A With Lukas Muhlemann?

16 Q With anyone.

17 A You know, I just don't remember. I mean, I'm sure
18 I talked to my wife about it. I may have spoken to Steve
19 Volk about it. I don't think so.

20 Q Any contacts you remember with anyone at First
21 Boston or Credit Suisse after this phone call with Mr.
22 Muhlemann?

23 A My only contact would be Dick Thornburgh if I had
24 contact.

25 Q Do you specifically remember whether you did or you

1 Q Did you learn anything suggesting that it might be
2 advantageous to sell GE stock?
3 A No.
4 Q During that trip to Switzerland in 2001 or any of
5 the contacts you had with representatives of Credit Suisse or
6 First Boston, up until the time you began work, did anyone
7 convey any information to you about a transaction involving
8 GE and Heller?
9 A Not that I remember.
10 Q If they had, do you think it's something you would
11 remember, or do you just not recall one way or the other?
12 A Probably not.
13 Q Why is that?
14 A It was five years ago. I just don't remember.
15 Q Earlier, I thought you said that it might have been
16 inappropriate, that you would have had no reason to know
17 about that type of information.
18 A Right.
19 Q Based on that, I'm asking whether you think that is
20 something that would have stuck out in your memory or not.
21 A I think if they said that, it would have stuck out
22 in my memory.
23 Q Do you have a recollection of them mentioning GE or
24 Heller or the GE/Heller transaction?
25 A I do not.

1 BY MR. EICHNER:

2 Q Mr. Mack, when did you first learn of the
3 transaction between GE and Heller that was announced in July
4 of 2001?

5 A I really don't remember. I'm sure if it was a
6 major transaction, I would know about it, but I don't
7 remember specifically being told about it on the date it came
8 up. I just don't remember.

9 Q Do you remember how you learned about the
10 transaction?

11 A I'm sure I was told by the banker who covers either
12 GE or Heller.

13 Q Who is that?

14 A I think it's Bob Clymer, but I'm not sure. I don't
15 know if he covers GE. I think he does cover Heller.

16 Q Where was Mr. Clymer employed?

17 A At First Boston.

18 Q You think one of your employees at First Boston
19 told you about the transaction?

20 A Yes.

21 Q When did he tell you about it?

22 A I don't know that.

23 Q Did you know anything about that transaction before
24 it was publicly announced?

25 A I'm sure I knew about the trade; yes.

1 A I see it.

2 Q It says "During the third quarter, John Mack, CEO
3 of CSFB, joined the Board of Directors of Celiant Corp.,
4 formerly Fresh Start Corp."

5 A That's what it says, but I don't remember Fresh
6 Start.

7 Q Does that remind you about anything in regard to
8 Fresh Start?

9 A It doesn't. I can tell you about Celiant, a lot
10 about that, but I can't tell you anything about Fresh Start.

11 Q You don't remember that Celiant was formerly Fresh
12 Start?

13 A No. That's all news to me today.

14 Q How did you come to be on the board of Celiant?

15 A They had invested to their limit.

16 Q Who is "they?"

17 A Pequot had invested up to their limit by what
18 percentage in any one investment in a private equity fund,
19 and they needed more money. They asked would I invest. I
20 had money. I left Morgan Stanley. I said yes, I would
21 invest.

22 Q How much did you invest?

23 A I think \$5 million, but it may have been \$7.5
24 million. I think it was five.

25 Q As a result of that investment, did you also become

1 A He just sat down and told me what they were doing,
2 what the company did, why they thought it was a good
3 investment, what they thought the growth potential was. As I
4 listened to it, I believed it.

5 Q Do you know when you invested in the company?
6 A I don't remember that.

7 Q Do you remember how long it took you to make the
8 decision to invest in the company?
9 A I don't remember that either.

10 Q Do you know if the company was private or public at
11 the time?
12 A I think it was private.

13 Q Did it ultimately go public?
14 A It did not. It got bought out, I think a year
15 later, by Andrew Corp., which makes coaxial cable and
16 something on the tower for mobile phones.

17 Q You said you did well in the investment?
18 A Yes.

19 Q You said you initially invested 5 to \$7.5 million.
20 A Right.

21 Q Do you remember what your return was on that?
22 A Well, I doubled it. I didn't get out of all of it,
23 but it doubled.

24 Q When you say you didn't get out of all of it?
25 A I still own some of the stock.

1 would assume, given his background in technology and Art's
2 background in technology, they talked about technology, but I
3 don't remember that.

4 MR. EICHNER: I'm going to ask the Court Reporter
5 to mark this as the next exhibit.

6 (SEC Exhibit No. 163 was
7 marked for identification.)

8 BY MR. EICHNER:

9 Q Mr. Mack, I'm going to hand you what's been marked
10 Exhibit 163, which is an one page document of e-mails with my
11 name in the upper left-hand corner. I'll ask you to take a
12 look at that. Have you read through the e-mails?

13 A Just really quickly.

14 Q Take your time. Mr. Mack, I have showed you this
15 e-mail which I know you are not on, in the hopes that it
16 might help you remember things about your dinner with Mr.
17 McGinn and Mr. Mack (sic).

18 Does this refresh your recollection at all about
19 things that were discussed at the dinner?

20 A Mr. Samberg.

21 Q I'm sorry.

22 A It doesn't except it confirms two things that I
23 said, that McGinn had left Lucent, and my idea of some kind
24 of fund or investment he could do with Art or work together.
25 That's all it does.

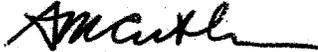
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EXHIBIT NUMBER 36

MEMORANDUM

July 15, 2004

TO: Jayne L. Seidman, Associate Executive Director
Office of Administration and Personnel Management

FROM: Stephen M. Cutler, Director
Division of Enforcement 

RE: Justification for special salary rate that Gary J. Aguirre be hired as an attorney (Securities Industry) in the Enforcement Division at the SK-14, step 24 Level

The Division of Enforcement, Securities and Exchange Commission, requests that an offer of employment be made to Mr. Gary Aguirre to serve as an attorney within the Division as a SK-14, step 24, at the starting salary of \$125,601 per annum, as provided by Commission Policy.

The facts to support a request above the minimum salary level are as follows:

Mr. Aguirre has much more litigation, securities and trial experience than the normal candidates we recruit. He has seven years of securities fraud litigation, including three class actions. He has obtained substantial recoveries in 95 consecutive complex cases with a total in excess of \$200 million. He was the lead counsel in more than half of these cases and assisted his partner on others. He has published many legal articles and served as a presenter in a variety of civil litigation and advocacy programs. He won appeals in seven separate cases.

Mr. Aguirre received an LLM with Distinction in October 2003 concentrating in Private Studies, Securities Regulation-International Law from Georgetown University Law Center. He graduated with a LLB from Boalt hall, at the University of California, Berkeley. He graduated with a B.S. degree in Political Science from the University of California. He is a member of the bar in California.

Mr. Aguirre recently came out of retirement to obtain an LLM degree and work again in the securities area. While in

retirement, Mr. Aguirre was supported by his investments. During the last three years as a partner at his firm, Aguirre & Eckmann, Mr. Aguirre received compensation of \$2,330,000, \$1,961,000 and \$25,000. The last year's compensation was limited because the firm was dissolving and stopped business in May of that year. Thus, we propose to offer him a salary of a SK-14/24 at \$125,601. The candidate's lowest acceptable pay is \$125,601. A recruitment bonus will not provide sufficient incentive for the candidate to join the Commission because it will not provide sufficient ongoing compensation to match his previous earning potential.

I am very impressed with Mr. Aguirre's legal experience, academic background, and his desire to join our staff. Based on the above facts, I believe that Mr. Aguirre's outstanding legal credentials merit approval, and it is my opinion that he will become a valued member of our staff within a very short time.

Thank you for your consideration.

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EXHIBIT NUMBER 37

Enclosure E**I
INTRODUCTION**

After a successful career as a trial lawyer in private practice, Complainant sought a second career in public service.¹ His first step was to return to law school in 2001 at age 61 for two years of hard work. In August 2003, he completed an LL.M. at Georgetown University Law Center ("GULC") focused on financial regulation and securities law with excellent grades.² (Dec. par. 5). All but one of these securities law and financial regulation courses were taught by current or former staff of the Division of Enforcement ("Enforcement") of the Securities and Exchange Commission ("SEC"), where he hoped to work. (Dec. par. 5). His thesis was published by a prestigious journal and the Texas Bar. (Dec. par. 23, Ex. 87). It also won the second prize in national competition for the best paper on securities law, and award the Association of SEC Alumni (ASECA), former SEC staff, give each year at their annual dinner.³ When Complainant applied to the SEC for employment, three GULC professors, current or former SEC staff, supported his applications, as did six trial judges who knew him and his work as a trial attorney at every stage of his career. (Dec. par. 17, Ex. 1).

The SEC has produced scant evidence why it rejected Complainant's first twenty-three applications.⁴ Only three ROI documents record how SEC staff members evaluated him. After an interview, one senior staff member offered these impressions:

Obviously a very experienced litigator...very effective and result oriented ...very smart...best student Mark Kreitman ever had in his class (in the securities LL.M. program at Georgetown)...thesis published in Delaware Law Journal...won all

¹ Complainant's Declaration ("Dec."), par. 2.

² Complainant's LL.M. had a secondary focus on international law.

³ The competition is open to all graduate or JD level law students. <http://www.secalumni.org/writing.html>. (Dec. par. 23, Ex. 3.)

⁴ The SEC motion only refers to twenty-two applications; it does not include vacancy 03-245-DC.

kinds of awards...happy to start at the bottom...has effectively done that by going back to school and excelling...discussion of Judge Harmon's decision in Enron, was clear, and well reasoned...seems to have a lot of energy and enthusiasm...litigated some securities cases back in the 1970s....final exam in Financial Reporting and Accounting...won the highest grade.

(ROI, Tab F-30B)

Two other interviewers completed standard evaluations forms that graded Complainant on his "reasoning ability, writing ability, relevant work experience, enthusiasm for SEC, knowledge of securities law, and poise-maturity." Each rated him highest on five factors and the next highest on the sixth. (ROI, Tab F-30B). One interviewer added: "one of the most qualified candidates that [he'd] interviewed." (ROI, Tab F-30B). Aside from these three documents, the SEC has failed to produce a single scrap of paper that records any staff person's impressions of Complainant's qualifications during any selection process.

The SEC processed Complainant's applications in connection with twenty-five selection processes, the twenty-three for which he applied plus two more.⁵ It made offers to at least forty-six applicants to fill these vacancies and hired thirty-five of them.⁶ It consistently rejected Complainant's applications for one reason or another until he initiated proceedings with its EEO Office. Overnight, he became a more attractive candidate. Days later, the SEC called him and set up an interview. It offered him a job as an investigative attorney in Washington, even though the SEC had issued no vacancy announcement for this job and Complainant had not applied for it. (Dec. par. 24). To complete its reversal, the SEC hired him as a "superior qualifications

⁵ The SEC sent Complainant's application for vacancy 03-268-DC to the selecting official for vacancy 03-323-DW. (ROI, Tab 13) It also considered his application for 03-171-DC and 03-228-DC. (ROI, Tabs F-3 and F-12).

⁶ Some vacancy announcements, as discussed later, included multiple vacancies. Additionally, some offeres did not accept the offer, requiring the offer to be extended to other applicant. Ex. 100 to Complainant's Declaration is a summary taken from the ROI of all offers the SEC extended.

appointment,”⁷ based on the same qualifications it found inadequate six prior times. (Dec. par. 6, Ex. 99).]

The SEC’s tale how it came to hire Complainant is pure fiction. According to its account, it previously interviewed him for vacancy 04-034-DC and “although not hired, he was later asked to reapply by Enforcement and was subsequently hired...” (Memo, p. 6). Sounds plausible, but it never happened. (Dec. par. 23). Very simply, Complainant’s telephone call to an EEO Counselor triggered an employment offer.

But the SEC’s fictionalized account how it hired Complainant is a mere pebble in a larger mosaic. Its staff withheld some documents and destroyed others, both critical to whether the SEC violated federal employment laws. It backdated a notice and then claimed Complainant did not timely act within the artificially shortened period. It told him his application was under consideration when it already filled the job months before. It decided to hire a younger friend of a senior official, and then put Complainant and others through the charade of a selection process. It threw away some applications, and then lied about it. It misled Complainant about other applications. And there’s more. Had a public company done half these acts in connection with the sale of securities, the SEC would civilly prosecute the culprit and its officers under the federal securities acts. Complainant respectfully requests this Administrative Judge to take the first step in bringing this errant agency into compliance with the applicable federal employment laws by denying its motion for summary judgment.

⁷ The certificate is submitted as Ex. 9 with Complainant’s Dec. 5 CFR 531.212(b)(1) provides that an “agency may determine that a candidate has superior qualifications based on the level, type, or quality of the candidate’s skills or competencies demonstrated or obtained through experience and/or education, the quality of the candidate’s accomplishments compared to others in the field, or other factors that support a superior qualifications determination.”

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EXHIBIT NUMBER 38

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE
1801 L Street, N.W., Suite 100
Washington, D.C. 20507

file journal

Gary Aguirre,)	
)	
Complainant,)	EEOC No. 100-2005-00413X
)	
v.)	Agency No. 155120631-48
)	
William H. Donaldson, Chairman,)	
U.S. Securities and Exchange Commission,)	Date: June 14, 2006
)	
Agency.)	

ORDER ENTERING JUDGMENT

For the reasons set forth in the enclosed Decision dated June 14, 2006, judgment in the above-captioned matter is hereby entered. A Notice To The Parties explaining their appeal rights is attached.

This office is also enclosing a copy of the hearing record for the Agency and a copy of the transcript for complainant and/or his/her representative.

This office will hold the report of investigation and the complaint file for sixty days, during which time the Agency may arrange for their retrieval. If we do not hear from the Agency within sixty days, we will destroy our copy of these materials.

It is so ORDERED.



Frances del Toro
Administrative Judge

For the Commission:

Enclosures

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
 WASHINGTON FIELD OFFICE
 1801 L Street, N.W., Suite 100
 Washington, D.C. 20507

Gary Aguirre,)	
)	
Complainant,)	EEOC No. 100-2005-00413X
)	
v.)	Agency No. 155120631-48
)	
William H. Donaldson, Chairman,)	
U.S. Securities and Exchange Commission,)	Date: June 14, 2006
)	
Agency.)	

DECISION

This Decision is being issued without a hearing, pursuant to 29 C.F.R. § 1614.109(g)(3) (2005). On June 28, 2005, I issued a Notice of Intent to Issue a Decision Without a Hearing (Notice). On July 13, 2005, the Agency issued a response to my Notice by filing a Motion for Summary Judgment Without a Hearing and Memorandum in Support. Complainant filed a Memorandum of Points and Authorities in Opposition for Summary Judgment, on August 15, 2005. The remaining procedural history is contained in the case file and the Investigative Report ("IR") and will not be reiterated. The record before me consists of the IR and the parties' submissions.¹

¹ On August 15, 2005, Complainant filed a Declaration and Application for Extension of Page Length to Motion for Summary Judgment and Motion to Strike Inadmissible Evidence Offered in Support of Summary Judgment. Complainant's request for an extension of page length is GRANTED. Complainant's request to strike is DENIED.

On July 13, 2005, the Agency filed a Motion for Leave to File a Motion for Summary Judgment in Excess of Fifteen Page Limit. The motion is GRANTED. On August 25, 2005, the Agency filed an Opposition to Complainant's Declaration and Application for Extension of Page (continued...)

55. Complainant applied for a non-posted Staff Attorney position with the Northeastern Regional Office.

56. Complainant was interviewed by several employees in the office, including Christopher Castano (Staff Attorney), Bennett Ellenbogen (Trial Attorney) and Leslie Kazon. Complainant's file was forwarded to Deputy Regional Director, Edwin Nordlinger, for further consideration.

57. Complainant was not selected for a position.

58. On February 18, 2004, the Agency canceled Vacancy Announcement No. 04-027-DP, SK-16 Attorney-Advisor, Securities Industry, Division of Corporate Finance. The Vacancy Announcement was set to close on February 25, 2004.

59. Complainant is currently employed as an SK-14 Trial Attorney in the SEC's Division of Enforcement in Washington, D.C.

C. CONCLUSIONS OF LAW

To establish a *prima facie* case of disparate treatment in a nonselection case, a Complainant may show: (1) that he/she is a member of a group protected from discrimination; (2) that he/she applied for and was qualified for the position at issue; and (3) that he/she was rejected under circumstances which give rise to an inference of unlawful discrimination, e.g., the Agency continued to seek applicants or filled the positions with persons who were not members of Complainant's protected group. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), n.13.

If a *prima facie* case is established, the burden shifts to the Agency to articulate a legitimate, non-discriminatory reason for the challenged action. *Texas Dep't of Cmty. Affairs v.*

Kornblau was after Complainant was hired by the Agency. According to Complainant, Kornblau stated to a fellow staff member that another person appeared to look younger than his/her twenty-two years of experience. Complainant avers that the comment is indicative of Kornblau's sensitivity to age. I find that the three comments are not indicative of age discrimination. In fact, the third comment was made after Complainant was hired by the Agency and is totally unrelated to the hiring for the position. Even assuming these comments were indicative of age discrimination, they are at most isolated or stray comments and are not legally sufficient to show pretext. *See Woythal v. Tex-Tenn Corp.*, 112 F.3d 243 (6th Cir. 1997) (It is insufficient to support an inference of age discrimination with just personal belief, conjecture and mere speculation.).

DECISION

For the reasons set forth above, I find that Summary Judgment is appropriate and that Complainant failed to produce evidence that could prove that the Agency discriminated against him.



Frances del Toro
Administrative Judge

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EXHIBIT NUMBER 39

cc 12 US 03:71a Gary Aguirre

202520052

ATTACHMENT 4

*Hand delivered
to Paul's in box outside*

January 10, 2005

Paul R. Berger,
Associate Director
Division of Enforcement
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: Request to be transferred

Dear Paul:

By this letter, I am formally requesting a transfer from the branch to which I have been assigned. My only request is that the transfer not be into another situation where my age and, consequently, my experience is an obstacle that must be overcome each day.

You have raised the question in the past whether the issue is my ability to take instructions from a younger supervisor. Respectfully, I must tell you that this is not the case. When I decided to return to the practice of law to work in public service, I knew that my supervisors would be younger, just as I knew my professors would be younger, and my colleagues would be younger. Almost all my SEC interviewers were younger. I looked forward to working with and learning from younger supervisors and colleagues, just as I looked forward to receiving the guidance of my younger, bright and quick-witted Branch Chief.

Further, since I joined the Commission staff, I have actively solicited the guidance of younger staff members, some far younger than my Branch Chief. On the Pequot matter, I am working with eleven other staff members, all younger than I, and with one exception, far younger. I have an excellent working relationship with each of them.

But there is another side to working with younger workers. If someone works hard over a lifetime at a profession, they tend to develop some skills. Those skills become part of the person. When I became employed here, no one suggested, for example, that I should forget the importance of documents in a financial fraud case. I am now in a situation where the option is to remain mute or incur the anger of my Branch Chief. Being mute, in my judgment, disservices the SEC's mission. I am prepared to document these assertions if it would assist you in deciding the merits of my request.

Now that I have been here for a while, I can see there are many situations where this problem would not occur. For example, as we have discussed, I understand that there will be an opening in Mark Kreitzman's section in the near future and I would appreciate being transferred there if possible. But I believe there are many others with whom I could work where my age and, consequently, my experience would not be a detriment. I would hope that this could be taken into consideration should you decide to grant my request.

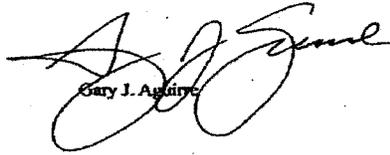
SEC 000393

02 12 00 09.118 Gary Aguirre

Paul R. Berger
January 10, 2005
Page 2

Your consideration of my request is appreciated. I would also appreciate being advised of your decision after you feel you have fully considered this request.

Very truly yours,



Gary J. Aguirre

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EXHIBIT NUMBER 40

Borostovik, Linda

From: Berger, Paul
Sent: Thursday, January 13, 2005 4:08 PM
To: Aguirre, Gary J.
Subject: Request for Transfer

Gary,

Thanks for your January 10, 2005 letter requesting a transfer to another branch. As I indicated when we spoke last week, Mark Kreitman's assistant director section does not have an opening right now. I did want to get back to you though to let you know that we are considering your request.

I also wanted to correct a thought that runs throughout your letter. You state that I have "raised the question in the past whether the issue is [your] ability to take instructions from a younger supervisor." That is not accurate. During our discussions, I suggested that one concern that we often flag for laterals when interviewing for a position here is whether they will be comfortable reporting to someone less experienced. Experience, and the comfort in reporting to someone less experienced, is the issue, not age. In our discussions, I stated that I hoped that you would be comfortable reporting to someone less experienced, particularly in light of what you could offer. I hope that this clarifies our discussions.

Paul

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EXHIBIT NUMBER 41

UNITED STATES SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

----- x
: In the Matter of: :
: TRADING IN CERTAIN SECURITIES, : No. HO-9818
: and the SEC's TERMINATION OF :
: EMPLOYMENT OF GARY AGUIRRE :
: GARY AGUIRRE :
: :
: :
----- x
Tuesday,
September 5, 2006

The interview of ROBERT HANSON, Securities and Exchange Commission, was convened, pursuant to notice, at 1:05 p.m.

APPEARANCES:

- NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance
- JASON A. FOSTER, Esq.
Investigative Counsel
U.S. Senate Committee on Finance
- HAROLD H. KIM, Esq.
Chief Civil Counsel
U.S. Senate Committee on the Judiciary
- HANNIBAL G. WILLIAMS II KEMERER, Esq.
Counsel
U.S. Senate Committee on the Judiciary
- SEEMA SINGH,
U.S. Senate Committee on the Judiciary

MS. STEPHANIE MIDDLETON
U.S. Committee on the Judiciary

MS. JANE COBB
Director
Office of Legal Affairs

MR. SAMUEL M. FORSTEIN
Assistant General Counsel
Litigation and Administrative Practice
U.S. Securities and Exchange Commission

MR. ROBERT HANSON
U.S. Securities and Exchange Commission

1 that was second highest from the top.

2 On 4/29, it is under B, I would have checked that
3 box, made contributions of high quality.

4 MR. KIM: So when you wrote this evaluation in
5 June, based on the period up to April 30, 31st, 2005, was
6 it your intent to write at that time a supplemental
7 evaluation for Gary Aguirre documenting some of the
8 concerns that you had in the subpoenas?

9 MR. HANSON: No.

10 MR. KIM: Then why did you write that supplemental
11 in August?

12 MR. HANSON: I wrote the supplemental in August. I
13 met with Paul Berger that morning of August 1st. He
14 called me probably about 8:30 or so in the morning,
15 called me down to his office, so I went down to his
16 office.

17 He said I'd like to talk to you about Mark Kreitman.
18 He said, I have heard some complaints about Mark
19 Kreitman, his management style or something to that
20 effect. I want you to keep this on a confidential basis,
21 but I feel as though I need to look into this.
22 So tell me about Mark Kreitman, what is your view on him?

23 I said, before you go any further, I'd like to just
24 say that there is two employees whose input you should
25 heavily discount. I mentioned Gary and this other

1 individual that also had gotten a supplemental review.

2 We talked about, Paul and I probably talked for a
3 half hour to 45 minutes, somewhere in that range. We
4 talked about those individuals. Paul asked about them
5 and he asked what their ratings were, or what I had given
6 them for ratings. I told him, and he said --

7 MR. KIM: What did you tell him?

8 MR. HANSON: I told him I gave them the second from
9 the top.

10 MR. KIM: Okay.

11 MR. FOSTER: What did you tell him about them as to
12 why he should discount their input?

13 MR. HANSON: At that point, which was August 1st,
14 Gary was no longer talking to Mark, and Rob, or the other
15 individual, excuse me, was looking to raise trouble in my
16 view with --

17 MR. FOSTER: Is the other individual Rob Swanson?

18 MR. HANSON: Yes, it is. He was also clearly at
19 odds with Mark and Mark's management style. From my
20 vantage, it might look like they were meeting together
21 and talking about things. I just thought it was improper
22 that they would be doing a coup against Mark.

23 I thought both of their work was not so great, and
24 expressed those kinds of views to Paul. He asked what I
25 evaluated them as, and I told him that it was the second

1 from the top. He said, you're not doing them any favors.
2 He said, you're doing them any favors or you're not doing
3 the Commission any favors by giving them those ratings.

4 I agreed, and actually apologized to Paul a number
5 of times because I agreed that my evaluations were
6 somewhat inflated with respect to those two individuals.
7 He suggested that we write a supplemental evaluation that
8 was more candid than what was written in the evaluations
9 that I had told him.

10 That day, Mark and I drafted supplemental
11 evaluations for those two individuals.

12 MR. FOSTER: What do you mean by a coup?

13 MR. HANSON: I think they were trying to do damage
14 to Mark or have Mark removed as a manager, or something
15 to that effect.

16 MR. FOSTER: Did they have complaints about him, is
17 that what you mean? Did they have complaints about any
18 misconduct on his part? Or what do you mean?

19 MR. HANSON: I could see them, well, particularly
20 one of the individuals, I could see him talking with
21 other people and complaining about Mark. He complained a
22 lot about Mark.

23 MR. KEMERER: Just to clarify, is that Mr. Aguirre,
24 or [REDACTED]?

25 MR. HANSON: [REDACTED] I could see them in the

1 hallways talking a lot about things, and what I
2 suspected.

3 MR. FOSTER: About what things?

4 MR. HANSON: I don't know what they were talking
5 about, but they were certainly very vocal in their
6 criticisms of Mr. Kreitman.

7 MR. FOSTER: But you don't know what they were?

8 MR. HANSON: Let's step back a second. In July of
9 that year, Gary said he could no longer talk to Mark
10 anymore. Whenever Gary would be in Mark's office, it
11 would often evolve into a shouting match.

12 So in terms of the time of August, it was clear that
13 the relationships were very poor between Mark and Gary.
14 Mr. Swanson was also very critical of Mr. Kreitman.

15 MS. MIDDLETON: Do you know what the fights were
16 about, that you say Gary and Mark had fights?
17 What were they about?

18 MR. HANSON: A number of issues. There were a
19 couple of individuals who were representing, claimed to
20 represent Pequot in the matter. I think Mark did not want
21 them to be, us to be communicating with them if it wasn't
22 clear that they were representing them.

23 MR. KEMERER: Is that Irving Pollach and Larry
24 Storch?

25 MR. HANSON: That's correct.

1 MR. HANSON: Probably.

2 MS. MIDDLETON: And did they relate to you, or did
3 Linda tell you anything that had to be done in connection
4 with documenting the termination?

5 MR. HANSON: Well, I knew there had to be a memo.
6 I think Mark drafted that memo, and I looked at it, or
7 something like that. We got input from Linda on that.

8 MS. MIDDLETON: Linda?

9 MR. HANSON: Barostovich.

10 MS. MIDDLETON: Did anyone else review the memo or
11 edit the memo?

12 MR. HANSON: I don't recall whether Paul did or
13 not. I would imagine he looked at it. We had a final
14 meeting with Linda somewhere late August as well, Linda
15 Thompson. She is the Division Director. We talked to
16 her about Gary.

17 MS. MIDDLETON: And what --

18 MR. FOSTER: Do you recall whether she was
19 consulted about the decision before or after you began
20 contacting personnel?

21 MR. HANSON: I don't know the answer to that. I
22 mean, she may have been, but I certainly didn't contact
23 her. I'm kind of at the ground level, and she is kind of
24 at 30,000 feet.

25 MS. MIDDLETON: You said you talked to Linda

1 Thompson about it?

2 MR. HANSON: Yes.

3 MS. MIDDLETON: Do you recall the conversation?

4 MR. HANSON: I recall parts of it. I recall saying
5 that he was the proverbial loose cannon in that meeting,
6 and that I thought he was a net negative for the
7 Commission.

8 I recall Linda asking, saying something that she had
9 gotten an email from him awhile ago about the testimony
10 of Mack. She said she had suggested that we all meet or
11 something like that to discuss whether it made sense to
12 take Mack's testimony. She said does it make sense to
13 take Mack's testimony at this point?

14 I said something to the effect of it would be a
15 pretty short session. There wouldn't be much to ask him,
16 nor would there be anything to confront him with. She
17 said something to the effect, well, don't we sometimes
18 ask, you know, get people on the record right away.

19 Paul said, well, this investigation is 2000, it is
20 not like it just happened, it is from 2001. It is not
21 like it happened last week and we can call a bunch of
22 people and get them on the record.

23 Mark said something that he had been saying for
24 awhile, is my recollection, that we have no information
25 suggesting that Mack had the information to pass it onto

1 Samberg, who is the head of Pequot.
2 MS. MIDDLETON: Are you describing one
3 conversation?
4 MR. HANSON: This was a meeting that we had.
5 MS. MIDDLETON: A meeting?
6 MR. HANSON: Yes.
7 MS. MIDDLETON: And this conversation about Mack
8 was at the same time when the discussion about Gary's
9 performance was discussed?
10 MR. HANSON: Right. It is my recollection.
11 MS. MIDDLETON: Do you recall anything else that
12 was said at that meeting?
13 MR. HANSON: No.
14 MR. FOSTER: This was the meeting with you, Linda
15 Thompson, and who else?
16 MR. HANSON: Mark Kreitman, Paul Berger. I don't
17 think anyone else was there.
18 MR. FOSTER: This was in August when you were
19 talking about the decision to fire him?
20 MR. HANSON: Correct.
21 MR. KEMERER: Just to refresh my recollection. You
22 said that somebody said because this is so long ago, it
23 was in 2001, there is no real need to bring them in and
24 get them on record as though it happened last week. Who
25 was it that said that?

1 MR. HANSON: Okay.

2 MR. FOSTER: This appears to be the portion of an
3 email that you were copied on.

4 MR. HANSON: Yes.

5 MR. FOSTER: That was sent on the 25th. The bottom
6 paragraph begins, I had a different, more troubling input
7 as to why it is difficult to move ahead with the second
8 CSFB and the Mack subpoena. I sent two emails to Bob --

9 MR. HANSON: Mack testimony.

10 MR. FOSTER: I'm sorry, Mack testimony. I sent two
11 emails to Bob during the week of June 20th, see
12 attachments 3 and 8. Proposing that we proceed with the
13 Mack testimony and broaden the CSFB subpoena.

14 When I did not hear back from Bob, I spoke with him
15 directly about these proposals. Bob told me one, well,
16 first let's stop there.

17 Do you recall -- is this accurate? I mean, is this
18 what happened?

19 MR. HANSON: I don't remember that he sent two
20 emails to me proposing that we proceed and that I didn't
21 hear back from him. I mean, I don't know the context of
22 it.

23 I tried to answer Gary's emails, but there were so
24 many of them that it was almost a full-time job just
25 answering his emails. So it is possible that I didn't

1 MR. HANSON: But probably not with respect to
2 issuing the CS First Boston subpoena. Maybe with the
3 Mack subpoena, but not with the CS First Boston subpoena.

4 MR. FOSTER: Okay. So when you say these
5 decisions, you mean what?

6 MR. HANSON: I didn't say these decisions.

7 MR. FOSTER: Okay. What did you say?

8 MR. HANSON: You're asking me about this email,
9 whether I said it. I'm trying to answer you whether I
10 remember saying that.

11 MR. FOSTER: Right.

12 MR. HANSON: So that's --

13 MR. FOSTER: So you think you only referred to one
14 decision, the decision to subpoena Mr. Mack?

15 MR. HANSON: As I said, I think what I probably
16 wanted to do was to get Mark's input on some of these
17 documents. It is less likely that I would have gotten it
18 put on the CS First Boston subpoena, though it's
19 possible.

20 MR. FOSTER: And what about number two, it would be
21 an uphill battle because Mack had powerful political
22 connections.

23 MR. HANSON: That doesn't sound like something I
24 would say.

25 MR. FOSTER: So you don't think you said that?

1 MR. HANSON: I don't think so, no.

2 MR. FOSTER: You don't recall saying that?

3 MR. HANSON: I do not.

4 MR. FOSTER: Do you recall reading this claim for
5 Mr. Aguirre at the time that he wrote it that you had
6 said that?

7 MR. HANSON: I didn't receive this document.

8 MR. FOSTER: That is not your cc listed on page 001
9 to Gary Aguirre, cc Hanson?

10 MR. HANSON: As I said, I didn't receive SEC0001
11 through SEC0005. That email was not sent to me.

12 MR. FOSTER: Have you seen --

13 MR. HANSON: I think that this was pasted from
14 another email, and perhaps even edited from another
15 email.

16 MR. FOSTER: Okay. So you don't recall receiving
17 it, and you don't think that you did receive that?

18 MR. HANSON: SEC0001 through 0005?

19 MR. FOSTER: Yes.

20 MR. HANSON: As I said, Paul Berger left me a
21 binder that had contained this email in it with a number
22 of other attached emails.

23 MR. FOSTER: So you saw that when?

24 MR. HANSON: When Paul left, he left me the binder,
25 or somewhere around that time.

1 MR. FOSTER: Okay. Do you ever recall receiving an
2 email from Mr. Aguirre, either being cc'd or being in the
3 to line where he claimed that you had made the statement
4 about powerful political connections?

5 MR. HANSON: I recall him making some statement
6 like that, yes.

7 MR. FOSTER: In an email?

8 MR. HANSON: Yes, I think so.

9 MR. FOSTER: And do you recall what your reply was?

10 MR. HANSON: I don't. I have a general sense that
11 some of these emails I responded to trying to straighten
12 Gary out because we seemed to be having a lot of trouble
13 communicating at that particular point in time.

14 At one point, I told Gary that I do not, I have
15 never seen politics into the equation here at the
16 Commission or something to that effect.

17 MR. FOSTER: So you never told him at any time that
18 it would be an uphill battle to subpoena Mr. Mack?

19 MR. HANSON: That doesn't sound like something I
20 would say. It's possible, but it doesn't sound like
21 something I would say.

22 MR. FOSTER: You don't recall saying it?

23 MR. HANSON: I do not. I mean, the reason I say
24 that is I sort of remember my thinking at the time. My
25 thinking was we should let people know about the fact

1 MR. FOSTER: Were you aware at that time of a call
2 from Mary Jo White to Linda Thompson?

3 MR. HANSON: I'm not sure. I may have been. I
4 probably was based upon this email, because it has got
5 Mary Jo White written in it, so I probably was. Gary
6 probably said something to me about it at that point.

7 MR. FOSTER: You learned about the call from Gary?

8 MR. HANSON: Yes.

9 MR. FOSTER: Do you recall when you learned about
10 it?

11 MR. HANSON: No.

12 MR. FOSTER: Do you recall when the call was? When
13 the call occurred?

14 MR. HANSON: No. This isn't something that made
15 really a blip on my radar screen.

16 MR. FOSTER: What isn't?

17 MR. HANSON: The phone call to Mary Jo White. Gary
18 had a big reaction to it. I did not have as significant
19 a reaction to it. I didn't consider it interfering with
20 the investigation or anything of that sort.

21 It seemed like from what I could tell, that Mary Jo
22 White was copying Linda on materials that were submitted
23 to the SEC. That didn't seem out of the ordinary to me.

24 MR. FOSTER: Did you mean to say the call from Mary
25 Jo White earlier?

1 MR. HANSON: I'm sorry?

2 MR. FOSTER: You said the call to Mary Jo White.

3 Did you mean to say the -- what is your understanding of

4 the call? The communication between Linda Thompson and

5 Mary Jo White. Which direction, who initiated the

6 communication?

7 MR. HANSON: I believe that the call came from Mary

8 Jo White, if there was a call. There was some

9 communication I believe from Mary Jo White to Linda

10 Thompson. That was something that I believe Gary brought

11 to my attention.

12 MR. PODSIADLY: Is it common for an outside counsel

13 to contact Linda Thompson?

14 MR. HANSON: I don't know.

15 MR. PODSIADLY: In an investigation?

16 MR. HANSON: I don't know the answer to that.

17 MR. PODSIADLY: Have you ever heard of it in

18 another instance? In another case?

19 MR. HANSON: I know from time to time that outside

20 counsel have talked to Linda's predecessor and I have

21 been in Linda's office when she has gotten calls from

22 outside counsel. I guess I had a trial last fall, and

23 Linda had talked to the opposing attorney in the trial.

24 He had told her how the case was going from his

25 perspective, so yes.

1 MR. FOSTER: So by juice, you mean that the counsel
2 can pick up the phone and get the Director of Enforcement
3 to call them back. Is that what you mean?

4 MR. HANSON: I think what I meant by juice was a
5 combination of things. One is confidence and the ability
6 to reach out and get someone's ear. There is a
7 competence element to that, too.

8 MR. FOSTER: A what?

9 MR. HANSON: A competence element to that, too.
10 Some people probably wouldn't put as much at stake in
11 other people.

12 MR. FOSTER: So you are saying --

13 MR. HANSON: I mean, this is projection. I don't
14 know what Linda is thinking. It is really just my
15 projection. That is the way I think of someone having
16 juice, they have the ability to influence you because
17 they are persuasive.

18 MR. FOSTER: I'm sorry. I'm confused by your last
19 answer. You said something about you didn't know what
20 Linda was thinking.

21 MR. HANSON: Yes.

22 MR. FOSTER: Can you explain?

23 MR. HANSON: This is my view. I don't know what --
24 you are sort of asking, I think your question was sort of
25 asking me what I meant by juice.

1 MR. FOSTER: Right.

2 MR. HANSON: It was only my perspective, what I
3 would think would be important, and what I would think
4 would be important. I don't know any of these things.
5 Somebody who would, that Linda knew, or had dealt with,
6 that through Linda might call her up and talk to her
7 about a case.

8 MR. FOSTER: And what would happen if that were the
9 case? Why were you pointing that out to Mr. Aguirre?

10 MR. HANSON: Again, it was to let people in the
11 front office know about what was going on in the case.
12 This was a significant witness in the case so she could
13 know about that if those people called and not just say
14 --

15 MR. FOSTER: Was Mr. Aguirre suggesting that the
16 front office shouldn't be made aware of the plans to take
17 Mr. Mack's testimony?

18 MR. HANSON: No, I didn't say that.

19 MR. FOSTER: I didn't say you did. I was just
20 asking. So I guess I'm still unclear as to how was that
21 an issue? Why was it an issue of whether or not the
22 front office would be informed of the plan to take Mr.
23 Mack's testimony?

24 MR. HANSON: Could you repeat that question?

25 MR. FOSTER: How did it become an issue in your

1 mind as to whether or not the front office would be
2 informed? I mean, you are responding to Mr. Aguirre's
3 email and you're saying that what you meant by, what you
4 said in the conversation the previous evening was that
5 merely that people should be kept informed, that the
6 front office should be kept informed.

7 I'm asking you why was that an issue. You just told
8 me that Mr. Aguirre, I think I understood you to say that
9 Mr. Aguirre did not suggest that the front office not be
10 informed, is that correct?

11 MR. HANSON: Mr. Aguirre did not suggest that the
12 front office not be informed.

13 MR. FOSTER: Did he neglect to inform anyone about
14 his plan to take the Mack testimony?

15 MR. HANSON: Did he neglect to inform? He told me
16 about it, which would be the normal way the protocol in
17 my group. I believe from this email that he also had
18 shared emails with, or the previous one with Paul and
19 with Mark.

20 I know for a fact that he had discussions with Mark,
21 because I could hear them through the wall. My office is
22 next to Mark's.

23 MR. FOSTER: Were you listening through the wall?

24 MR. HANSON: I'm sorry?

25 MR. FOSTER: I'm sorry. What were you --

1 MR. HANSON: I could hear Mark and Gary having
2 discussions through the wall.

3 MR. FOSTER: Did you hear the substance of the
4 discussions?

5 MR. HANSON: No, no. But I could hear Gary
6 yelling.

7 MR. FORSTEIN: Our walls are thin, but not quite
8 that thin.

9 MR. FOSTER: So I guess I'm still confused, I don't
10 understand why it is that you are bringing up, why are
11 you discussing the issue of whether or not people in the
12 front office are going to be informed of the plan to take
13 Mr. Mack's testimony?

14 MR. HANSON: I'm trying to, I think, and this is
15 going back and sort of reading these emails and trying to
16 refresh my recollection. I think what I'm trying to do
17 is explain what I took from the conversation the previous
18 night. So I'm trying to reiterate what I thought I told
19 Gary.

20 MR. FOSTER: Which was?

21 MR. HANSON: What was written in this email.

22 MR. FOSTER: So you don't recall why the issue of
23 keeping the front office informed came up in the
24 conversation the previous evening?

25 MR. HANSON: That was always an issue for me, to

1 keep the front office informed. That was one of the
2 things that I wanted Gary to do throughout the
3 investigation, particularly with sensitive aspects of the
4 investigation.

5 MS. MIDDLETON: Back to this August 1 supplemental
6 evaluation.

7 MR. HANSON: Yes.

8 MS. MIDDLETON: What was your understanding, was
9 that going to be given to Gary? Was that going to be put
10 in his personnel file? What was the purpose of doing the
11 supplemental evaluation?

12 MR. HANSON: I'm not sure.

13 MS. MIDDLETON: And do you know what happened to
14 the document after you, I guess you looked at it? You
15 said Mark did the first cut, is that correct?

16 MR. HANSON: Yes, he did.

17 MS. MIDDLETON: And then you made some changes, or
18 you didn't?

19 MR. HANSON: I made some editorial comments or
20 suggestions to it.

21 MS. MIDDLETON: Okay. And do you know whether he
22 put those changes into the document?

23 MR. HANSON: I do not, no.

24 MS. MIDDLETON: And you don't know what happened to
25 it after that?

1 MR. HANSON: Right. That is what I write in this
2 email.

3 MS. MIDDLETON: Okay.

4 MR. FOSTER: In the second paragraph of the email,
5 it says, "Most importantly the political clout I
6 mentioned to you was a reason to keep Paul and Linda in
7 the loop on the testimony."

8 MR. HANSON: Yes.

9 MR. FOSTER: So you recall mentioning political
10 clout to Mr. Aguirre in some previous conversation
11 previous to this email?

12 MR. HANSON: I'm responding to Gary's email. It
13 says, "You have told me several times that the problem in
14 taking Mack's exam is his political clout." So he is
15 saying that political clout, meaning that all the people
16 Mary Jo White can contact with a phone call.

17 I'm responding with his definition saying the reason
18 I mentioned that was the reason to keep Paul and Linda in
19 the loop on the testimony.

20 MR. FOSTER: All right.

21 MR. HANSON: So I'm responding.

22 MR. FOSTER: The my question is do you recall using
23 the phrase "political clout" in a conversation with Gary
24 Aguirre?

25 MR. HANSON: I don't. It's possible I used it, but

1 it just doesn't sound like something I would say. I
2 think the most important thing is the sentence that
3 follows, which is that politics are never involved in
4 determining whether to take someone's testimony. I have
5 not seen it done at this agency.

6 MS. MIDDLETON: At the time of these emails, you
7 had made the recommendation that Gary be terminated, is
8 that correct?

9 MR. HANSON: I don't know if that's true or not.
10 It is around that time, and there was a process that
11 still needed to take place. I don't know when we vetted
12 this with Paul and how many discussions we had with Paul.
13 It was around this time, but I don't know whether this
14 was before or after.

15 MR. FOSTER: The first email that we have, I don't
16 have it with me, but just to let you know, the first
17 email that we have that I have seen that shows any
18 discussion of his termination is on August 24th.

19 MR. HANSON: From Mark?

20 MR. FOSTER: Yes, I believe so. He says Bob and I
21 feel that his termination should be considered.

22 MR. HANSON: Right.

23 MR. FOSTER: So assuming that I'm representing that
24 properly, do you think that's accurate that August 24th
25 is the first day that you discussed his termination?

1 MR. HANSON: The first day we discussed it? I
2 don't know. It is hard for me to know the first day we
3 discussed his termination.

4 I know around that time, the August 24th date that
5 Mark was talking about, Liban, Jim, Mark and I met to
6 discuss the case. Had we discussed his termination
7 before, did we talk with Paul around that time? We
8 talked to Paul around that time. I don't know exactly
9 when, and we definitely met with Jim and Liban on that
10 day.

11 MR. FOSTER: What's the maximum amount of time
12 before August 24th in your mind that would have been
13 possible that you were talking about Mr. Aguirre's
14 termination?

15 MR. HANSON: Talked in any sense?

16 MR. FOSTER: Yes. Talked about the possibility.

17 MR. HANSON: A month and a half probably before
18 that.

19 MR. FOSTER: And when would that have been? The
20 middle of June?

21 MR. HANSON: Probably. A month and a half would be
22 early July.

23 MR. FOSTER: Do you have any specific recollections
24 of the conversation about his termination?

25 MR. HANSON: No, I don't.

1 MR. FOSTER: Who do you think you might have talked
2 about it with?

3 MR. HANSON: Well, you asked me sort of my
4 speculation. So I said a month and a half. But I don't
5 have any specific recollection of talking to anybody
6 about it.

7 MR. FOSTER: I understand.

8 MR. HANSON: I mean, sort of the process as I
9 remember it is am I getting to the point where I thought
10 that the straws were too many on the camel's back.

11 At that point in time, I didn't know what Gary's
12 plans for work were. He wasn't getting along with the
13 other people in the group.

14 MR. FOSTER: When you say at that time, you mean
15 August 24th?

16 MR. HANSON: Around the time that I talked to
17 Charles Cain. I don't know exactly when I talked to
18 Charles. In fact, he was then having difficulties with a
19 new staff attorney who I was a little protective of. It
20 was sort of a culmination.

21 MR. FOSTER: So why did you use the term "political
22 clout" in your response to Mr. Aguirre?

23 MR. HANSON: I'm responding to his use of that
24 term. If you look at, he responds and says political
25 clout meaning all the people that Mary Jo White could

1 contact with a phone call.

2 MR. FOSTER: So you are saying you adopted his use
3 of the term in your reply?

4 MR. HANSON: That looks like what I did, yes.

5 MR. FOSTER: You don't think that you independently
6 said it previous to his using the term?

7 MR. HANSON: It's possible, but it doesn't sound
8 like something I would say. It is possible. Again, as
9 far as I know, politics aren't involved in the decision
10 to take someone's testimony.

11 MR. KEMERER: Just to clarify further for the
12 record, because I don't know that we have done this here.
13 We discussed that Mary Jo White is a member/partner in
14 Debevoise and Plimpton. But do you have any knowledge of
15 her prior employment, or sort of what lends itself to
16 some of her prominence?

17 MR. HANSON: She was a very prominent federal
18 prosecutor in the southern district of New York. I have
19 never met Mary Jo White, nor have I talked to Mary Jo
20 White.

21 MR. FOSTER: After the sentence where you say, "As
22 far as I know, politics are never involved in determining
23 whether to take someone's testimony," you say, "I have
24 not seen it done at this agency."

25 MR. HANSON: Yes.

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EXHIBIT NUMBER 42

Gary,

My recollection is different about a couple of things. Most importantly I have not said that the problem is Mack's political clout.

From: Aguirre, Gary J.
Sent: Wednesday, August 24, 2005 1:58 PM
To: Hanson, Robert
Subject: RE: Mack testimony

Bob:

I have three comments regarding "the over the wall" requirement. First, before and after the Mack decision, you have told several times that the problem in taking Mack's exam is his political clout, e.g., all the people that Mary Jo White can contact with a phone call. Second, proof that a witness was "over-the-wall" had not been a prerequisite for any other examination in this matter. Third, see my memo to Mark on the same subject below.

You state, "My suggestion a while ago was to write a memo so that we could vet the issue with Paul." I sent Paul a comprehensive memo in mid-July. When you told me in early August that he was still waiting for a memo, I drafted another memo and sent it to you on August 4.

Finally, you state "On that note, do you remember when Paul asked for the assessment from you? I got the sense from him that it had been a while ago. Is the assessment the third e-mail below?" I have clear recollections of my discussions with Paul, but I do not recall his request for an "assessment," other than a statement of my views why we should proceed with the Mack testimony. As stated above, I have sent two lengthy memorandums on that issue to him.

In my office, in mid-July, I told Paul that I would be sending him a second memo discussing the factors which, in addition to the Mack decision, led to the tender of my resignation. I intend to complete and send that memo to Paul as soon as I return, since I do not have access now to the documents I need. If there is some urgency that Paul receive it, which I did not understand before, I will endeavor to do it from my recollection of the events and dates, but that will be tough because it will cover approximately seven months.

From: Kreitman, Mark J.
Sent: Wednesday, August 17, 2005 2:48 PM
To: Aguirre, Gary J.
Cc: Hanson, Robert
Subject: RE: Pequot pending matters.

Please confer with Susan Yashar, Elizabeth Jacobs, or Scott Birdwell at OIA re Swiss privacy law issues.



OFFICE OF
LEGISLATIVE AND
INTERGOVERNMENTAL
AFFAIRS

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

July 30, 2007

Jason Foster
Investigative Counsel
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, DC 20510-6200

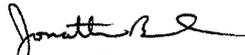
Re: Pequot Capital Management

Dear Mr. Foster:

The document with the Bates stamp SEC 00005827 is an email recovered from a SEC back-up tape in a subfile called "drafts" in a file called "hansonr 8-05" indicating that it is the August 2005 back-up of files from Robert Hanson's draft email folder. Further information available in the subfile notes that the email was created on Wednesday, August 24, 2005 at 2:23 p.m.

Please call me at 202-551-2010 if you have any further questions regarding this matter.

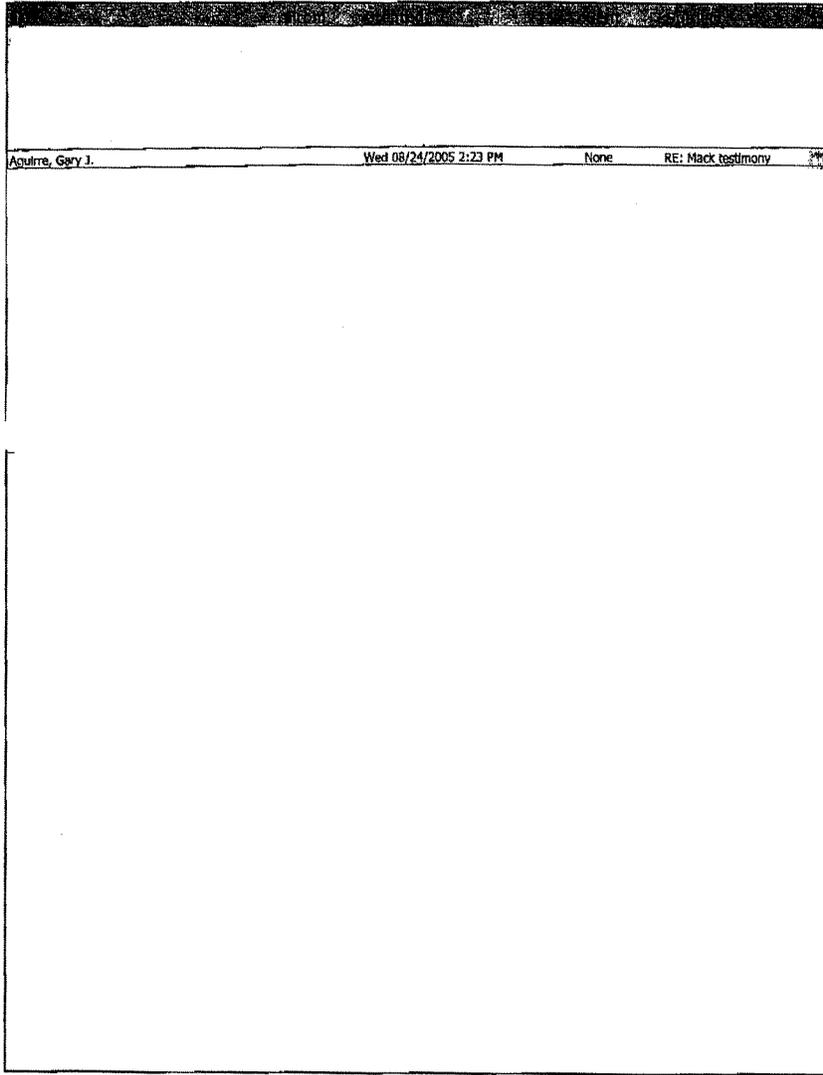
Sincerely,


Jonathan Burks
Director

cc: Dean Shahinian, Senate Committee on Banking, Housing and Urban Affairs
Mark Oesterle, Senate Committee on Banking, Housing and Urban Affairs

07/25/2007 01:24 FAX [REDACTED]

002/002



Hardy, Melinda

1

07/25/2007 2:04 PM

07/25/2007 2:25PM

485

EXHIBIT NUMBER 43

From: Berger, Paul
Sent: Tuesday, June 28, 2005 1:44 PM
To: Aguirre, Gary J.
Subject: RE: Open door policy

Sure. Stop by when you get a chance.

From: Aguirre, Gary J.
Sent: Tuesday, June 28, 2005 10:57 AM
To: Berger, Paul
Subject: Open door policy

Is the door still open? If so, I would like to have a word with you.

487

EXHIBIT NUMBER 44

Humes, Richard M.

From: Berger, Paul
Sent: Thursday, June 30, 2005 3:21 PM
To: Kreitman, Mark J.
Subject: FW: Pequot

FYI

From: Aguirre, Gary J.
Sent: Thursday, June 30, 2005 3:10 PM
To: Berger, Paul
Subject: Pequot

Paul:

I just want to assure you that Pequot will get 110% between now and September 30.

Gary

EXHIBIT NUMBER 45

GARY J. AGUIRRE
[REDACTED]
WASHINGTON, DC 20009

COMMUNICATION PURSUANT TO LLOYD LAFOLLETTE ACT

TO:	Nicholas J. Podsiadly Jason Foster	FROM:	Gary Aguirre
COMPANY:	United States Senate Committee on Finance	DATE:	October 19, 2006
FAX NUMBER:	[REDACTED]	TOTAL NO. OF PAGES INCLUDING COVER:	14
PHONE NUMBER:	202-224-4515	RE:	See enclosed

members to achieve consensual goals and the importance of operating within the SEC process." If he knew I was having these problems, why did he go along with Hanson and Kreitman on my merit rating? Is he, like Hanson, just a nice guy who gives two step increases to everyone whether they deserve it or not.

Documents: Some type of document approving two step increase and communicating that decision to the next link in the process. Also, SEC FOIA letter says there are compensation committee spreadsheets.

Questions:

- 1) When was the compensation committee meeting?
- 2) Who was present? E.g., were Kreitman and Hanson present during the committee's review of their recommendation? [Clampitt says this is common]
- 3) Why he did not object to two-step merit rating increase, given his "meeting" with me?
- 4) If he claims that it only involved the period prior to April 20, 2005, you could point out that both the subpoena privacy issue and the Lynch issue all occurred after April 30.

Date: July 13

Event: Berger agrees to official leave

Issue: Means that I will be out of the office 80 hours over the next month

Why suspicion? Not applicable

Significance: This was the least active period of my year with the SEC. Coming into this period, the last significant event was Hanson's June 29 positive evaluation. The only significant events were my meeting and email to Berger re Mack and his sponsorship of the August 1 reevaluation.

Documents: My email exchanges with Berger re official leave.

Questions:

- 1) Firm up 80 hours off over next month.
- 2) Did he discuss this with Humes [Berger earlier told me to discuss official leave with Humes.]

Date: July 20 or 21, 2005

Event: I told Berger during a face-to-face that Hanson had told me he had blocked Mack's testimony because of his political influence.

Issue: Why no inquiry by Berger into my allegations?

Why suspicion? Not applicable; I saw it happen.

Significance: More evidence that Berger involved in giving Mack special treatment.

Comment: So far as I can tell, Berger took no action to determine whether or not my statement about the Mack special treatment was true. I told Berger my immediate supervisor had given favored treatment to a suspect because of his political influence. You would expect Berger to make some statement to the effect that he would look into it, e.g., let's get Bob down here, I'll talk to Mark about this, I'll get back to you on this, or a dozen other similar responses.

When I told Berger that the Mack subpoena had been blocked because of his political influence

Berger replied angrily: "I take that *personally*." [Why *personally* unless he was involved?]

I responded, "I am not giving you an opinion; I am telling you what was said."

Berger then said: "Who told you that?"

I responded: "Bob."

EXHIBIT NUMBER 46

11/15/2008 00:34 FAX [REDACTED]

002/002

Page 1 of 1

Hardy, Melinda

From: Fielder, Dave
Sent: Monday, August 01, 2005 3:42 PM
To: Kreitman, Mark J.
Subject: FW: <no subject>
Follow Up Flag: Follow up
Flag Status: Red

J. David Fielder
 Branch Chief
 U.S. Securities and Exchange Commission
 100 F Street, NE
 Room 4603
 Washington, DC 20549-4603
 (202) 551-4499
 (202) 772-9236 (fax)

From: [REDACTED] (mailto:[REDACTED])
Sent: Thursday, July 21, 2005 7:25 AM
To: Fielder, Dave; Davis, Charles
Subject: <no subject>

Dave,

Could you quietly find out from Mark why he over-reacted (ask Charles) last night?

My sense is Vinca DiBlasi — because Mario Gabelli is mad he has to answer questions — called Linda with some misrepresentations, which went to Paul and then to Linda. Since you have the e-mail, I suspect you can find out innocently. You should know that Mario Gabelli is mad because, as Jersulic says, he doesn't think he should have to answer our questions — even though we have e-mails showing he approved timing arrangements, involving quid pro quo exchanges for timing capacity, with Canary and Varas — two of the leading groups caught by Spitzer. (\$24,000 to Spitzer during a pending investigation...and the staff isn't getting adequate support. We should be unified here, not questioning one another from within.)

Mark's reaction fed into DiBlasi's strategy, since it left us feeling undermined. That a recurring problem here, but I want to make sure I have the right facts in this particular instance before drawing any conclusions. If it is DiBlasi, he should be put in his place, not treated solidously (for reasons we can discuss). If not, I am somewhat troubled by Mark's way of handling this. If this were the first, or the second, or the tenth time, I wouldn't write. Who wants to? I have better things to do, as I'm sure you do.

I'd like to know before taking any other action, and I'd appreciate your confidence in this. Ask Charles, quietly, for background. I'm sick today, but would like to hear from you. I need the information, however, before I can draw any conclusions.

I'd greatly appreciate it. I hate to make unwarranted assumptions about anyone — and who is making mischief here depends upon the facts.

In any event, the staff just not get the kind of support it needs here. Sullivan, Anderson, Besso, Aguirre, and perhaps others, have all become disturbed at their treatment. I do not want my name used in this breath, but it's not any fun to come to work. It's sad, because it could be a great place.

I'd appreciate your help here.

[REDACTED]

11/15/2006

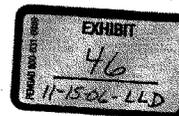


EXHIBIT NUMBER 47

COMPENSATION COMMITTEE DATES

July 18, 2005	Compensation Committee review beginning at 9:00; members were advised to leave entire day open for meeting.
July 19, 2005	Linda Thomsen receives Compensation Committee recommendations
July 27, 2005	Linda Thomsen, the Deciding Official, finishes merit pay process for Division of Enforcement
August 1, 2005	Division of Enforcement transmits final results to Office of Human Resources

496

EXHIBIT NUMBER 48

Hardy, Melinda

From: Kreitman, Mark J.
Sent: Monday, August 01, 2005 12:13 PM
To: Hanson, Robert

Attachments: 8-05 Supplemental Evaluations.doc



8-05 Supplemental
Evaluations....

Supplemental Evaluations:

Aguire: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chief, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

██████████ puts in long hours, takes advantage of expertise available throughout the Commission, and develops creative investigative models. He occasionally has difficulty, however, working within a structured organizational framework and fails adequately to consult his supervisors with respect to tactical and strategic decisions. For example, he has dispatched subpoenas without first clearing them with his branch chief, and taken legal positions without full consideration of conflicting decisions.

Filename: 8-05 Supplemental Evaluations.doc
Directory: C:\Documents and Settings\HardyM\Local
Settings\Temporary Internet Files\OLK38
Template: C:\Documents and
Settings\HardyM\Application
Data\Microsoft\Templates\Normal.dot
Title: Supplemental Evaluations:
Subject:
Author: kreitmanm
Keywords:
Comments:
Creation Date: 08/01/2005 10:54:00 AM
Change Number: 1
Last Saved On: 08/01/2005 12:12:00 PM
Last Saved By: kreitmanm
Total Editing Time: 79 Minutes
Last Printed On: 11/06/2006 4:23:00 PM
As of Last Complete Printing
Number of Pages: 1 (approx.)
Number of Words: 256 (approx.)
Number of Characters: 1,460 (approx.)

Hardy, Melinda

From: Hanson, Robert
Sent: Monday, August 01, 2005 1:14 PM
To: Kreitman, Mark J.
Subject: RE:

Attachments: 8-05 bob changes.doc



8-05 bob
changes.doc (33 KB)

From: Kreitman, Mark J.
Sent: Monday, August 01, 2005 12:13 PM
To: Hanson, Robert
Subject:

<< File: 8-05 Supplemental Evaluations.doc >>

Supplemental Evaluations:

Aquirre: Gary works very hard, puts in long hours, and is dedicated to his work. He is willing to go the extra mile. But he is resistant to supervision and insufficiently aware of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain subpoenas he issued required retraction to avoid violating privacy statutes and he has, by failing to consult with his branch chief, inaccurately stated Commission policy in communication with defense counsel. His manner has drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency (don't think we should allege if it only raises a question). His desire to maintain complete control of his investigation seems to preclude full and open sharing of information with others. He has difficulty explaining the significance of evidence his investigation uncovered in a clear and well-organized manner and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

Deleted: cognizant

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Deleted: Other staff attorneys find it difficult to work with him; his

Deleted: single

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Deleted: his legal analysis

Deleted: linear fashion

[REDACTED] puts in long hours, takes advantage of expertise available throughout the Commission, and develops creative investigative models. He has excellent analytical skills. He has difficulty, however, working within a structured organizational framework and fails adequately to solicit his supervisors with respect to tactical and strategic decisions. For example, he has dispatched subpoenas without first clearing them with his branch chief, and taken legal positions without full consideration of conflicting decisions. Often he seems to focus on individual interests rather than soliciting others' input to ensure shared understanding of priorities and concerns.

Deleted: occasionally

Deleted: consult

Filename: 8-05 bob changes.doc
Directory: C:\Documents and Settings\HardyM\Local
Settings\Temporary Internet Files\OLK38
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Settings\HardyM\Application
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Title: Supplemental Evaluations:
Subject:
Author: kreitmanm
Keywords:
Comments:
Creation Date: 08/01/2005 1:13:00 PM
Change Number: 2
Last Saved On: 08/01/2005 1:13:00 PM
Last Saved By: US
Total Editing Time: 3 Minutes
Last Printed On: 11/06/2006 4:33:00 PM
As of Last Complete Printing
Number of Pages: 1
Number of Words: 311 (approx.)
Number of Characters: 1,777 (approx.)

503

EXHIBIT NUMBER 49

Williams, Betty J.

From: Kreitman, Mark J.
Sent: Monday, August 01, 2005 6:17 PM
To: Fielder, Dave
Subject: supplemental evaluations
Attachments: Supplemental Evaluations 2.doc

Dave – Paul has asked for supplementation of these two evaluations. Please let me know if I



Supplemental
Evaluations 2.doc...

should make any changes. Thanks. Mark

505

EXHIBIT NUMBER 50

[REDACTED]

From: Kreitman, Mark J.
Sent: Monday, August 01, 2005 6:31 PM
To: Berger, Paul
Subject: [REDACTED] Complaint

Paul -

Though I emphasize that I don't discount, indeed welcome, constructive criticism regardless of the source, my inquiries of Bob and Dave concerning their sense of the morale of the group lead me to believe that it continues to be strong, with the obvious exception of [REDACTED] and Gary, and, to a lesser extent, [REDACTED], who is having trouble with productivity. The excerpt below from an email [REDACTED] sent Dave July 21 may shed some light on his complaint:

[REDACTED] Aguirre, and perhaps others, have all become disturbed at their treatment. [REDACTED]

I will of course continue to monitor the group for signs or expressions of dissatisfaction with their work environment, including but not limited to the style and substance of my management.

Mark

507

EXHIBIT NUMBER 51

M E M O R A N D U M

To: Brian Cartwright
Jeff Risinger
Diego Ruiz
Linda Thomsen
Peter Uhlmann

From: Walter Stachnik *w stachnik*

Date: February 8, 2007

Re: Enforcement Performance Management (Audit no. 423)

Attached is our audit report on Enforcement Performance Management. The report reflects the comments we received on prior drafts.

We would appreciate receiving any additional comments you have concerning this audit and the report. In particular, we would like to know whether you found the audit useful. We also welcome any suggestions from you concerning how we could improve future audits.

The courtesy and cooperation of you and your staff are greatly appreciated.

Attachment

Cc: Joan McKown
Darlene Pryor
Jayne Seidman

Rick Hillman, GAO

ENFORCEMENT PERFORMANCE MANAGEMENT

EXECUTIVE SUMMARY

We reviewed the Division of Enforcement's (Enforcement) compliance with required performance management procedures. Enforcement did not consistently perform parts of the performance appraisal process, especially for new, reassigned and detailed staff. Enforcement also did not consistently retain performance documentation for the required time. The Commission's written policies and procedures did not provide adequate guidance on certain requirements of the performance management process and document retention requirements.

We are recommending that Enforcement ensure its supervisors perform all required performance management steps and that the Office of Human Resources (OHR) improve its written guidance and provide additional training. We are also recommending that OHR issue guidance on retention of performance management documents.

Enforcement management suggested that our findings are typical of the Commission as a whole. The Executive Director indicated that the current performance management program needs significant improvements and starting in fiscal year 2008, the Commission will adopt a new program to address its deficiencies.

OBJECTIVES, SCOPE AND METHODOLOGY

Our objectives were to evaluate the Division of Enforcement's compliance with the Commission's performance management policies and procedures and to determine whether improvements were needed. We began the audit after learning that a second-level supervisor prepared an undated supplemental memorandum regarding the performance of two employees the manager did not directly supervise. Supplemental memoranda are not addressed in the Commission's policies and procedures.

Our scope was limited to the Division of Enforcement's two most recent performance management cycles (ending on April 30, 2006, and April 30, 2005, for most employees and September 30, 2005, and September 30, 2004, for Senior Officers). We interviewed Enforcement, OHR and other Commission staff. We also reviewed written guidance and performance documentation and tested whether required steps were completed and, if so, whether they were completed properly and timely.

Our judgment sample included 34 of the 440 (7.7%) eligible staff for the cycle that ended on April 30, 2005, and 39 of the 421 (9.3%) eligible staff for the cycle that ended on April 30, 2006. We believed that selecting at least 30 staff from each review cycle would be sufficient. In selecting this sample, we included several categories of Enforcement employees in different grade levels and positions, including experienced, probationary, detailed and reassigned employees, supervisors, non-supervisors, and separated employees.¹

Our judgment sample also included six of Enforcement's nine senior officers (SOs) for the period sampled. Because there were so few SOs, we sampled the majority of the SOs.

We chose our sample by relying on OHR data, which identified Enforcement staff by several categories listed above. We also relied on Enforcement data identifying Enforcement headquarters staff. We verified whether the staff in our sample were actually in the category assigned by OHR, but we did not perform this verification for staff outside our sample.

We conducted this audit from July 2006 to October 2006 in accordance with generally accepted government auditing standards. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence that provides a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.²

BACKGROUND

The Commission changed its Performance Management program in 2003, giving employees an opportunity to increase their salary based on their performance. According to the Commission's written policies and procedures,³ the objectives of the Commission's performance management program are to:

- 1) Establish fair and equitable performance expectations and goals that are tied to improving organizational effectiveness in the accomplishment of the agency's mission and goals;
- 2) Encourage and facilitate communication between supervisors and employees;
- 3) Effectively evaluate employee performance, identifying strengths and weaknesses; and
- 4) Provide a mechanism to address deficient performance effectively.

¹ We planned to select staff who were on a Performance Improvement Plan (PIP), but no Enforcement staff were on a PIP during the two review cycles included in our sample.

² OIG Audit and Inspection Manual, page 15.

³ Issued through a memorandum to all employees from Jayne L. Seidman, dated May 2003.

Performance Appraisal Period

The performance appraisal period for most employees is from May 1 through April 30 of the following year. If an employee begins employment near the end of the appraisal period, the performance appraisal period may be adjusted.

The appraisal process is documented on Commission Form 2494 for non-supervisory staff and Form 2495 for supervisory staff (see appendices 1 and 2). These forms contain three parts:

- 1) Performance Planning;
- 2) Monitoring and Feedback; and
- 3) Evaluation.

An employee must have worked a minimum of 120 days to receive a performance rating under an established performance plan.

Performance Planning

At this stage, the supervisor and the employee meet to discuss the performance plan, expectations about what is to be accomplished, and the performance level to be achieved by the employee over a given period of time.

A supervisor should provide a performance plan to an employee within 30 days of the beginning of the performance appraisal period or the employee's assumption of a new position. The supervisor is responsible for assuring the employee understands the Commission's performance standards. The Commission has established four performance elements that apply to non-supervisory staff and eight performance elements that apply to supervisory staff. The supervisor and employee must sign and date the performance plan (Form 2494 or 2495) to acknowledge their discussion.

Monitoring and Feedback

During this stage, the supervisor consistently measures performance and provides ongoing feedback to the employee. The supervisor and the employee are to maintain an ongoing dialogue regarding what accomplishments are expected of the employee.

Additionally, on an ongoing basis, the supervisor must discuss any deficient performance with an employee, and explain what the employee must do to improve performance to an acceptable level. According to Commission policy, this discussion should take place as soon as possible after the deficient performance is identified, normally not less than 30 days prior to giving the final evaluation at the end of the rating period.

The supervisor should provide an employee with a mid-year review within 45 days before or after the mid-point of the performance appraisal period. For most employees, the mid-point is November 1, and the mid-year review should take place between September 17 and December 16.

The mid-point for a new employee is halfway between the employee's start date and April 30. The mid-year review should take place within 45 days before or after the employee's mid-point. For example, if an employee starts at the Commission on August 30, that employee's mid-point would be January 1, and the mid-year review should take place between November 17 and February 15.

The supervisor and employee should sign and date Form 2494 or 2495 to acknowledge the mid-year review.

Evaluation

The evaluation measures actual work performance against the performance criteria established at the beginning of the appraisal period. The supervisor assigns a rating of "acceptable" or "unacceptable" to each performance element and an overall rating of "acceptable" or "unacceptable." If an employee receives an "unacceptable" rating for any element, the overall rating will be "unacceptable."

The employee and supervisor should meet to discuss the evaluation and sign and date Form 2494 or 2495 to acknowledge their discussion. This meeting should take place within 60 days after the end of the appraisal period (typically by June 30) and the employee should receive a copy of Form 2494 or 2495.

Merit Increase

An employee who receives an overall "acceptable" rating is eligible to be considered for a merit increase. An eligible employee has the option of writing a summary of his or her contributions and providing it to the supervisor. The supervisor is required to write a summary of contributions for each employee with an overall "acceptable" rating. The supervisor also completes a transmittal form (see appendix 3) to indicate the level of contributions the supervisor believes the employee provided ("highest quality," "high quality," "quality" or "no significant contributions beyond an acceptable level of performance").

Enforcement's Compensation Committee (composed of senior level Enforcement staff) reviews all performance documentation and recommends to Enforcement's Director any proposed merit increase for each eligible employee. The Director makes the final determination.

Merit increases are one, two or three steps. For employees already at the top of a step range, an equivalent cash bonus is awarded.

Supplemental Memoranda

Supplemental memoranda include documents describing an employee's performance, other than those documents specifically required in the Commission's written policies and procedures.

Performance Improvement Plans

Employees rated "unacceptable" in at least one performance element are normally placed on a Performance Improvement Plan (PIP). A PIP provides an employee with a formal notice that he or she is performing below an acceptable level and gives the employee an opportunity to improve over a period of time (usually 60-120 calendar days). If the employee's performance does not improve to an acceptable level, the employee may be demoted or removed. Typically, only employees who have worked at the Commission for more than one year and have completed their probationary periods are placed on a PIP.

Reassigned and Detailed Staff

Staff who were reassigned or detailed during a review cycle should still be evaluated based on their work over the 12-month review cycle, regardless of whether the employee reported to more than one supervisor.

For reassignments, the new supervisor should discuss expectations with the employee within 30 days of the reassignment. The new supervisor should obtain the employee's "Performance Plan and Evaluation" (Form 2494 or 2495) from the former supervisor and base the employee's year-end evaluation on input from all supervisors to whom the employee reported during the review cycle.

For details, the original (permanent) supervisor is normally responsible for rating the employee. The permanent supervisor should obtain input from all other supervisors to whom an employee reported during the rating period and base the employee's evaluation on input from all supervisors.

Senior Officers

The performance appraisal period for Senior Officers (SOs) is from October 1 to September 30 of the following year (*i.e.*, the fiscal year).

Senior Officers are rated using a Performance Plan document. According to the Commission's SO written policy,⁴ the supervisor should develop a Performance Plan with the SO at or before the beginning of the rating period and conduct at least one progress review during the rating period. The supervisor and SO should sign the Performance Plan to document these meetings.

At the end of the appraisal period, both the SO and the supervisor are required to develop a written summary of the SO's contributions. The supervisor assigns a rating to the SO of "satisfactory," "unsatisfactory," or "minimally satisfactory" for each performance element. The supervisor and SO should sign the Performance Plan document to note the review.

The supervisor then makes a recommendation to the Commission's Performance Review Board (PRB) on the amount of any proposed merit increase. The PRB is comprised of the Executive Director, the General Counsel and the Chairman's Chief of Staff. The PRB meets to review all of the recommendations on merit increases and submits their final recommendations to the Chairman for final approval. If the SO being rated is a member of the PRB or reports directly to the Chairman, the Chairman alone makes the merit increase determination.

Document Retention

Performance appraisal documentation must be retained for a defined period of time. The National Archives and Records Administration (NARA) provides guidance on the retention period and how documents are handled when an employee transfers to another Federal agency or separates.⁵ The Commission's Office of Filings and

⁴ Securities and Exchange Commission Senior Officer Program manual, July 16, 2002.

⁵ NARA General Records Schedule 1, Civilian Personnel Records, Transmittal No. 12 (July 2004), §§ 1(b) and 23.

Information Services (OFIS) is currently responsible for Commission record retention policies.⁶

New Performance Management Program

The Executive Director informed us that the Commission's performance management program was the subject of union negotiations and a review by the Federal Services Impasse Panel (FSIP), and the Commission was prohibited from making changes to the program during the negotiations and review. FSIP recently issued a decision⁷ requiring the implementation of changes to the performance management program, and management has begun implementing this decision.

As part of the implementation of the FSIP decision, the SO performance plans will be restructured and managed in the same way as those for other employees and the rating cycle for all employees will be the fiscal year.

In addition, OHR has been experimenting with a pilot program under which its staff are rated on a five-level system. The program includes a written performance work plan and individual development plan, training provisions, and a year-end evaluation for each employee. This new program is expected to be adopted throughout the Commission starting in fiscal year 2008.

To improve accountability, OHR plans to purchase a computerized system to manage the appraisal process. The system is expected to help supervisors ensure they perform all parts of the process for their staff. The system will identify steps that need to be performed and timely remind supervisors to perform remaining steps with staff members.

AUDIT RESULTS

Enforcement did not consistently perform required parts of the performance appraisal process, especially for new, reassigned and detailed staff. Enforcement also did not consistently retain performance documentation for the required time. The Commission's written policies and procedures did not provide adequate guidance on certain requirements of the performance management process and accurately document retention requirements. The lack of adequate guidance may have contributed to Enforcement's non-compliance.

Enforcement management and OHR's Director suggested that our findings are typical of the Commission as a whole. The Executive Director indicated that the current performance management program needs significant improvements and starting in fiscal year 2008, the Commission will adopt a new program to address its deficiencies.

Our detailed findings and recommendations for improvement are set forth below.

⁶ OFIS is in the process of being dissolved and the records retention function will move to the Office of the Secretary.

⁷ In re SEC and NTEU, Case No. 06 FSIP 54 (Oct. 19, 2006).

PERFORMANCE APPRAISAL PROCESS

Performance Plan and Evaluation (Form 2494 or 2495)

We found that parts of the appraisal process were not completed or were completed late for certain employees in our sample. The following table summarizes the results of our review of Form 2494 or 2495 for sampled employees.

	2005			2006		
	Performance Planning	Mid-Year Review	Evaluation/ Rating	Performance Planning	Mid-Year Review	Evaluation/ Rating
Performed Timely	7	13	23	10	14	24
Not Timely	5	8	1	8	9	1
Not Performed	14	7	3	10	5	1
Incomplete Documentation on Form 2494/2495 *		2	2	0	0	2
N/A **	0	0	1	1	1	1
Total	30	30	30	29	29	29

* Refers to a Form 2494/2495 where an item was not signed or dated by the supervisor and/or employee.

** Refers to employees who were no longer at the Commission when an element of the performance appraisal process was to be performed.

Enforcement was unable to locate Form 2494 or 2495 for 14 employees in our sample of 73 (four in 2005 and ten in 2006). As a consequence, we could not determine if Enforcement complied with the performance appraisal process for these 14 employees.

Nine of the 14 missing Forms were for separated employees and five were for current employees. Enforcement said it discarded some Form 2494s or 2495s or mailed them to employees after they separated from the Commission. Enforcement officials indicated that parts of the appraisal process were conducted in some instances, even though Form 2494 or 2495 was not available.⁵

Recommendation A

Enforcement should develop appropriate procedures to ensure all required performance appraisal steps are completed.

Supervisory Contribution Statements

The following table summarizes our results on whether supervisors wrote a summary of employee contributions, as required by Commission policy.

	Written Summary of Contributions by Supervisor	
	2005	2006
Completed	31	29
Not Completed	1	0
N/A *	2	10
Total	34	39

* N/A refers to employees who were no longer at the Commission at the time the written summary of contributions was due.

⁵ Document retention is discussed on pages 11-12.

Supervisory summaries were due on June 29th of 2005 and 2006. Enforcement's Compensation Committee initially met to recommend each employee's merit increase on July 18th in 2005 and July 25th in 2006.⁹

Most of the supervisory summaries were not dated. In 2005, 11 supervisory summaries were dated, nine of which were completed by June 29th. In 2006, 12 supervisory summaries were dated, seven of which were completed by June 29th. All except one of the dated summaries were written before Enforcement's Compensation Committee's initial meeting. The remaining summary was written two days after the initial meeting.

Recommendation B

Enforcement should develop procedures to ensure that all supervisory summaries of employee contributions are completed timely and dated to indicate when they were completed.

Mid-year Review Certifications

Each year, OHR e-mails a memorandum to Division/Office Administrative Contacts asking them to certify that mid-year reviews were conducted. OHR requested that the memorandum be certified and returned by December 15, 2004, and January 13, 2006, for the 2005 and 2006 review cycles, respectively.

Enforcement returned the certifications to OHR after their due dates, on January 26, 2005 and January 19, 2006. In addition, the required mid-year review did not occur for four people in our sample (all of whom were at the Commission for the entire review cycle), as of the dates that Enforcement certified the memoranda.

Recommendation C

Enforcement should develop procedures to ensure that its certification of mid-year reviews is timely, and that all applicable mid-year reviews are conducted by the certification date.^{10, 11}

The mid-year review certification does not specifically provide for new employees who should receive a mid-year review later than the normal time (see "*Monitoring and Feedback*" section of the Background). Additionally, the certification was due or returned before the deadline for performing the related mid-year reviews for many new employees.

Recommendation D

OHR should develop procedures to ensure that mid-year reviews are

⁹ Enforcement told us that the Committee meets more than once to review all employees and the Committee will not make a recommendation on an employee's merit increase until all required performance documentation is present.

¹⁰ The implementation of OHR's automated system should make the mid-year certification process more efficient and effective.

¹¹ In January 2007, Enforcement changed its mid-year review certification process by requiring all senior offices to certify that mid-year reviews were performed for all of their staff. Prior to this, Enforcement's administrative contact informed senior officers of their responsibility to perform mid-year reviews and to report any exceptions. The administrative contact assumed the mid-year reviews were performed timely unless he was notified of exceptions.

conducted for all new employees. For example, OHR could revise its existing certification to discuss mid-year review requirements for new employees and/or develop a separate certification.

SUPPLEMENTAL MEMORANDA

We identified two staff members for whom a supplemental memorandum was written. The memorandum was written by the employees' second-level supervisor and was not dated. We did not review any performance appraisal documents of these employees to avoid interfering with ongoing investigative work within the Office of Inspector General.

We did not find that supplemental memoranda were written for any other employees in our sample. Enforcement's Director and other senior level Enforcement staff were not aware of any other supplemental memoranda prepared by Division supervisors. Enforcement management stated that supplemental memoranda are not typically prepared.

The Commission's policies and procedures do not discuss supplemental memoranda, and no policies expressly allow or disallow these memoranda in the performance appraisal process.¹²

EMPLOYEES WITH PERFORMANCE PROBLEMS

Enforcement management told us that supervisors are not comfortable giving "unacceptable" ratings to their staff, especially to new employees on their one-year probationary periods.¹³ Enforcement management also told us that supervisors sometimes do not rate probationary employees when Enforcement expects to terminate the employees during their probationary periods. As a consequence, employees with performance problems may not receive accurate assessments of their performance and suggestions for improvement during their appraisal.

In the two most recent rating periods, only two employees received an "unacceptable" rating on Form 2494. One was a probationary employee¹⁴ and the rating was not shared with this employee, as Commission policy requires. This employee was terminated during his probationary period.¹⁵ The second, a non-probationary employee, was rated in accordance with Commission policy.

A third, non-probationary employee's Form 2494 did not reflect a rating. However, an Enforcement rating spreadsheet indicated this employee was rated "unacceptable." Enforcement management could not explain this inconsistency.

¹² Recommendation K refers to supplemental memoranda.

¹³ Newly-appointed Federal government employees generally must serve a probationary period, which is typically one year. The purpose of the probationary period is to provide the Government with an opportunity to evaluate the individual's conduct and performance to determine whether the appointment should become final.

¹⁴ Our sample included 16 probationary employees.

¹⁵ Although the rating was not shared with this employee, Enforcement management discussed this employee's poor performance with him on more than one occasion prior to his separation.

Recommendation E

Enforcement should develop procedures to ensure that all employees are rated in accordance with Commission policy and the rating is shared with the employee.

Recommendation F

OHR, in consultation with Enforcement, should provide guidance and training to Enforcement supervisors on rating employees with performance problems. The guidance should discuss what constitutes "unacceptable" performance, how to document and manage performance problems, and how to communicate the rating to the employee.

SENIOR OFFICER APPRAISALS

We selected for review, the two most recent review cycles for Enforcement Senior Officers (October 1, 2003 – September 30, 2004 and October 1, 2004 – September 30, 2005).¹⁶

We reviewed six of the nine Enforcement Senior Officer (SO) performance appraisals and related documents for the cycle that ended on September 30, 2004. In each instance, only the final year-end evaluation was documented. The "Plan" and "Progress Review" sections were not documented, as required by the appraisal form and the Commission's SO policy.¹⁷ Employee and supervisor contribution statements were written in all six instances.

Performance review documents were not prepared for the cycle that ended on September 30, 2005, because the Chairman did not approve any SO merit increases for this cycle. While the performance appraisal process supports a merit increase for the SOs, it also helps SOs review their performance and identify organizational goals, expectations, objectives and accomplishments.

Recommendation G

Enforcement, in consultation with the PRB (the Executive Director, the General Counsel, and the Chairman's Chief of Staff), should develop procedures to ensure that the required steps of the SO performance appraisal process are conducted in accordance with Commission policy, even when merit increases are not awarded.

The SO manual states: "Periodically the effectiveness of the Senior Officer Program will be assessed. Improvements will be implemented as appropriate."¹⁸ Because the "Plan" and "Progress reviews" were not consistently completed for Enforcement SOs in accordance with Commission policy, changes to the policy, appraisal process, or

¹⁶ Performance documentation for the rating period that ended on September 30, 2006 was not available at the time of our review. In accordance with Commission policy, this documentation should be completed by January 2007.

¹⁷ Securities and Exchange Commission Senior Officer Program manual, July 16, 2002, pages 5 and 7.

¹⁸ Section XIII, page 12.

both may be necessary. The SO policy has not been assessed since it was written in July 2002.

Recommendation H

The Executive Director, in consultation with other members of the PRB (the General Counsel, and the Chairman's Chief of Staff), should review the Commission's SO manual and actual practice, and consider possible improvements to the SO appraisal process. The manual should be revised to reflect any changes to the appraisal process.

DOCUMENT RETENTION

We identified the following inconsistencies between NARA's guidance on document retention and the Commission's Personnel Operating Policies and Procedures (POPPS) Manual:

NARA's guidance on document retention states that agencies should generally retain performance appraisal documentation for current employees (except SES employees) for four years. If an employee transfers to another Federal agency or separates from Federal service, the records should be placed in the employee's OPF (Official Personnel File). Upon transfer, the OPF should be forwarded to the gaining agency. Upon separation from Federal service, the OPF should be transferred to the National Personnel Records Center in Missouri.¹⁹

In contrast to NARA's four-year retention requirement, the Commission's POPPS Manual states that employee performance appraisals are typically retained for only three years.²⁰ Additionally, the POPPS manual states that performance appraisal documentation will be destroyed no later than 30 days after the employee separates from the Commission.²¹

We identified the following inconsistency between the Commission's written policy and actual Commission practice:

The Commission's guidance on the Performance Management Program states that SEC Form 2494/2495 should be sent to OHR each year, where it will be maintained in an employee's OPF for four years.²²

In practice, SEC Form 2494/2495 and related documentation is retained by the Divisions/Offices, as OHR no longer accepts performance documents unless an employee separates from the Commission or there is an unusual circumstance (e.g., an employee has a labor-relations issue).

¹⁹ NARA General Records Schedule 1, Civilian Personnel Records, Transmittal No. 12 (July 2004), §§ 1(b) and 23.

²⁰ POPPS 6-293.C, September 9, 1991, § 11(a), pages 4-5. According to the Associate Executive Director for Human Resources, this manual will be replaced by mid-2007 with human capital directives.

²¹ POPPS 6-293.C, September 9, 1991, § 11(c), page 5.

²² Issued through a memorandum to all employees from Jayne L. Seidman, dated May 2003, part 2-5, page 8.

Our sample included 14 sets of performance documents related to Enforcement staff who left the Commission during the two most recent appraisal periods. Performance documents were not available in nine of 14 instances.

Enforcement's Administrative Contact retains performance documents for current employees while they are still with Enforcement. Three to four months after an employee leaves the Commission, Enforcement may discard Forms 2494 or 2495 that do not contain an evaluation because the employee left before the evaluation due date. Enforcement sometimes mails the former employee his or her performance documents. This practice does not comply with NARA's guidance.

Recommendation I

OHR should update the Commission's guidance on retention of performance management documentation to conform to NARA's guidance and current practice. OHR should issue the revised guidance and provide appropriate training to the Commission's Divisions and Offices.

Recommendation J

Enforcement should implement procedures to retain performance documentation of separated employees for the appropriate time period.

OHR GUIDANCE

We found OHR's written guidance on the performance appraisal process difficult to understand. OHR staff agreed that the guidance can be improved and assisted us in interpreting the guidance.

OHR staff also provided us with additional information not included in the Commission's written procedures. For example,

- Staff who start at the Commission during a review cycle should have a mid-year review performed at a later time than staff who were present for an entire review cycle (see the Background section).
- When an employee is reassigned, the new supervisor should discuss the expectations for the new position with the employee within 30 days of the reassignment. The new supervisor should obtain the "Performance Plan and Evaluation" (Form 2494 or 2495) from the former supervisor and base the employee's year-end evaluation on input from all supervisors to whom the employee reported during the review cycle.
- For reassigned and detailed staff, the timing of the mid-year evaluation is unaffected by the reassignment or detail, provided the employee was a Commission employee for the entire rating cycle.
- When a supervisor separates from the Commission, the supervisor should prepare a memorandum for each employee he or she supervised for use in the employee's evaluation.
- Probationary employees are not generally placed on PIPs. An employee typically will have worked for at least one year before a PIP is used.

- There is no policy on whether supplemental memoranda (see Background) can be used in the performance management process, and under what circumstances they might be appropriate and when they must be submitted.

Recommendation K

OHR should update the Commission's performance management guidance to address the issues listed above and provide appropriate training to the Commission's Divisions and Offices.

U. S. Securities and Exchange Commission Performance Plan and Evaluation			
Employee Information		Performance Evaluation Period	
Name		From	To
		Month Year	Month Year
Title		Period Covered by this Evaluation	
Division/Office/ Field Office		<input type="checkbox"/> Entire Performance Evaluation Period	
Pay Plan, Series, Grade, Step		<input type="checkbox"/> Detail (From: To:)	
SK- _____		<input type="checkbox"/> Other (specify) _____	
Certification of Performance Appraisal Process			
Performance Planning (to be held within 30 days of the beginning of the performance evaluation period)			
Employee Signature		Date	
Supervisor/Rating Official Signature		Date	
Mid-Year Review (to be held within 45 days of the mid-point of the performance evaluation period)			
Employee Signature		Date	
Supervisor/Rating Official Signature		Date	
Evaluation (to be completed within 60 days after the end of the performance evaluation period)			
Employee Signature		Date	
Supervisor/Rating Official Signature		Date	
Performance Rating			
<input type="checkbox"/> Acceptable		<input type="checkbox"/> Unacceptable	

SEC 2494 (5/35)

Performance Assessment Select the most appropriate level for each element		
Critical Elements and Acceptable Standards	Results	
	Acceptable	Unacceptable
Knowledge of Field or Occupation Maintains and, with few exceptions, demonstrates technical skills essential to performing duties of the position, including knowledge of pertinent laws, standards, regulations, rules, policies, procedures, and technologies.		
Planning and Organizing Work - With few exceptions recognizes and solves problems, meets objectives, and considers priorities when planning work assignments. Efficiently uses time and resources to produce a quality product with appropriate guidance and completes assignments within agreed upon time frames.	☐	☐
Execution of Duties - With few exceptions, thoroughly and carefully analyzes and researches assignments. Effectively applies necessary knowledge and technical skills in order to perform duties of the position in an acceptable manner. Final work products meet established need, reflect appropriate attention to detail, and are well organized.	☐	
Communications Oral and written communications further agency objectives and with few exceptions, are clear, concise, well organized, accurate, grammatically correct, and appropriate for the intended audience. Required personal interactions with internal and external constituencies/ counterparts are generally responsive to the needs of these individuals or entities. Keeps these entities and management apprised of relevant issues, changes and problems as directed.	☐	☐

SEC 2494 (MUM)

U. S. Securities and Exchange Commission Performance Plan and Evaluation (For Supervisors)	
Employee Information Name _____ Title _____ Division/Office/Field Office _____ Pay Plan, Series, Grade, Step _____ SK- _____	Performance Evaluation Period From _____ Month _____ Year _____ To _____ Month _____ Year _____ Period Covered by this Evaluation <input type="checkbox"/> Entire Performance Evaluation Period <input type="checkbox"/> Part (From _____ To _____) <input type="checkbox"/> Other (specify) _____
Certification of Performance Appraisal Process	
Performance Planning (To be held within 30 days of the beginning of the performance evaluation period) Employee Signature _____ Date _____ Supervisor/ating Official Signature _____ Date _____	
Mid-Year Review (To be held within 45 days of the mid point of the performance evaluation period) Employee Signature _____ Date _____ Supervisor/ating Official Signature _____ Date _____	
Evaluation (To be completed within 14 days after the end of the performance evaluation period) Employee Signature _____ Date _____ Supervisor/ating Official Signature _____ Date _____	
Performance Rating	
<input type="checkbox"/> Acceptable	<input type="checkbox"/> Unacceptable
SEC 2495 (REV. 01/07)	

Performance Assessment (The most appropriate row level is selected)		
Critical Elements and Acceptable Standards	Results	
	Acceptable	Unacceptable
Knowledge of Field or Occupation - Maintains and, with few exceptions, demonstrates technical skills essential to performing duties of the position, including knowledge of pertinent laws, standards, regulations, rules, policies, procedures, and technologies.	<input type="checkbox"/>	<input type="checkbox"/>
Planning and Organizing Work - With few exceptions, recognizes and solves problems, meets objectives, and considers priorities when planning work assignments. Efficiently uses time and resources to produce a quality product with appropriate guidance and completes assignments within agreed upon time frames.	<input type="checkbox"/>	<input type="checkbox"/>
Execution of Duties - With few exceptions, thoroughly and carefully analyzes and researches assignments. Effectively applies necessary knowledge and technical skills in order to perform duties of the position in an acceptable manner. Final work products meet established needs, reflect appropriate attention to detail, and are well organized.	<input type="checkbox"/>	<input type="checkbox"/>
Communications - Oral and written communications further agency objectives and, with few exceptions, are clear, concise, well organized, accurate, grammatically correct, and appropriate for the intended audience. Required personal interactions with internal and external constituencies/courtesy are generally responsive to the needs of these individuals or entities. Keeps those entities and management apprised of relevant issues, changes, and problems as directed.	<input type="checkbox"/>	<input type="checkbox"/>

For Municipal Employees Only (In addition to the elements above)

Critical Elements and Acceptable Standards	Performance	
	Acceptable	Unacceptable
Manages People - With few exceptions, uses available financial, material, and human resources effectively and efficiently to accomplish mission/organizational goals. Reacts effectively to changing priorities and re-directs work and resources in response.	<input type="checkbox"/>	<input type="checkbox"/>
Effective Leadership - With few exceptions, develops and clearly communicates goals to subordinates, delegates authority to the appropriate level, and sets priorities, as necessary, to ensure the work of the unit is accomplished within established time frames.	<input type="checkbox"/>	<input type="checkbox"/>
Developing and Counseling Staff - Routinely provides constructive guidance, instruction, and feedback to employees on an on-going basis, encouraging two-way communications. Accurately and timely evaluates employees' contributions to mission accomplishments. Provides recognition and discipline fairly and consistently, when appropriate, within established guidelines.	<input type="checkbox"/>	<input type="checkbox"/>
Support for Diversity and EEO Programs - Applies agency management practices that support EEO and diversity principles.	<input type="checkbox"/>	<input type="checkbox"/>

EO 2495 (05/03)

Merit Pay

Supervisory Transmittal Form

Employee Name: _____

Supervisor Name: _____

Supervisor Recommendation: This employee has:

_____ made contributions of the highest quality

_____ made contributions of high quality

_____ made contributions of quality

_____ made no significant contribution beyond an acceptable level of performance

Supervisor's Signature _____ Date _____

This recommendation is provided as guidance to the Compensation Committee and does not correlate to a level of merit pay increase.

Compensation Committee Recommendation:

_____ Merit Increase(s)

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EXHIBIT NUMBER 52

[REDACTED]

From: Aguirre, Gary J.
Sent: Monday, May 23, 2005 4:34 AM
To: Hanson, Robert
Subject: subpoenas and other correspondence to be faxed on Monday
Attachments: Moskovitz May 23, 05.doc; MS SUBPOENA Custodian III.doc; MS Cover Subpoena III.doc; MS Subpoena Attachment III.doc; AOL Subpoena attachment.doc; AOL SUBPOENA.doc; AOL Cover.doc; Reuterssubpoena attachment.doc; Reuters cover letter.doc; Reuters SUBPOENA.doc; Bloomberg Subpoena attachment.doc; Bloomberg SUBPOENA.doc; Bloomberg Cover.doc; Samberg SUBPOENA II.doc; Samberg cover II.doc; Samberg SUBPOENA ATTACHMENT II.doc; JP Morgan re Subpoena.doc; GE info request May 23, 05.doc

These were leftovers from last weekend.

6/15/2007

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EXHIBIT NUMBER 53

Humes, Richard M.

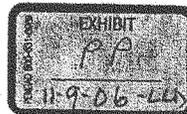
From: Hanson, Robert
Sent: Wednesday, May 25, 2005 8:30 AM
To: Aguirre, Gary J.
Subject: RE: Subpoenas on Bloomberg, AOL and Reuters

<http://enforcenet/reference/privacy/ecpa/manual.htm>

From: Aguirre, Gary J.
Sent: Wednesday, May 25, 2005 7:14 AM
To: Hanson, Robert
Subject: Subpoenas on Bloomberg, AOL and Reuters

Can I see the documents that raise the privacy concerns? I would like to resolve this issue, since there could be something in the Bloomberg IMs for the critical Heller time frame.

Please keep in mind that we have an e-mail in which Samberg says he only communicates with a certain group of people by some form of IM. Samberg's IMs were subpoenaed by both our 2/7 and 3/22, but we got none. I have talked to his attorney and Audrey about what IM system Samberg used and both say they don't know. I think it was probably Bloomberg. On a related note, last night Audrey told me she would not be able to deliver the letter she had agreed to provide describing the number of e-mails FF is withholding. When I asked her what had changed since she agreed to provide the letter last Thursday in the meeting with Judge Sporkin, she told me that FF has decided more IMs are due under our subpoenas and thus there will be more privileged docs. I suspect Bloomberg's counsel called them; he told me I should get the IMs from Pequot rather than Bloomberg, so he'd probably telling them the same.



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EXHIBIT NUMBER 54

May 31, 2005

Via Facsimile to 212-893-5371 and via Federal Express

Custodian of Records
c/o Karl P. Kilb
Bloomberg L.P.
731 Lexington Ave.
New York, NY 10022

Re: In the Matter of Trading in Certain Securities; MHO-9818

Dear Sir or Madam:

The enclosed subpoena has been issued pursuant to a formal order entered by the United States Securities and Exchange Commission ("Commission") in the above-referenced matter. The subpoena requires Bloomberg L.P. to produce certain documents.

Unless otherwise indicated, the subpoena requires production of original materials. For your convenience and at your expense, however, you may presently satisfy this requirement by producing copies of the documents specified. If you do produce copies, you should maintain the originals. I will notify you if and when they are required.

Certain of the records called for by the subpoena may constitute "contents of electronic communications" within the meaning of the Electronic Communications Privacy Act of 1986 [18 U.S.C. 2510, et. seq.] (the "ECPA"). Pursuant to Section 2703(b) of the ECPA [18 U.S.C. 2703(b)], you may not release these records to us until I have provided the "subscriber" or "customer" with prior notice of this request. I will send you confirmation that the customer notice requirement has been complied with in approximately 14 days.

Please send the documents required by the subpoena to:
Gary J. Aguirre, Esq.
US Securities and Exchange Commission
100 F St. N.E.
Washington, D.C. 20549

Please consecutively number and mark each document produced with a symbol that identifies it as being produced by you; provide an index that briefly identifies each document; and provide a statement whether a diligent search has been made for, and whether you have produced, all information required. If any required document is not produced, please submit a list of all such documents that contains: the document date; a brief description; the identity of the author(s) and all persons provided the document or a copy thereof or informed of its substance; and the reason for failing to produce the document.

Information provided is subject to the Commission's routine uses. A list of those uses is contained in the enclosed copy of SEC Form 1662, which contains other important information.

Pursuant to Section 2706 of the ECPA [18 U.S.C. 2706], you may be entitled to reimbursement for certain costs incurred in complying with this subpoena. In order to obtain reimbursement, you must

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submit to the undersigned an itemized bill or invoice.

This inquiry is confidential and should not be construed as an indication by the Commission or its staff that any violation of law has occurred, nor as a reflection upon any person, entity, or security.

If you have any questions, please do not hesitate to call me at (202) 551-4437. Thank you for your cooperation.

Sincerely,

Gary J. Aguirre
Senior Counsel

Enclosures: Subpoena w/Attachment
Commission Form 1662

UNITED STATES PRIVATE
SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT
100 F ST, N.E.
WASHINGTON, D.C. 20549-0800

WRITER'S DIRECT DIAL LINE

(202) 551-4437

Document Properties

534

Title: May 31, 2005

Author: US

Template: Normal

Last saved by: US

Revision number: 5

Application: Microsoft Office Word

Total editing time: 00:30:00

Created: 2005/05/29 11:48:00

Last saved: 2005/05/30 17:19:00

Company: SEC

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EXHIBIT NUMBER 55

Kreitman, Mark J.

From: Hanson, Robert
Sent: Friday, July 07, 2006 4:43 PM
To: Ricciardi, Walter
Cc: Kreitman, Mark J.; Eichner, Jim
Subject: RE: Mack testimony

Yes. One of the problems with the messages we were bombarded with was that they contained boatloads of speculation. Another problem that became apparent as time went on was that the messages often contained numerous factual errors, making it difficult to have any degree of confidence in his suggested investigative steps.

From: Ricciardi, Walter
Sent: Friday, July 07, 2006 4:29 PM
To: Hanson, Robert
Cc: Kreitman, Mark J.; Eichner, Jim
Subject: RE: Mack testimony

Thanks for digging this out – if the CSFB CFO didn't even have the information, it makes Gary's speculation even more tenuous.

From: Hanson, Robert
Sent: Friday, July 07, 2006 11:59 AM
To: Ricciardi, Walter
Cc: Kreitman, Mark J.; Eichner, Jim
Subject: RE: Mack testimony

Walter,

According to an email from Gary to me on August 16, counsel for CSFB told him that Mack met with the CFO of CSFB approximately two weeks before Mack was hired by CSFB on July 12, 2001, and then again just before Mack joined CSFB. According to a second Gary email sent to me on August 26, CSFB counsel told him that the CFO did not get pending deal information. We got a handful of documents from CSFB after Gary left, including a table of individuals at CSFB who had access to the CSFB's lists of Watch and Restricted lists during the period from April 1 through July 15, 2001. REG.0002049

09/13/2006

According to the table, the CFO was not one of the individuals who had access to the lists. CSFB provided a letter stating that Heller may have been on the CSFB watch list from March 19 - April 23, 2001 and again from June 11 through October 25, 2001. We also received a copy of the CFO's outlook calendar, showing that the CFO had a telephone call with Mack on July 9, 2001 from 1 to 3pm. This document seems to confirm that the CFO did in fact talk with Mack just before Mack joined CSFB. CSFB was not able to produce anything similar for the earlier meeting between the CFO and Mack that Gary referenced in his August 16 email to me.

Along these lines, an email dated July 12, 2001 from Samberg to his own son in response to the announcement by the WSJ of Mack's hire by CSFB, shows that Samberg spoke with Mack on July 11. Samberg wrote: "Spoke with him last night and commented on how up he sounded. He said he was close to something [sic], but I didn't know it would be today. Sounds like a perfect opportunity for him." The email suggests that in spite of their closeness, Samberg did not even know that Mack was joining CSFB the night before it was announced.

Let me know if you want additional information or have other questions.

Thanks,

Bob

From: Ricciardi, Walter
Sent: Thursday, July 06, 2006 6:11 PM
To: Hanson, Robert; Kreitman, Mark J.
Subject: RE: Mack testimony

Thanks Mark. Gary says Mack met with the CFO of CSFB at a couple of key points. Is that speculation or do we know whether there is evidence of such contacts at that time? Thanks.

From: Kreitman, Mark J.
Sent: Thursday, July 06, 2006 1:54 PM
To: Ricciardi, Walter
Cc: Hanson, Robert
Subject: FW: Mack testimony

SEC 0002050

09/13/2006

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EXHIBIT NUMBER 56

MEMORANDUM

VIA: Federal Express, Certified and First Class Mail

TO: Gary J. Aguirre

FROM: Linda Chatman Thomsen *by JTB*
Director, Division of Enforcement

DATE: September 1, 2005

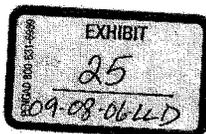
SUBJECT: Notice of Termination During Trial Period

This is to inform you that your employment as a General Attorney (SI), Enforcement Division, will be terminated during your trial period based upon your demonstrated inability to work effectively with other staff members and your unwillingness to operate within the Securities and Exchange Commission (SEC) process. Your termination from the SEC and from the Federal service will be effective at the close of business on Friday September 2, 2005.

You began your employment with the Commission on September 7, 2004. As you were advised at the time of your appointment, an employee who is given a career conditional appointment, as you were, must serve a one-year trial period. It is during this time that an employee has to demonstrate fully his/her qualifications for continued employment.

Several times throughout your trial period, your supervisors advised you that your conduct was inappropriate. You were permitted to transfer from one Assistant Director group to another after assuring your Associate Director that problems that had occurred, including personality conflicts and resistance to standard supervision, would not recur. However, you have continued to have conflicts with other staff attorneys, your branch chief, and a Trial Unit attorney assigned to your primary case responsibility. You have continually expressed dissatisfaction with the supervisory structure and ignored the chain of command in the Division. On one occasion, you submitted (and later withdrew) your resignation to your Associate Director, and indicated that you were uninterested in participating in preparation of your primary case assignment beyond its investigatory stage. While your substantive work generally has been good, the problems that have occurred in other areas are so significant that they far outweigh the value of that work.

During the last several months, your Associate Director, your Assistant Director, and your branch chief have met with you on several occasions to explain to you the importance of working together with other staff members to achieve consensual goals and the importance of operating within the SEC process.



GJA - 00139

Since those meetings, your conduct has not improved to the level that warrants retention beyond your trial period. Therefore, your employment with the SEC will be terminated during your trial period, effective September 2, 2005 at 5:00 p.m., in accordance with the provisions of 5 CFR 315.804.

I have reviewed the situation with your supervisors, and this decision represents the consensus reached among them. You may appeal this action to the Merit Systems Protection Board (MSPB) only if you believe it was based on partisan political reasons or marital status. Any such appeal must be submitted in writing, not later than thirty days after the effective date of this action, to the Merit Systems Protection Board, Washington, D.C. Regional Office, 1800 Diagonal Road, Suite 205 Alexandria, VA 22314-2480; e-mail: washingtonregion@mspb.gov; Fax: (703) 756-7112. Appeal forms are attached. You can access the relevant regulations at www.mspb.gov.

If you have any questions about this notice or your rights, please contact Linda Borostovik, Human Resources Specialist, at [REDACTED]. Although she may not represent you, Ms. Borostovik is available to answer questions you may have regarding your attendant rights. In addition, we need to coordinate your obtaining personal items from Station Place and returning your laptop, token, identification badge, and office key. You may contact Chuck Staiger at [REDACTED] to arrange to come into the office for your personal belongings and the return of Commission items or to use a courier service for this purpose.

Attachment: MSPB Appeal Forms

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EXHIBIT NUMBER 57

Williams, Betty J.

From: Kreitman, Mark J.
Sent: Wednesday, May 25, 2005 12:06 PM
To: ORourke, Kevin
Subject: RE: Aguirre's Skin

Hanson's on it.

-----Original Message-----
From: ORourke, Kevin
Sent: Wednesday, May 25, 2005 11:36 AM
To: Kreitman, Mark J.
Subject: Re: Aguirre's Skin

I hope his correpondnce is being reviewed and mortar applied before it goes out.
Sent from BlackBerry Wireless Handheld.

-----Original Message-----
From: Kreitman, Mark J. [REDACTED]
To: ORourke, Kevin [REDACTED]
Sent: Wed May 25 11:24:27 2005
Subject: RE: Aguirre's Skin

Mortar.

-----Original Message-----
From: ORourke, Kevin
Sent: Wednesday, May 25, 2005 11:18 AM
To: Kreitman, Mark J.
Subject: Re: Aguirre's Skin

I have already given him a huge amount of slack, and will continue to do so. However,
he has shown strong signs of being a loose cannon.
Sent from BlackBerry Wireless Handheld.

-----Original Message-----
From: Kreitman, Mark J. [REDACTED]
To: ORourke, Kevin [REDACTED]
Sent: Wed May 25 11:06:03 2005
Subject: Aguirre's Skin

Hey, Kevin -

I hope you can try to give Gary a bit of slack. He is, in fact, the sensitive type --
high strung, unused to working in an institutional environment, frustrated by the
concomitant lack of independence. I've talked to him about what I think is the
impropriety of his response to your email and how I think this kind of disagreement
ought to be privately resolved in any case. Bottom line is, this is an important
case, we need (and fought to get) you, and I hope that, in service of mission, you
can overlook style that we both may find grating.

Thanks.

Mark

-----Original Message-----
From: ORourke, Kevin
Sent: Wednesday, May 25, 2005 10:14 AM
To: Aguirre, Gary J.; Hanson, Robert; Foster, Hilton; Ribelin, Eric; Eichner, Jim;
SEC 0001368

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EXHIBIT NUMBER 58

Hardy, Melinda

From: Clarkson, James
Sent: Tuesday, March 15, 2005 10:29 AM
To: ORourke, Kevin
Subject: RE: EEO

That is fine with me Kevin.

From: ORourke, Kevin
Sent: Tuesday, March 15, 2005 10:28 AM
To: Clarkson, James
Subject: EEO

I just started working on a matter in which Gary Aguirre is the staff attorney. It is early in the investigation and I was brought in for one meeting with dilatory outside counsel. The plan is for me to stay with the case. Kreitman is now Aguirre's A.D. Obviously, if things develop, I would end up working closely with Aguirre (and others) on the matter. My suggestion is that I continue to work on the matter, with no discussion of the EEO matter. Let me know if you think otherwise.

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EXHIBIT NUMBER 59

[REDACTED]

From: ORourke, Kevin
Sent: Tuesday, May 31, 2005 12:28 PM
To: Simpson, Richard
Subject: Comments

Pequot

The staff attorney, Gary Aquirre, is very dedicated and quite skilled, but is somewhat a loose cannon that needs to be supervised.
The branch chief, Robert Hanson, seems to be appreciative and supportive of the trial unit. Kreitman is fully supportive.

[REDACTED]
[REDACTED] and [REDACTED] are all highly significant assets of the Commission. [REDACTED]
[REDACTED] and [REDACTED] both work well with and are supportive of the trial unit.

[REDACTED]
[REDACTED] is a great staff attorney, with great support from Robert Hanson.

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EXHIBIT NUMBER 60

Robert Hanson OIG-431

I spoke with Robert Hanson by phone on October 17, 2005 regarding the Aguirre allegations. Hanson said that the investigation regarding HO-9818, trading in the matter of certain securities and Pequot Capitol Mgt., is active and was opened in approximately October/November 2004. Hanson told me that John Mack's testimony has not been taken, but may be in the future. Hanson said that it is an insider trading case with many potential tippers, of which Mack is one. Hanson said that Gary Aguirre wanted to take Mack's testimony, and that there was lots of dialogue in the office about whether to do so. Hanson said that Aguirre felt that the need for Mack's testimony was compelling, and the issue was whether Mack had access to very old information. Hanson said that he and others felt that they should get "their ducks in a row" first and figure out Mack's access and motive, before taking Mack's testimony. Hanson said the issue arose in the summer of 2005, and that with Aguirre on the investigation was Hanson, a couple of staff attorneys including Lee Ban-Jama (?) and Jim Eichner, along with Mark Kreitman (Associate) and Berger. Hanson said that Thomsen agreed about not taking Mack's testimony yet. According to Hanson, there was still an outstanding subpoena for documents to several broker/dealers. Hanson was aware that Mary Jo White had called Thomsen directly once, and Hanson said that folks who have access to Thomsen use it. Hanson said that there are lots of e-mails between him and Aguirre about taking Mack's testimony. Hanson said that an open issue was whether Mack had access to information. Hanson said that he told Aguirre that he needed to give others a heads up, and that there were two subpoenas issued by Aguirre that were against Enforcement policy. Hanson said that Gary Lynch called him about a request he got from Aguirre to keep information confidential, and that violates Enforcement policy. Hanson said that Aguirre was terminated during his probation because he did not work well with others, his writing was poor, he didn't communicate well, and that while he had some good ideas he made serious mistakes. Hanson said that Aguirre came to his group in January or February or 2005 after not making out in another group. Hanson rated Aguirre pass because in the couple of months he had worked in his group before the rating he was fine. Hanson said that his work devolved after that and that Aguirre quit the job twice. Hanson told me that the last straw was when Aguirre quit the last time and said that he was leaving at the end of September 2005.

At some point, according to Hanson, Berger asked Hanson about complaints about Kreitman and Hanson told Berger to consider the source, meaning that if it were either Aguirre or another "troublemaker" he should consider the source. Sometime around July or August of 2005, Berger told Hanson to be honest in his evaluation of Aguirre, Hanson told me, and suggested that he and Kreitman do a supplemental evaluation of Aguirre. Hanson said that Kreitman and Aguirre were friends before and after his employment at the Commission, and that he believed that Aguirre saw himself as a co-partner with Kreitman. Hanson said that Aguirre and Kreitman did not see eye-to-eye and that Aguirre would complain about and yell at Kreitman. Hanson said that Berger asked Aguirre to do a memo about why taking Mack's testimony now was important. Hanson told me that Aguirre sent two different memos on this, one to Berger and one to Hanson. Hanson said that some of the assertions in the memos were not true. Hanson said that Aguirre told Hanson that he had filed an EEO case for being denied jobs at the SEC 22 times.

Kelly Andrews

2000451

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EXHIBIT NUMBER 61

May 18, 2006 Thursday 4:22 PM GMT

LENGTH: 350 words**HEADLINE:** UPDATE: SEC Associate Enforcement Director Stepping Down**BODY:**

(Adds statement from the Debevoise law firm in third paragraph.)

By Judith Burns
OF DOW JONES NEWSWIRE

WASHINGTON (Dow Jones)--The Securities and Exchange Commission announced Thursday that associate enforcement director Paul Berger will leave the SEC to become a partner at Debevoise & Plimpton LLP (DBP:XX), working in the law firm's Washington, D.C., office.

Berger is a 14-year veteran of the SEC, having joined the agency as a staff attorney in the enforcement division in 1992. Berger, 56 years old, became an SEC branch chief in 1994, an assistant director in 1996, and an associate director in 2000, when he was named as co-chair of the SEC's financial-fraud task force.

In a statement, Mary Jo White, the former federal prosecutor who chairs Debevoise's litigation department, said Berger will start in June and work on securities cases, enforcement and white-collar criminal defense matters. She said Berger's wealth of experience at the SEC "will be a tremendous asset to our clients."

At the SEC, Berger worked on financial fraud and auditor independence cases, including charges stemming from KPMG's audit of Xerox Corp. (XRX). He also was involved in Regulation Fair Disclosure cases against Schering-Plough Corp. (SGP) and its former chairman and chief executive, in executive compensation cases against General Electric (GE) and Tyson Foods Inc. (TSN), and in foreign-corrupt-practices-act cases, including one brought in conjunction with the Justice Department against Titan Corp. Titan, which was acquired by L-3 Communications Holdings Inc. (LLL) last summer, paid \$28.5 million to settle the criminal and civil charges.

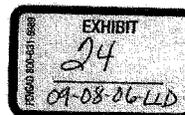
Berger's departure creates a third opening for an associate director in the SEC's enforcement division. One slot opened when former associate director Peter Bresnan was promoted to be co-deputy director of the enforcement division, and another opening was created when former associate director Lawrence West moved to a private-sector law firm.

-By Judith Burns, Dow Jones Newswires; 202-862-6692; judith.burns@dowjones.com [05-18-06 1222ET]

NOTES:

PUBLISHER: Dow Jones & Company, Inc.

LOAD-DATE: May 19, 2006



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EXHIBIT NUMBER 62

Cain, Margaret A.

From: Cain, Margaret A.
Sent: Friday, October 21, 2005 12:19 AM
To: Ribelin, Eric
Subject: RE: p.p.s.

yes, that's what i hear. :) thought you might be glad to hear it.

-----Original Message-----
From: Ribelin, Eric
Sent: Thursday, October 20, 2005 10:21 PM
To: Cain, Margaret A.
Subject: Re: p.p.s.

Really?

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Cain, Margaret A. [REDACTED]
To: Ribelin, Eric <[REDACTED]>
Sent: Thu Oct 20 21:39:33 2005
Subject: p.p.s.

More news that PB is, in fact, leaving.

mac aka rona barrett

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EXHIBIT NUMBER 63

Cain, Margaret A.

From: Cain, Margaret A.
Sent: Friday, October 21, 2005 5:26 PM
To: Ribelin, Eric
Subject: corroborating info?

Have you heard anything to corroborate my PB news?

[REDACTED]

SEC 0004929

10/11/2006

555

EXHIBIT NUMBER 64

U.S. SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

-----x
:
In the Matter of: :
:
TRADING IN CERTAIN SECURITIES, :
No. HO-0818, and the SEC's :
TERMINATION OF EMPLOYMENT OF :
GARY AGUIRRE :
:
-----x

Friday,
October 13, 2006

The interview of MARGARET A. CAIN, ESQ.,
Securities and Exchange Commission, was convened,
pursuant to notice, at 2:09 p.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, ESQ.
Investigative Counsel
U.S. Senate Committee on Finance

STEPHANIE MIDDLETON
U.S. Senate Committee on the Judiciary

SAMUEL M. FORSTEIN, ESQ.
Assistant General Counsel
Litigation and Administrative Practice
U.S. Securities and Exchange Commission

ANIL ABRAHAM, ESQ.
Counsel, Office of the Chairman
U.S. Securities and Exchange Commission

1 Barrett in the past.

2 MR. FOSTER: Because--

3 MS. CAIN: Inside joke between us.

4 MR. FOSTER: Because you were discussing whether

5 people were going to be--

6 MS. CAIN: Right.

7 MR. FOSTER: --leaving or staying?

8 MS. CAIN: Exactly.

9 MR. FOSTER: Did you know at the time that you

10 sent this e-mail where Paul Berger was going?

11 MS. CAIN: I don't have a specific memory about

12 where he was going, looking at this e-mail, no.

13 MR. FOSTER: Okay. Independent of the e-mail, do

14 you have any sort of general memory as to having an idea

15 where Paul Berger was going before he announced that he was

16 leaving?

17 MS. CAIN: I have impressions, yes.

18 MR. FOSTER: What are they?

19 MS. CAIN: That he was going to Debevoise.

20 MR. FOSTER: Do you believe that you knew that he

21 was going to Debevoise at the time you sent this e-mail?

22 MS. CAIN: Not 100 percent, no.

23 MR. FOSTER: Fifty percent?

24 MS. CAIN: I can't really--I don't know if I can

25 put an exact number on it.

1 subsequent firing.

2 MR. FOSTER: Are you referring to a retirement
3 party for Hilton Foster?

4 MS. CAIN: Yes.

5 MS. MIDDLETON: Oh, this was before Gary was
6 fired, right?

7 MS. CAIN: Right, but that was pretty much my only
8 communication with Gary, and it wasn't really a
9 communication, more as an observance, then his subsequent
10 firing. So I probably--

11 MR. FOSTER: So before that party, did you know
12 Gary Aguirre?

13 MS. CAIN: I knew of him.

14 MS. MIDDLETON: So you met him at the party? I
15 mean, that is the first time you think you met him or talked
16 to Gary?

17 MS. CAIN: I don't know if that is the first time
18 I met him. I don't know if that is the first time I met
19 him.

20 MS. MIDDLETON: But you did talk to him at Hilton
21 Foster's party?

22 MS. CAIN: Yeah, I think, you know, just like
23 chit-chat.

24 MR. FOSTER: Where was Hilton Foster's party?

25 MS. CAIN: The Dubliner. The Dubliner.

1 MR. FOSTER: Can you describe what it is that you
2 recall from the party?

3 MS. CAIN: Can you be more specific?

4 MR. FOSTER: Just tell me everything you remember.

5 MS. MIDDLETON: The conversation.

6 MR. FOSTER: About the conversation.

7 MS. CAIN: Oh, okay. I didn't know if--

8 MS. MIDDLETON: What was the food?

9 [Laughter.]

10 MS. CAIN: It was just your standard good-bye
11 party. I recall a conversation taking place between Hilton
12 Foster and Gary about the case, Pequot. It was just SEC
13 people.

14 MS. MIDDLETON: And what did Hilton say and what
15 did Gary--

16 MS. CAIN: You know, Gary was upset, saying that
17 he, you know, wanted to take testimony of Mr. Mack and was
18 frustrated because it appeared that there was some pushback,
19 that specifically the managers did not want that to occur.
20 And Hilton was really encouraging Gary to keep moving
21 forward, that he said several times that he thought this was
22 the most important case that he had ever seen at the
23 Commission.

24 MS. MIDDLETON: He, Hilton?

25 MS. CAIN: Yes. And that he was going to tell

1 Linda Thomsen, the Director of Enforcement, his opinion on
2 the case, and he encouraged Gary to talk to Linda directly,
3 either through e-mail or personally. And I believe Gary,
4 you know, had said either he was going to e-mail her or had
5 e-mailed her. And Linda actually attended the party, and I
6 also saw Hilton actually say--you know, pull Linda over to
7 Gary and say, Hey, this is the guy I was telling you about,
8 this is an important case--I am paraphrasing, but this is an
9 important case and, you know, this is the most important
10 case I have ever seen, the most egregious insider trading
11 case.

12 Hilton Foster was really specialized in insider
13 trading cases, so from the insider trading standpoint, from
14 where I was standing it looked like he felt very strongly
15 about it.

16 MS. MIDDLETON: Anything else from that party that
17 you can remember as far as conversations about Pequot or--

18 MS. CAIN: No, that is pretty much it.

19 MR. FOSTER: The conversation between Hilton
20 Foster and Gary Aguirre where Gary was complaining that
21 management wouldn't let him take Mr. Mack's testimony, was
22 there anyone else involved in that conversation besides--
23 were you involved in the conversation?

24 MS. CAIN: I wasn't actually--I don't think I was
25 actively saying, Hey, what's up, you know? I think it was

1 really more--I remember it was Hilton, Gary, me, and this
2 conversation just kind of evolved. I don't really remember
3 what preceded it or what followed.

4 MR. FOSTER: Was anyone else there as it evolved?

5 MS. CAIN: I don't have a specific memory of who
6 else was there in that specific conversation. I can say I
7 have a visual in my mind of the three of us.

8 MR. FOSTER: What about the second conversation
9 you described where you saw Hilton Foster introducing Gary
10 Aguirre to Linda Thomsen?

11 MR. FORSTEIN: Just so the record is clear, we are
12 still at the good-bye party.

13 MR. FOSTER: Yes.

14 MS. CAIN: Right, we are at the good-bye party.
15 And I apologize, but I think my memory is a little fuzzy on
16 this. But I feel like the point where Hilton mentioned it
17 to Linda preceded the actual kind of--I don't know. I don't
18 have a--I just don't have a specific memory. I know they
19 both took place at that party. I can't remember which one
20 came first. I just remember watching, you know, Linda--you
21 know, hearing Hilton say to Linda this is important.

22 MR. FOSTER: And do you remember what her reaction
23 was or if she said anything in response?

24 MS. CAIN: She--nothing--no, nothing of note. She
25 acknowledged hearing him.

1 MS. MIDDLETON: When Gary was talking to Hilton
2 about wanting to take testimony, did he say who--did he name
3 the human and opposed to "my management chain" doesn't want
4 me to take Mack's testimony? Do you remember a name?

5 MS. CAIN: I don't remember.

6 MS. MIDDLETON: So is it fair to say the next
7 thing you heard was that Gary had been fired in connection
8 with what was going on on that side of the--

9 MS. CAIN: I would say I think so.

10 MS. MIDDLETON: Okay. So then you and Eric
11 talked. Did you--

12 MS. CAIN: I am guessing that we talked. I mean,
13 again, I don't have a specific memory about us talking about
14 it.

15 MR. FOSTER: Was Eric Ribelin at the going-away
16 party?

17 MS. CAIN: Yes.

18 MR. FOSTER: But he wasn't involved in either of
19 these conversations that you recall?

20 MS. CAIN: Well, I didn't say that. I said that I
21 didn't have a specific recollection of who else besides the
22 three of us were there. I can speculate if you would like
23 me to.

24 MS. MIDDLETON: Do you think Eric was standing
25 there with you when that conversation happened?

1 MS. CAIN: It wouldn't surprise me, but, again, I
2 don't--

3 MS. MIDDLETON: Okay.

4 MS. CAIN: You know, I don't remember.

5 MS. MIDDLETON: So when you are talking to Eric
6 about Gary being fired, what did he say to you, Eric say to
7 you?

8 MR. FORSTEIN: She just said she can't remember if
9 she was talking to Eric about that.

10 MS. CAIN: I said--

11 MS. MIDDLETON: Okay. As best you can recall--and
12 I know it was a year ago, but what do you recall Eric saying
13 to you about it, if anything?

14 MS. CAIN: Well, as I said earlier, I think my
15 impression was that Eric was not happy about it. He was a
16 friend of Gary's. He believed in the case. I just don't
17 want to put words in Eric's mouth. I don't remember.

18 MS. MIDDLETON: Okay. Do you recall any
19 discussion about who would pick up--what attorney would pick
20 up the investigation with Gary gone?

21 MS. CAIN: That sounds familiar but I don't--I
22 don't know who--I don't even know who is working the case
23 now, so, no, I don't have a memory of that. I remember
24 thinking at the time, Is the case going to be killed? You
25 know, is it going to continue at all with Gary gone?

1 different.

2 MS. CAIN: Okay.

3 MS. MIDDLETON: I think you said that you weren't
4 sure whether it was Debevoise or not, but my question is
5 actually the fact that it was Debevoise as opposed to some
6 other firm. Did that have any significance to Eric or to
7 you, as far as you know?

8 MS. CAIN: Well, I don't know if it did to Eric.
9 It didn't to me. It didn't to me at all.

10 MR. FOSTER: So--I am sorry. I am a little
11 unclear as to what it is that you recall at the time of you
12 sending this e-mail.

13 MS. CAIN: Well, as I said before, I don't--

14 MR. FOSTER: With regard--excuse the interruption,
15 sorry. With regard to whether you knew which firm it was
16 that he might be going to, what is your memory?

17 MS. CAIN: It is not very good. That is the
18 problem.

19 My impression, sitting here today, thinking about
20 fall of '05, is that Berger was going to Debevoise. I don't
21 have a basis for that. I can't go back any further than
22 that. I can't tell you where I think I got that, why I got
23 that. I just--that is what I feel today. That is what my
24 memory is today. Whether, in fact, that was exactly what I
25 was thinking in 2005, in October, I can't answer that.

1 [Exhibit O marked for
2 identification.]

3 MR. PODSIADLY: I think that is the one you were
4 just referencing.

5 MS. CAIN: Yeah.

6 MR. PODSIADLY: And LR?

7 MS. CAIN: Larry Renbaum, R-e-n-b-a-u-m.

8 MR. FOSTER: So when you say "my usual," you are
9 saying that is my usual source for information?

10 MR. FORSTEIN: And for the record, I think we are
11 now referring to what has been marked as Exhibit O.

12 MR. FOSTER: Correct.

13 MS. CAIN: Yes. Eric asks sources, and I say my
14 usual, LR."

15 MS. MIDDLETON: So between October and May, Paul
16 Berger was sort of--everybody or some people were aware he
17 would be leaving, but he didn't leave?

18 MS. CAIN: Yeah, if I could just give a
19 chronological explanation of what my memory is today. My
20 memory is that--and, again, I don't know where I got this.
21 Just that in early 2005, Mr. Berger was going to leave, that
22 his leaving was going to be imminent, was going to happen,
23 he was going to leave the Commission. That is really all I
24 know. At some point in time, I came to understand he was
25 going to a firm, Debevoise. Then subsequent to that, I

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EXHIBIT NUMBER 65

Hardy, Melinda

From: Renbaum, Lawrence
Sent: Thursday, February 16, 2006 9:47 AM
To: Peterson, Timothy P.
Subject: RE: Timothy Peterson's Signature Board

The word I hear is that Berger's been talking to them for months, but does not have an offer in hand, because it requires a vote of the full partnership (unanimous perhaps?) to bring in lateral partners. So he's been spotted making trips to NY to lobby individual partners like he's a SCOTUS nominee going to the Hill to meet senators.

Glad to hear they are beating the math quiz. Do they have a different scale for DC and NY? Do you expect to be billing 2500 hrs as part of the deal? What do they offer for branch chiefs? Ha, ha, just kidding. Sort of. No really, I'm kidding. Mostly.

Lets remember to go out for liquid lunch before you go - I'm taking 6 days in Florida at my parents' place the first week of March and might miss whatever farewell (or pity) party may arise.

From: Peterson, Timothy P.
Sent: Thursday, February 16, 2006 9:31 AM
To: Renbaum, Lawrence
Subject: RE: Timothy Peterson's Signature Board

To use your mathematical requirements, it's more than working for me. Although they're only bringing me in as an 8th year, not of counsel. On the other hand, they don't have non-equity partnerships, so of counsel is closer to non-equity junior than it is at most firms. They told me that for laterals, they want 2 years as an associate before making of counsel. But whatever. The pay is right, and there aren't any associates or of counsel above me anyhow, so I'll be the most senior non-partner in securities enforcement.

They do have an of counsel (who's up for partner this spring), but he's in securities litigation. The thought is that he'll handle the civil litigation, I'll handle the governmental investigations. So, no - and this was a big question throughout my interviewing - they're not going to throw me on civil litigation matters. They've got enough SEC/CFTCAUS Attorney stuff for me to do.

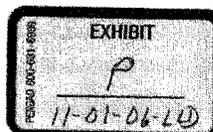
I think you told me about PB. They told me they were trying for someone, but wouldn't say who. They said they did try for Larry b/f he went to Latham.

From: Renbaum, Lawrence
Sent: Thursday, February 16, 2006 9:27 AM
To: Peterson, Timothy P.
Subject: RE: Timothy Peterson's Signature Board

Well, with Ferrara gone to LeBeouf, Debevoise is probably not a bad choice. Of course he'll be replaced by Paul Berger any time now, so you'll still be managed by a complete idiot, only not so much a raving lunatic like Ferrara. Do they have enough securities work to keep you busy or are you going to be thrown into the general complex litigation group? Coming in as "of counsel" or senior associate, or what? Are they paying good money? I've always maintained that a firm would have to double my salary to get me to leave the Commission. Is that working for you?

From: Peterson, Timothy P.
Sent: Thursday, February 16, 2006 9:19 AM
To: Renbaum, Lawrence

1



SEC 00004988

Subject: RE: Timothy Peterson's Signature Board

I thought I vetted this with you? Debevoise. They're not making me managing partner or anything, but it's attractive enough and I like them enough that I'm taking it. One bonus issue: all attorneys above 5th year save one are Democrats.

From: Renbeam, Lawrence
Sent: Wednesday, February 15, 2006 3:53 PM
To: Peterson, Timothy P.
Subject: FW: Timothy Peterson's Signature Board

Dude! How dare you leave without personal notice (and an opportunity to badmouth your prospective employer). Seriously though, what are the details?

From: Covington, Deanna
Sent: Wednesday, February 15, 2006 3:42 PM
To: #ENF - HO
Subject: Timothy Peterson's Signature Board

Please stop by the secretary bay area of room 6253 in SF II to sign Timothy Peterson's Signature Board no later than Friday, February 24, 2006. His last day with the Commission is Tuesday, February 28, 2006. Thanks!

Deanna V. Covington, Paralegal Specialist
U.S. Securities & Exchange Commission
Division of Enforcement
100 F Street, N.E., MS 6030
Station Place II, Room 6278
Washington, D.C. 20549
Office: [REDACTED]
Email: [REDACTED]

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EXHIBIT NUMBER 66

Seeking and Negotiating for Employment**MEMORANDUM**

To: All SEC Employees
From: William Lenox Ethics Counsel, Office of the General Counsel
Subject: Seeking and Negotiating for Employment

Table of Contents**Summary****I. Definitions: "Seeking" and "Negotiating" for Employment**

- A. "Seeking" employment
 - 1. Exception to "seeking" for rulemaking/matters of general applicability
- B. "Negotiating" for employment

II. Restrictions on Seeking and Negotiating

- A. Personal and Substantial Participation
- B. Particular Matter -- Matters Involving Specific Parties and Matters of General Applicability
- C. Direct and Predictable Effect on a Prospective Employer's Financial or Other Interest

III. Three Choices When Seeking or Negotiating Employment Where Prospective Employer Has Financial Interest

- A. Disqualification or Recusal
- B. Terminate attempts to seek or negotiate for employment
- C. Waiver or Authorization to Proceed

IV. Use of Headhunters**V. Reimbursement of Interviewing Expenses****VI. Post Employment Issues****VII. Counseling Available****Sample - Disqualification or Recusal Memorandum**

SEC 00001533

Sample - Termination of Employment Discussions Letter**Summary**

The purpose of this memorandum is to explain the government-wide restrictions on seeking and negotiating other employment.¹ At the outset, the most important rule to remember is that an employee may not seek or negotiate for employment with any entity that has a financial interest in a matter in which the employee is personally and substantially participating.² Additionally, there are situations where a prospective employer's interest in a matter does not rise to the level of a financial interest, but would raise a question in the mind of a reasonable person about the employee's impartiality, if the employee were to participate in the matter while engaging in employment discussions with the prospective employer.³

As discussed more fully below, when such financial or other interests exist an employee has three choices:

- to **disqualify or recuse** from a particular assignment involving a prospective employer so that he or she may seek or negotiate for employment;
- to **terminate** the negotiations; or
- to **obtain a written waiver or authorization to proceed** from his or her Division Director, Office Head, Regional Director, or District Administrator enabling the employee to continue working on a matter notwithstanding a prospective employer's financial or other interest in the matter.

I. Definitions: "Seeking" and "Negotiating" for Employment

Once an employee begins "seeking" employment, the provisions of the Standards are triggered. The most common error is to assume that no restrictions apply to preliminary inquiries and that no consideration need be given to disqualifying oneself until actual negotiations begin. This is not correct. An employee may not even begin to seek employment with any entity that has a financial or other interest in a matter in which the employee is participating.

A. "Seeking" employment begins when an employee:

- makes unsolicited communications to a prospective employer or the agent or intermediary of a prospective employer, regarding possible employment (this includes sending out resumes);⁴ or
- makes a response *other than rejection* to an unsolicited communication from a prospective employer regarding possible employment with that person;⁵
- directly or indirectly engages in negotiations for employment with any person.⁶

1. Exception to "seeking" for rulemaking/matters of general applicability

The Standards include an exception to the definition "seeking" employment where rulemaking and other matters of general applicability are involved. In this regard, an employee working on a rulemaking or other matter of general applicability may submit a resume to, or request a job application from, a potential employer whose interests are affected by the performance or nonperformance of the employee's duties *only* as part of an industry or other discrete class, and that employee will not be viewed as seeking employment *until* he or she receives a response indicating an interest in employment discussions.⁷ For example, an employee who is engaged in

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general rulemaking affecting the entire investment company industry has mailed her resume to several investment companies. The employee has not begun seeking employment with any of the companies until she receives a response from one of the companies indicating interest in employment discussions. However, this exception would not apply if the employee's official duties involved a matter affecting one mutual fund company, such as an investigation or an application for exemptive relief.

B. "Negotiating" for employment occurs when the employee has:

- a discussion or communication with another person, or such person's agent or intermediary,
- mutually conducted with a view toward reaching an agreement regarding possible employment with that person,
- not limited to discussions of specific terms and conditions of employment in a specific position.⁸

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II. Restrictions on Seeking and Negotiating

The Standards prohibit an employee, in either the seeking or negotiating stage, from:

- participating personally and substantially,
- in a particular matter,
- that has direct and predictable effect on a prospective employer's financial or other interest.⁹

A. Personal and Substantial Participation

The term "personal and substantial participation"¹⁰ can be misleading. Under the case law, virtually any participation is substantial.¹¹ Thus, while a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial.¹² For example, if an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter, then he or she may have participated personally and substantially.¹³ Accordingly, it is advisable to first consult with your Ethics Liaison Officer or Deputy, or the Ethics staff in the Office of the General Counsel ("OGC"), if you are uncertain as to whether your participation is personal and substantial.

B. Particular Matter -- Matters Involving Specific Parties and Matters of General Applicability

The prohibition against participating in matters that would have a direct and predictable effect on the financial interests of a prospective employer applies to both particular matters involving specific parties,¹⁴ and matters of general applicability, such as legislation or rulemaking matters that are narrowly focused on the interests of a discrete and identifiable class of persons.¹⁵ However, the term "particular matter" would not extend to the consideration or adoption of broad policy options that are directed to interests of a large diverse group.¹⁶ For example, an amendment to the Internal Revenue Service's regulations that would change the manner in which depreciation is calculated is not a particular matter. However, consideration by the Interstate Commerce Commission of regulations establishing safety standards for trucks on interstate highways involves a particular matter.¹⁷

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The scope of coverage for those involved in rulemaking is potentially problematic, thus coverage is determined on a case-by-case basis through consultation with an agency ethics official. In some instances, after careful analysis, it may be determined that although a rulemaking is a particular matter, the prospective employer does not have a financial interest in the matter, as the term "financial interest" is used in 18 U.S.C. 208. In other instances, the interest may be so minimal that a waiver would be appropriate. In addition, as discussed above, there is an exception to the definition of "seeking employment" for employees assigned to rulemaking and other matters of general applicability. Employees involved in rulemaking and other matters of general applicability who send out resumes to persons in the covered industry or group are not considered to be "seeking employment" until they receive a response indicating an interest in employment discussions.¹⁸

C. Direct and Predictable Effect on a Prospective Employer's Financial or Other Interest

For a direct and predictable effect to occur, there must be a causal link between the outcome of the Commission's decision or action in the matter and an expected effect on the financial interest of the prospective employer. For example, any time a law firm is receiving fees for representation in an investigation, it has a financial interest, and a Commission employee's actions during the course of such investigation may impact the fees generated by the firm's representation. There is no direct and predictable effect if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or independent of or unrelated to the matter. There is also no direct and predictable effect if the matter impacts the prospective employer's financial interest only as a consequence of its effect on the general economy.¹⁹

In some instances, the prospective employer may not have a financial interest in the matter, but may have another type of interest that raises a question as to the appearance of a loss of impartiality by the employee if he or she continues to participate in the matter while seeking or negotiating for employment. For example, an employee who seeks employment with the FDIC while representing the Commission in a particular matter in which the FDIC is taking a position adverse to the Commission may be asked to disqualify because of the appearance of a loss of impartiality.²⁰ Unless the employee is authorized to participate in the matter, he or she may not participate in a particular matter involving specific parties, if the employee's participation is likely to raise a question in the mind of a reasonable person about his or her impartiality.²¹

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III. Three Choices When Seeking or Negotiating Employment Where Prospective Employer Has Financial Interest

A. Disqualification or Recusal

First, employees may disqualify themselves or ask to be disqualified from further participation in the matter. Employees are often reluctant to do this because they do not want their supervisor to know they are looking for another position. It has been our experience that supervisors are far more understanding than employees may expect. Further, as a matter of policy, the Commission recognizes that in order to recruit and retain qualified staff, the private sector job market must remain accessible to its employees.²²

To accomplish a disqualification or recusal, the employee must not participate in the matter.²³ In addition, the employee should notify the person responsible for his or her

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assignment.²⁴ Generally, there is no requirement to memorialize in writing a decision to recuse or disqualify from matters in which a prospective employer has an interest, unless specifically requested by an agency ethics official.²⁵ It is usually advisable, however, to orally advise a select number of individuals of the decision to disqualify; and in some instances, a written memorandum may be the preferred approach. A copy of any written disqualification should be filed in the employee's conduct file maintained in the Office of Administration and Personnel Management. A sample memorandum is attached.

Note that if it is determined that an employee's disqualification from a matter while seeking employment materially impairs the employee's ability to perform critical duties of the job, the employee's supervisor may direct the employee to take annual leave or leave without pay while seeking employment.²⁶

As soon as an employee accepts other employment, he or she will be disqualified from participating in any particular matters affecting the financial interests of his or her future employer unless authorized to participate by a written waiver. Even when an employee has rejected an offer or none was made, a Division Director, Office Head, Regional Director, or District Administrator may determine, after consulting with the Ethics staff in OGC, that an additional period of disqualification is appropriate to ensure that a reasonable person would not question the integrity of the agency's decision-making process.²⁷

B. Terminate attempts to seek or negotiate for employment

The second choice is to terminate all attempts to seek or negotiate for employment with a prospective employer who has a financial or other interest in a matter the employee is working on. Attempts to seek or negotiate employment are terminated when the employee or the prospective employer *rejects* the possibility of employment and all discussions have terminated; or if *two months* have transpired since the employee sent an unsolicited resume, provided the employee has received no indication of interest from the prospective employer.²⁸

Employees often decide that they would prefer to terminate employment discussions rather than be disqualified from an assignment that enhances their professional development. An employee may terminate discussions by thanking the prospective employer (or his or her intermediary) for their interest, advising that he or she is not looking for a position at this time, but that he or she will remember the prospective employer's interest if he or she ever decides to leave the Commission.²⁹

The employee who chooses to terminate employment discussions does not need to inform a supervisor. Note, however, we suggest such a termination be done in writing and a copy put in your conduct file. A sample letter terminating employment discussions is attached.

A response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or prospective employment possibility.³⁰ Discussions must be terminated not just suspended. For example, it is not sufficient to defer discussions with a prospective employer until a certain matter is concluded, or until some other point in the foreseeable future, while the employee continues to work on a matter involving the prospective employer.

C. Waiver or Authorization to Proceed

The third choice is to seek a waiver or an authorization to proceed to permit the employee to participate in a matter while proceeding with employment discussions. A waiver is used if

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discussions are at the negotiations stage. An "authorization to proceed" is used if discussions are at the "seeking" stage, or if the prospective employer's interest does not rise to the level of a financial interest for purposes of 18 U.S.C. 208, but raises questions as to the employee's impartiality in the matter.³¹

If discussions have reached the negotiations stage, a written waiver must be obtained pursuant to 18 U.S.C. 208(b)(1). Waivers must be issued in advance.³² At the Commission, circumstances rarely warrant the granting of such waivers. Prior consultation with the Office of Government Ethics ("OGE") is required with respect to all 208 waivers, and a copy of all 208 waivers must be sent to OGE.³³ **Accordingly, consult with the Ethics staff in OGC and/or your Ethics Liaison Officer or Deputy with respect to all waivers.**

In granting a waiver, the agency designee must determine that the financial or other interest of the prospective employer "is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from the employee." In making such a determination, the agency designee may consider whether the government interest in the employee's participation outweighs any question concerning the employee's impartiality, based on the following factors:

- the nature of the relationship between the employee and the prospective employer;
- effect of resolution of the matter on the interest of the prospective employer;
- nature and importance of the employee's role in the matter;
- sensitivity of the matter;
- difficulty of reassigning the matter;
- possible adjustments in the employee's duties.³⁴

If the employee is in the seeking stage, or if the prospective employer's interest in the matter does not rise to the level of a financial interest, but raises questions as to the employee's impartiality in the matter, the agency designee may authorize the employee to participate in the matter, based upon a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. The factors listed above may be taken into consideration by the agency designee in determining whether to grant the employee an authorization to proceed. Prior consultation with OGE is not required with respect to authorizations to proceed. Note, however, that the employee must otherwise follow the same procedures for authorizations to proceed as with 208 waivers.

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IV. Use of Headhunters

Where employment contacts or inquiries are made on behalf of an employee by a headhunter, or by any other intermediary of the employee, such as a friend or associate, the employee would be viewed as seeking employment when the identity of the prospective employer is made known to the employee. In addition, if an employee is contacted by a headhunter about a particular position and the identity of the prospective employer is made known to the employee, the employee is in a seeking status as to that prospective employer.³⁵ Thus, an employee could ask a headhunter or other intermediary to make inquiries on his or her behalf (including informing the prospective employer of the identity of the Commission employee), and disqualification would not be required until the identity of the prospective employer became known to the Commission employee.

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If a friend or associate acts as an intermediary between the employee and the prospective employer, care should be taken if the friend or intermediary has interests pending before the Commission that could be substantially affected by the Commission employee in the performance of his or her official duties. In such instances, to avoid the appearance of loss of impartiality in the performance of one's official duties, the Commission employee should not participate in matters in which the friend or associate has an interest.³⁶ However, absent unusual circumstances,³⁷ there would be no appearance of impropriety if a Commission employee asked or permitted an employee of another government agency to make inquiries on his or her behalf.

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V. Reimbursement of Interviewing Expenses

An employee may accept reimbursement for travel expenses and other reasonable amenities that are customarily provided by a prospective employer in connection with bona fide employment discussions, even if the prospective employer would otherwise be considered a prohibited source for purposes of the Standards governing gifts from outside sources.³⁸ Of course, employees must disqualify themselves from matters involving the prospective employer before accepting reimbursements. A touchstone to determine the bona fides of an employment discussion, and thus propriety of acceptance of reimbursement, is to ask whether assuming that all requirements for salary and other conditions of employment are met, the employee would be likely to accept an offer of employment. If the employee can honestly answer yes, then the employment discussions are considered bona fide.³⁹

Note, however, that employees who are required to file public financial disclosure forms (SF 278) or confidential financial disclosure forms (SF 450) will be required to disclose receipt of such items if the threshold reporting amounts are reached. Currently, acceptance of transportation, food, entertainment, or gifts must be disclosed if the amount accepted totals \$250 or more from any one source. Items with a retail value of \$100 or less may be excluded in aggregating the total amount.

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VI. Post Employment Issues

On occasion, employees find that employment discussions cannot be pursued until potential post employment questions are resolved. For example, a firm may not be willing to hire a Commission employee if that employee would be disqualified from participating in matters which the firm wants to assign to that individual.⁴⁰ In other instances, a law firm may request assurances that the firm would be able to obtain waivers of imputed disqualification with respect to certain matters if the firm hired a Commission employee who participated in those matters at the Commission.⁴¹ The Ethics staff in OGC will provide oral and/or written opinions on such issues.

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VII. Counseling Available

Employees are sometimes reluctant to seek counseling in connection with an employment search. This reluctance can have serious consequences. Possible violations of the statutory and regulatory provisions relating to seeking and negotiating for employment must be

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referred to the Inspector General and/or the Department of Justice for investigation and possible prosecution.⁴² Counseling is available not only to ensure that all requirements are complied with, but also to give employees the added protection of being able to say that they relied in good faith upon the advice of the agency ethics official.⁴³ Employees may seek counseling from the Ethics staff in OGC, or the Ethics Liaison Officer or Deputy for their Division or Office concerning employment searches. All inquiries are kept confidential.⁴⁴ If unique or novel issues arise, and consultation outside the Ethics staff in OGC appears to be required, the employee is so advised and given the option of terminating employment discussions, rather than informing others.

* * *

If you have any questions concerning any of the issues discussed above, please call the Ethics Liaison Officer or Deputy for your Division or Office, or the Ethics staff in OGC, at (202) 551-5170.

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Sample - Disqualification or Recusal Memorandum

MEMORANDUM

February 6, 1994

TO: Branch Chief (Supervisor)
FROM: Andrea Attorney
RE: Disqualification in the *Matter of Beta Inc.*

This is to confirm my conversation with you yesterday in which I advised you that I am disqualified from participating in the *Matter of Beta Inc.* As I indicated to you yesterday, I have entered into employment discussions with ABC Law Firm. I cannot be assigned to the *Matter of Beta Inc.*, since Beta Inc. is represented by ABC Law Firm, and the outcome of this matter will have a direct and predictable effect on the financial interests of ABC Law Firm. Accordingly, I have disqualified myself from working on the *Matter of Beta Inc.* in accordance with the Standards of Conduct for Employees of the Executive Branch, Subpart F, 5 C.F.R. 2635.604. Please advise me if this disqualification presents a problem.

cc: Ethics Liaison Officer
 OAPM - Conduct File

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Sample - Termination of Employment Discussions Letter

721 Applecourt Rd.
 Takoma Park, MD

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Alpha & Beta Law Firm
1000 Pennsylvania Ave, N.W.
Washington, D.C.

Dear Mr. Alpha:

I enjoyed meeting with you and your associates last week regarding my possible employment. However, as I indicated to you in our telephone conversation yesterday, I am very happy with my position at the Commission and am not interested in leaving. If I ever decide to leave the Commission, I will remember your interest.

Sincerely,
Donald Doe

bcc: OAPM - Conduct File

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1 See Standards of Ethical Conduct for Employees of the Executive Branch ("Standards"), 5 C.F.R. Part 2635, Subpart F, 57 Fed. Reg. 35006 (August 7, 1992). The government-wide Standards issued by the Office of Government Ethics ("OGE") became effective February 3, 1993, and superseded comparable provisions of Rule 7 of the Commission's Conduct Regulation, except with respect to the existing delegations of authority.

The rules governing seeking employment are substantially the same as the rules governing negotiating for employment. However, restrictions on negotiations for employment are based upon 18 U.S.C. 208, a criminal statute, and therefore, violations potentially have more serious ramifications.

2 *Id.*

3 Standards, Subpart E, "Impartiality in Performing Official Duties," 5 C.F.R. 2635.501-502.

4 Standards, 5 C.F.R. 2635.603(b)(ii). However, an employee is not seeking employment by using a headhunter or other intermediary until the identity of the prospective employer is revealed to the employee. See *infra* Section IV. Use of Headhunters.

5 Standards, 5 C.F.R. 2635.603(b)(iii).

6 Standards, 5 C.F.R. 2635.603(b)(i).

7 Standards, 5 C.F.R. 2635.603(b)(1)(ii)(B).

8 Standards, 5 C.F.R. 2635.603(b)(i).

9 Standards, 5 C.F.R. 2635.601 and 2635.501. See also 18 U.S.C. 208.

10 "Personal and substantial" is defined in the Standards, at 5 C.F.R. 2635.402(b)(4), as follows:

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To participate personally means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate substantially means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort.

11 See *Wagner v. Lehman Brothers Kuhn Loeb, Inc.*, 646 F. Supp. 643 (N.D. Ill. 1986) (After leaving the Commission, a former assistant regional administrator ("ARA") was disqualified from representing a client in a private matter because he had participated personally and substantially in the matter while at the Commission. The former ARA had spent less than five minutes on the matter at the Commission and the entire office spent less than 24 hours on the case. However, the former ARA had participated in two critical decisions pertaining to the matter. In one decision, the ARA concurred with the staff's recommendation to continue to monitor the matter; and in another decision, the ARA concurred with the staff recommendation to close the case.)

12 Standards, 5 C.F.R. 2635.402(b)(4).

13 *Id.*

14 "Particular matter" covers matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Standards, 5 C.F.R. 2635.402(b)(3).

15 Standards, 5 C.F.R. 2635.402(b)(3).

16 *Id.*

17 *Id.*, Examples 1 and 2.

18 See *infra* Section I.A.1. Exception for Rulemaking/Matters of General Applicability.

19 It is not necessary to know the amount of the gain or loss, as the amount of money involved is immaterial. See Standards, 5 C.F.R. 2635.402(b)(1).

20 The disqualification requirement for financial interest does not apply when seeking employment with other government agencies because such agencies are excluded from the definition of person. See 57 Fed. Reg. at 35043, 5 C.F.R. 2635.102(k).

21 Standards, 5 C.F.R. 2635.501(a).

22 For example, the Division of Corporation Finance has a policy permitting such requests for disqualification so that employees do not find it so difficult to look for a job.

23 Standards, 5 C.F.R. 2635.604(a).

24 Standards, 5 C.F.R. 2635.604(b).

25 Standards, 5 C.F.R. 2635.604(c).

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- 26 Standards, 5 C.F.R. 2635.604(d).
- 27 Standards, 5 C.F.R. 2635.606(b). We suggest that the time frame for such a cooling-off period be determined in light of the seriousness of the negotiations and the significance of the matter.
- 28 Standards, 5 C.F.R. 2635.603(b)(2).
- 29 Standards, 5 C.F.R. 2635.603(b)(3) Example 1.
- 30 Standards, 2635.603(b)(3).
- 31 Standards, 5 C.F.R. 2635.502(d).
- 32 See Standards, 5 C.F.R. 2635.605(a) and (b); 18 U.S.C. 208. The Chairman may grant such waivers to Members of the Commission, and to Division Directors, Office Heads, Regional Directors, and District Administrators. Waivers for all other employees may be granted by the employee's Division Director, Office Head, Regional Director, or District Administrator. See Commission's Conduct Regulation, Rule 7.
- 33 See Standards, 5 C.F.R. 2635.402(d)(4). 18 U.S.C. 208 requires that waivers involving negotiations for employment be made available to the public upon request. The Commission may withhold information in such waivers that is protected under the FOIA and the Privacy Act.
- 34 Standards, 5 C.F.R. 2635.502(d). An employee's reputation for honesty and integrity is not a relevant consideration for purposes of this determination, and is not a sufficient basis for granting a waiver or authorization to proceed. See 5 C.F.R. 2635.502(f).
- 35 See Standards, 5 C.F.R. 2635.603(c).
- 36 See Standards, Subpart E, "Impartiality in Performing Official Duties," 5 C.F.R. 2635.501.
- 37 Prior consultation with an agency ethics official is recommended if the two government employees are participating in matters in which the two agencies are taking adverse positions.
- 38 See Standards, 5 C.F.R. 2635.602(b) and 2635.204(e)(3).
- 39 See Commission's Conduct Regulation, Commentary to Rule 7, p. 7-3.
- 40 See All Employee Memorandum on Post-Employment Restrictions, from Lyn Blatch, Ethics Counsel, and Virginia Canter, Assistant Ethics Counsel, dated July 9, 1992.
- 41 See Commission's Conduct Regulation, Rule 8-4, 17 C.F.R. 200.735-8(d) ("Waiver of Imputed Disqualification").
- 42 See Standards, 5 C.F.R. 2635.107(b). Section 208 of Title 18 provides for criminal penalties and substantial civil fines for violations that follow employees even after they leave the Commission.

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43 The Standards provide that no disciplinary action will be taken against an employee who had made full disclosure of all relevant circumstances and relies in good faith upon the advice of agency ethics officials, and that the Department of Justice will take such reliance into account in selecting cases for prosecution. See Standards, 5 C.F.R. 2635.107.

44 Inquiries are kept confidential, except that if the employee reveals information indicating a past violation, the agency ethics official is required to investigate or refer the matter for appropriate action.

/divisions_offices/hqo/ethics/ethics_bulletins/seek_neg_employment_pf.html

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http://intranet.sec.gov/divisions_offices/hqo/ethics/ethics_bulletins/seek_neg_employment... 5/14/2007

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EXHIBIT NUMBER 67

UNITED STATES SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

----- x
: In the Matter of: :
: :
: TRADING IN CERTAIN SECURITIES, :
: No. HO-9818, and the SEC's :
: TERMINATION OF EMPLOYMENT OF :
: GARY AGUIRRE :
: :
: ----- x

November 21, 2006

Whereupon,

KELLY ANDREWS

was called for examination by counsel for the Senate
Judiciary Committee and the Senate Finance Committee,
pursuant to notice, commencing at 10:36 a.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, Esq.
Investigative Counsel
U.S. Senate Committee on Finance

MS. STEPHANIE MIDDLETON
U.S. Senate Committee on the Judiciary

WILLIAM L. BRANSFORD, Esq.
Shaw, Bransford, Veilleux & Roth, PC
Counsel for Ms. Andrews

KELLY J. ANDREWS
Associate Counsel
Office of the Inspector General
U.S. Securities and Exchange Commission

1 MS. ANDREWS: Uh-huh.

2 MR. FOSTER: It has "Criminal", "Civil" and
3 "Administrative", and you checked "Administrative".

4 MS. ANDREWS: Right.

5 MR. FOSTER: Can you explain the difference
6 between civil and administrative, and explain why you
7 chose to mark "Administrative"?

8 MS. ANDREWS: I'm not sure I could really
9 describe the difference between civil and administrative.
10 To me, it's whether it has more administrative scope or
11 whether it might be some kind of civil violation. At
12 that point, I picked administrative.

13 MR. FOSTER: Okay.

14 And what about the priority below that where you
15 have "High", "Medium" and "Low".

16 MS. ANDREWS: Yes.

17 MR. FOSTER: Did you make the decision to mark
18 it as "Medium" priority?

19 MS. ANDREWS: I initially marked it "Medium".
20 Mary Beth would have reviewed this.

21 MR. FOSTER: Okay.

22 And so she agreed with your determination --

23 MS. ANDREWS: Apparently. I don't remember
24 having changes, and I don't have copies of drafts or
25 changes. This is all I have.

1 MR. FOSTER: If you look at the second page of
2 the exhibit, "Planned Investigative Steps In Order Of
3 Priority".

4 MS. ANDREWS: Uh-huh.

5 MR. FOSTER: The first one is "Interview
6 subject".

7 MS. ANDREWS: Uh-huh.

8 MR. FOSTER: Can you explain who you meant by
9 "subject"?

10 MS. ANDREWS: Subjects. They're on the first
11 page: Robert Hanson, Mark Krietman, Linda Thomsen, Paul
12 Berger.

13 MR. FOSTER: So those are the people against
14 whom Mr. Aguirre had made those allegations?

15 MS. ANDREWS: Right. Exactly.

16 MR. FOSTER: And why was that your number-one
17 priority to interview those people?

18 MS. ANDREWS: Well, to see what their story was.
19 To see what -- what their response was and to get -- you
20 know, to learn about it, get an overview before I start -
21 - I mean, I was going to get documents from the subjects,
22 too, so the documents would have come second.

23 MR. FOSTER: Uh-huh.

24 MS. ANDREWS: But usually where there are
25 subjects, we try to interview them first, if it's not

1 criminal. So that's normally what we do.

2 MR. FOSTER: Okay.

3 So since you've been there since the summer of
4 '06 --

5 MS. ANDREWS: '05. This is '06.

6 MR. FOSTER: I mean -- I'm sorry. The summer of
7 '05. That's been your experience, that it's typically
8 how the office works, is the first step in any
9 investigation is to talk to the people against whom the
10 allegations have been made?

11 MS. ANDREWS: It depends. It's not typical. It
12 depends on the allegations and -- it depends on whether
13 there's a criminal element. It just depends on the
14 allegations.

15 MR. FOSTER: Okay.

16 So what is it about these allegations that made
17 you want to talk to the subjects first?

18 MS. ANDREWS: I think to see just what their
19 response was and to ask them for documents. Who else was
20 I going to get documents from?

21 MR. FOSTER: The four people that are named as
22 subjects on the first page --

23 MS. ANDREWS: Right.

24 MR. FOSTER: -- Hanson, Krietman, Thomsen,
25 Berger. Had you dealt with them while you were in the

1 General Counsel's Office?

2 MS. ANDREWS: Mark Krietman a little bit and
3 Linda Thomsen just a little bit, but not Paul Berger or
4 Bob Hanson.

5 MR. FOSTER: Did you have any other interactions
6 with them, non-work related interactions?

7 MS. ANDREWS: No.

8 MR. FOSTER: No.

9 The second step, "Review relevant case
10 documents". What did you do to obtain -- how did you
11 obtain documents to review?

12 MS. ANDREWS: I asked most of the subjects for
13 relevant documents that they had retained and I got Mr.
14 Aguirre's official personnel file. I got his conduct
15 file. I talked to the Human Resources specialist and got
16 documents from her. It's all in the file.

17 MR. FOSTER: And did you give anyone a written
18 request for documents or did you merely ask them orally
19 for documents?

20 MS. ANDREWS: No. Orally.

21 MR. FOSTER: And did you ask them -- how did you
22 define your request?

23 MS. ANDREWS: Well, except I think the conduct
24 and official personnel file. I would have done that in
25 writing. But I couldn't find the e-mail.

1 MR. FOSTER: Okay.

2 MS. ANDREWS: Because that's typically how I do
3 it.

4 MR. FOSTER: Okay.

5 MS. ANDREWS: They're in another building and
6 they have to put it on a shuttle.

7 MR. FOSTER: All right.

8 So for the request directly to the subjects for
9 their documents --

10 MS. ANDREWS: Uh-huh.

11 MR. FOSTER: -- how did you define your request
12 to them? What exactly did you ask them for?

13 MS. ANDREWS: I would have asked them -- I think
14 I asked them what documents they had. Now, Linda
15 Thomsen, I don't believe I asked for documents, but the
16 others, I believe I asked what documents they had and
17 they sent me those, or forwarded me e-mails.

18 MR. FOSTER: You didn't define it any more
19 narrowly or more specifically than that? You just asked
20 them for, what, all documents that they deemed relevant?

21 MS. ANDREWS: No, that they had related to Mr.
22 Aguirre and this case, the Pequot case.

23 MR. FOSTER: And about how much did you get?

24 MS. ANDREWS: You have it. It's all in my
25 closed investigative file.

1 MR. FOSTER: Okay.
2 There are no documents that we don't have that
3 you have?
4 MS. ANDREWS: No.
5 MR. FOSTER: The third item on your list of
6 order of priority is "possibly interview the complainant
7 for clarification of claims". What does the rest of that
8 say?
9 MS. ANDREWS: "[A]nd/or additional information."
10 MR. FOSTER: Or additional information. Okay.
11 But you didn't interview Mr. Aguirre, right?
12 MS. ANDREWS: Correct.
13 MR. FOSTER: Why didn't you?
14 MS. ANDREWS: Because we thought that his
15 September 2nd and October 11th letters were very clear as
16 to the allegations he was making so we didn't feel we
17 needed clarification as to the allegations, and we had a
18 lot of documents and e-mails.
19 MR. FOSTER: Did you discuss the discussion?
20 Did you make an affirmative decision at some point not to
21 interview him?
22 MS. ANDREWS: I think we did, yes.
23 MR. FOSTER: Okay.
24 And you discussed that with your colleagues in
25 the IG's office?

1 it. If it's not there, she didn't have it.

2 MS. ANDREWS: Well, he's telling me it's not.

3 MR. BRANSFORD: Yes.

4 MS. ANDREWS: So if it --

5 MR. BRANSFORD: I must tell you, this looks very
6 familiar to me.

7 MS. ANDREWS: Okay. And you only saw the
8 closed. So --

9 MR. BRANSFORD: So if it's not there, something
10 very similar to this is there.

11 MS. ANDREWS: Right. I think that's what it
12 might be, something very similar.

13 MS. MIDDLETON: Do you know why the
14 investigation has been reopened?

15 MS. ANDREWS: Our investigation? The Inspector
16 General decided to reopen it.

17 MS. MIDDLETON: I know that. Do you know why?

18 MR. BRANSFORD: She -- I don't think you --

19 MS. ANDREWS: We answered that in your
20 interrogatories, as I call them. I mean, I can't answer
21 more than that.

22 MS. MIDDLETON: And what was -- I mean, I'm
23 asking you what you know as to why.

24 MS. ANDREWS: The Chairman's office wrote to the
25 Inspector General and asked us to reopen it, and also

1 there were new allegations that have come out in the
2 press and that we've learned from you guys that we didn't
3 have at the time before.

4 For example, that the Enforcement case was
5 stopped or halted. That was no something that we had
6 ever heard of. And there were allegations that we didn't
7 do a thorough investigation, so the Inspector General
8 decided to reopen it. I can't answer it more than that.

9 MR. PODSIADLY: Did the Inspector General decide
10 to reopen it before or after it was communicated from the
11 Commissioner's office to reopen it?

12 MS. ANDREWS: The Chairman's office or the
13 Commissioner's office?

14 MR. PODSIADLY: The Chairman's office. Excuse
15 me.

16 MS. ANDREWS: After.

17 MR. PODSIADLY: It was after?

18 MR. FOSTER: Chairman Cox's office.

19 MR. PODSIADLY: Yes.

20 MS. ANDREWS: Right.

21 MS. MIDDLETON: Do you feel that Mr. Aguirre's
22 letters of September and October of '05 which you
23 referred to the IG for investigation, that those letters
24 got an open-minded, independent, and full investigation
25 by the IG's office?

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EXHIBIT NUMBER 68

UNITED STATES SENATE
COMMITTEE ON FINANCE
COMMITTEE ON THE JUDICIARY
Joint Investigation

----- x
:
In the Matter of: :
:
:
TRADING IN CERTAIN SECURITIES,:
No. HO-9818, and the SEC's :
TERMINATION OF EMPLOYMENT OF :
GARY AGUIRRE :
:
:
----- x

November 22, 2006

Whereupon,

MARYBETH SULLIVAN

was called for examination by counsel for the Senate
Judiciary Committee and the Senate Finance Committee,
pursuant to notice, commencing at 10:36 a.m.

APPEARANCES:

NICHOLAS J. PODSIADLY
Investigator
U.S. Senate Committee on Finance

JASON A. FOSTER, Esq.
Investigative Counsel
U.S. Senate Committee on Finance

MS. STEPHANIE MIDDLETON
U.S. Senate Committee on the Judiciary

MARY BETH SULLIVAN, Esq.
Counsel and AIGI
Office of Inspector General
U.S. Securities and Exchange Commission

1 MS. SULLIVAN: Again, I can't speculate as to
2 what I would do if I were doing an investigation of that.

3 MR. FOSTER: Can you go back and look at the
4 exhibit that was the Investigative Plan?

5 MS. SULLIVAN: Number 63?

6 MR. FOSTER: Yes.

7 MS. SULLIVAN: Okay.

8 MR. FOSTER: Turn to the second page. Under the
9 heading, "Planned Investigative Steps In Order of
10 Priority". Do you see that?

11 MS. SULLIVAN: Yes.

12 MR. FOSTER: Do you agree with that order of
13 priority that Kelly Andrews listed there?

14 MS. SULLIVAN: I am not sure what you mean
15 "agree with order of priority".

16 MR. FOSTER: Is that how you would do it?

17 MS. SULLIVAN: I'm not sure exactly how I would
18 have done it, but I do agree with putting "Interview
19 Subjects" first, because there is a provision of the
20 Privacy Act that requires you to elicit information from
21 the subjects first. So I would have, and I may well
22 have, suggested to her putting that first for that very
23 reason.

24 MR. FOSTER: So is that something you do in
25 every investigation? Do you always interview the subject

1 first? In other words, the subject being the person
2 about whom the allegation of misconduct is made.

3 MS. SULLIVAN: We try to in cases that don't
4 clearly contain a criminal violation, because an agency
5 can exempt itself, or an office can exempt itself from
6 that provision of the Privacy Act; in a non-criminal
7 case, we do have such an exemption.

8 But in cases that aren't clearly criminal on
9 their face, we try to go to the subject first. I believe
10 the way the Privacy Act is worded it contains qualifying
11 language that, unless unavoidable, to the greatest extent
12 practicable, there's some kind of qualifying language.
13 So in cases that are primarily administrative, we do try
14 to go to the subject first, unless there's some
15 particular reason not to.

16 MS. MIDDLETON: What is it about the Privacy Act
17 that suggests you should go to the subject first?

18 MS. SULLIVAN: It's a specific provision of the
19 Privacy Act, Section 2(e) I believe.

20 MS. MIDDLETON: Okay.

21 That says what?

22 MS. SULLIVAN: That says you -- it would be
23 helpful if I had the exact language in front of me, but
24 it says something like, "you should elicit information
25 from the subject, to the greatest extent practicable

1 the Smithsonian. I think it's the Smithsonian and
2 Margaret Dong, D-O-N-G.

3 I'm not sure it was an investigation by an IG's
4 office, but it was an internal investigation. The judge
5 found that they had violated the Privacy Act--it was some
6 sort of travel issue--by not going to her, not going to
7 the subject, first.

8 MR. FOSTER: D-O-N-G? You said Dong?

9 MS. SULLIVAN: I believe her name was Margaret
10 Dong. I'm not sure of the first name. It was *Dong v.*
11 *Smithsonian*, is the case.

12 MR. FOSTER: Can we go off the record?

13 (Whereupon, at 12:03 p.m. the interview was
14 recessed and resumed back on the record at 12:04 p.m.)

15 MR. FOSTER: Going back to the first page of the
16 Investigative Plan, Bates number 488, the priority of the
17 case there is listed as "medium". Do you see that?

18 MS. SULLIVAN: Yes.

19 MR. FOSTER: Did you agree with Kelly Andrews
20 that this was a medium priority case?

21 MS. SULLIVAN: At the time, yes, I believe I
22 did.

23 MR. FOSTER: Now you disagree?

24 MS. SULLIVAN: I'm not saying that. I'm just
25 saying, yes, I agree it was a medium priority case.

1 MS. SULLIVAN: Sure. I did a pretty long report
2 of what I found. I don't believe I found anything that
3 appeared to be criminal. We issued the report to
4 management. I believe they proposed a suspension. I
5 forget how many days. I believe he challenged it in an
6 arbitration, and to the best of my recollection it was
7 settled.

8 The settlement was that there would be no
9 suspension, but I think he had already served the
10 suspension. This is just a rough understanding based on
11 my recollection. I think it was that it would not appear
12 in his record as a discipline, but he -- on the other
13 hand, he wouldn't -- he still would have lost that pay
14 for the time he was suspended.

15 MR. FOSTER: So you said you did a lengthy
16 report. How long was it?

17 MS. SULLIVAN: I think it was almost 60 pages.

18 MR. FOSTER: Six zero, 60?

19 MS. SULLIVAN: Yes, I think so. That's just a
20 guess. But --

21 MR. FOSTER: Okay.

22 So you took transcribed interviews in that
23 investigation.

24 MS. SULLIVAN: Some were transcribed and some
25 were not.

1 MR. FOSTER: Do you know about how many?
2 MS. SULLIVAN: How many were on the record?
3 MR. FOSTER: Uh-huh. About. Approximately.
4 MS. SULLIVAN: Approximately six. But that's
5 just approximate.
6 MR. FOSTER: And what was it that [REDACTED] was
7 alleged to have said or done, exactly?
8 MS. SULLIVAN: As far as the threatening
9 comments, I can't remember exactly what they were. I
10 think there was more than one instance. This is -- you
11 know, I'm just trying to do the best I can based on my
12 recollection, but there was some reference -- maybe some
13 reference to guns and Vietnam, and something that scared
14 people.
15 Then there was a comment to an IT specialist
16 about a manager. I think he called her a "princess" and
17 there was some question whether he called her a "JAP" or
18 just a "princess", and there were some other
19 inappropriate comments. Then with the two women
20 attorneys, there was a whole litany of alleged comments
21 that were offensive in a variety of possible ways.
22 MR. FOSTER: And how did these allegations come
23 to your attention?
24 MS. SULLIVAN: To my attention personally or to
25 the office's attention?

1 the IG's investigation was retaliatory in some way for
2 his union activities?

3 MS. SULLIVAN: Yes, I believe he did.

4 MR. FOSTER: Were they?

5 MS. SULLIVAN: Absolutely not.

6 MR. FOSTER: Was your first step in that
7 investigation to interview [REDACTED], the subject?

8 MS. SULLIVAN: I don't believe so. I believe I
9 interviewed the other individuals, including the two
10 attorneys, first. I believe there were several reasons
11 and extenuating circumstances for that, one being that
12 these two women were extremely frightened of [REDACTED] at
13 the time.

14 MR. FOSTER: So was there reason that the
15 Privacy Act provision that you cited to us earlier
16 wouldn't prevent you from going to [REDACTED] first?

17 MS. SULLIVAN: Yes. It says "to the greatest
18 extent practicable", and given the situation, their fear
19 of him, we didn't think it was practical or wise to go to
20 him first; to the best of my recollection.

21 And I don't know. I don't remember if we
22 specifically discussed that or not, but I think that
23 would have been the reason. I mean, I don't know if we
24 specifically discussed the Privacy Act. I don't
25 remember. But --

1 MR. FOSTER: Has the OIG investigated
2 allegations related to Commissioner Cynthia Glassman and
3 the Geek Securities case?

4 MS. SULLIVAN: Yes, I did an investigation of
5 Commissioner Glassman.

6 MR. FOSTER: Can you describe that for us?

7 MS. SULLIVAN: Yes. It's -- I don't recall a
8 lot of specific detail, but I believe the allegation was
9 that Commissioner Glassman had a relative at a brokerage
10 firm who -- someone who claimed to be her relative and
11 also claimed -- claimed to be her relative and claimed
12 that she had maybe given some heads up about an
13 examination. But without looking at my file, I'm not
14 sure of the specifics.

15 MR. FOSTER: By "examination", do you mean an
16 audit that was being performed by the SEC? An audit of
17 the firm at which the purported relative worked?

18 MS. SULLIVAN: No. They do exam -- they call
19 them examinations.

20 MR. FOSTER: Can you describe what that is?

21 MS. SULLIVAN: It's my understanding that either
22 the Office of Inspections and Examinations, OCIE --
23 Compliance, Inspections and Examinations or a regional
24 office will conduct an examination of firms. It can be a
25 routine exam or a cause exam where they go in and look at

1 MR. FOSTER: Did you come to a belief as to
2 whether he was actually a cousin of the Commissioner?
3 MS. SULLIVAN: I believe she told me she didn't
4 know him, or have any -- to her knowledge, had no -- he
5 was not a relative.
6 MR. FOSTER: Okay.
7 So you interviewed Commissioner Glassman?
8 MS. SULLIVAN: Yes, I did.
9 MR. FOSTER: Was that the first step that you
10 took in the investigation?
11 MS. SULLIVAN: I don't remember.
12 MR. FOSTER: What other steps did you take in
13 the investigation that you can recall?
14 MS. SULLIVAN: It's pretty hard for me to recall
15 without seeing my closing memo. I think I looked the
16 name "Lipkowitz" up on Autotrack XP, a database to try to
17 see if there was some -- I could establish some relative
18 connection. I probably looked at some of the exam
19 reports. I don't remember who else I talked to. I'd
20 have to look at the memo.
21 MR. FOSTER: Do you remember what your findings
22 and conclusions were?
23 MS. SULLIVAN: I concluded that there appeared
24 to be insufficient evidence to support the allegation.
25 MS. MIDDLETON: The allegation was made by Mr.

1 MR. FOSTER: Do you know about how many?

2 MS. SULLIVAN: I may have done -- it's possible
3 I did a declaration, but I don't -- I'm not sure.

4 MR. FOSTER: Do you know about how long the
5 investigation was open?

6 MS. SULLIVAN: I think I did it pretty quickly,
7 but I'm not sure.

8 MS. MIDDLETON: And what you remember -- I mean,
9 basically did you just go to Cynthia Glassman and say,
10 "Do you know Al Lipkowitz," or did you ask her whether
11 she tipped him, or what was the nature of your interview
12 of her, Cynthia?

13 MS. SULLIVAN: I don't remember the specific
14 questions or the order, but I certainly would have asked
15 her, you know, do you have a relative by this name and
16 did you tip him or share any nonpublic information with
17 him.

18 I also may have looked at some documents in an
19 effort to determine whether Commissioner Glassman would
20 have even known that. I think it was -- even in the
21 Miami office he was going in and doing the examination.
22 I can't remember. I may have looked at some documents to
23 see whether she would even have had that information as a
24 Commissioner.

25 MS. MIDDLETON: Did you talk to the Miami office

1 about why they thought there had been a tip?

2 MS. SULLIVAN: About what?

3 MS. MIDDLETON: Did the Miami office think
4 somebody had tipped off the entity that was being subject
5 to the investigation or the audit?

6 MS. SULLIVAN: I don't recall. I don't recall
7 for sure their saying what they thought. I did -- I
8 believe I did have discussions with some people in the
9 Miami office, but I don't -- right now I don't remember
10 what they told me. I'm not even 100 percent sure who I
11 talked to. I think I may have talked to Dave Nelson,
12 who's the head of the office. I don't remember who else
13 I talked to or exactly what they told me at this point.

14 MR. FOSTER: Did you know Commissioner Glassman
15 in any other than the professional sense? Did you know
16 her outside of work, or --

17 MS. SULLIVAN: No. I don't think I had even met
18 her until I interviewed her. I had probably seen her in
19 the building.

20 MS. MIDDLETON: Did you interview her in person
21 or on the phone?

22 MS. SULLIVAN: In person. And I believe she
23 asked if one of her counsels could sit in, and I think
24 they did. But I don't even remember who that was. I
25 forget.

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EXHIBIT NUMBER 69

October 24, 2005

On October 21, 2005, Hanson called me back to clarify a couple of matters related to our discussion. First, Hanson recalled that Thomsen's involvement was a discussion with Berger, Kreitman and himself regarding terminating Aguirre and that Thomsen's communications with Mary Jo White was around the time that Morgan Stanley was hiring Mack and that Enforcement did not give them any information. Hanson also recalled that Kreitman said that he would love to take Mack's testimony, meaning that he would not steer away from taking his testimony. Hanson said that most of the testimony Enforcement takes involves high-ranking officials. Hanson also reiterated that everyone was in agreement that at that stage in the investigative process was not the time to take Mack's testimony.

Kelly Andrews
October 24, 2005

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EXHIBIT NUMBER 70

Linda Thomsen OIG-431

Spoke to Linda Thomsen by telephone today regarding the alleged preferential treatment of John Mack, CEO of Morgan Stanley, in an ongoing investigation in which he may be a potential tipper and about the alleged tampering with enforcement personnel files for Gary Aguirre. Thomsen said that in the Pequot Capitol Management investigation she heard from time to time about the disagreement between Aguirre, who thought it was important to take Mack's testimony at a particular instance, and Bob Hanson, Mark Kreitman and Paul Berger who all thought it didn't make sense to take his testimony until they received documents from a subpoena request. Thomsen said that the decision of when to take someone's testimony is a decision that Enforcement struggles with all the time, but that there was not an issue with taking his testimony because he is a high level person. It was just that now is not the time to take his testimony.

Thomsen said that Aguirre had sent her one e-mail asking if she had an open-door policy. She replied yes that she would meet with the team about a case, but Aguirre later e-mailed her saying there was no need to meet. Thomsen said that Aguirre had been terminated and that she believes he may be suing the Commission about his not being hired by the Commission. She said that Aguirre asked to be moved to another Assistant Director's group, specifically requesting Mark Kreitman's group, and she said that Paul Berger decided to move him to that group. Thomsen said that Aguirre and Kreitman were friends. She also told me that Enforcement doesn't usually like to honor requests to move to another group because the subordinate should not be choosing who they work with and it may result in everyone wanted to work for a more popular supervisor. Thomsen told me that Aguirre was unhappy with his working at the Commission both before and after the move and that once he moved to Kreitman's group he raised issues about his cases, his time to work on his EEO cases, and said that he was leaving because he did not need to work.

Thomsen said she received copies of the letters to the Chairman, but simply forwarded them to the attorney in OGC who is handling his case. She responded to the claim in the letter that it was not normal protocol to have a high-powered attorney contact her about a case. Thomsen said that she was contacted by Mary Jo White during the vetting process of Mack for the CEO position at Morgan Stanley, White telling Thomsen that she was aware of the investigation and wanting some assurance that Mack was in the clear. (White also made clear to Thomsen that she did not mean to effect the investigation in any way). Thomsen said she told White nothing in this regard, but that it was during that vetting process that they talked about the outstanding subpoena for documents request. Thomsen said that attorneys call her all the time related to cases instead of calling Enforcement staff working on the case.

As to Aguirre's evaluation, Thomsen signed off on his rating and recommendation to get a two-step increase. Thomsen recalls asking why Kreitman and Hanson would recommend Aguirre for 2 steps, when he was so difficult to manage and difficult with peers. Thomsen said that she was told that Aguirre's investigative work is solid and that is why they recommended him for 2 steps. I asked Thomsen about the September 26, 2005 e-mail from Kreitman to Chuck Staiger. She wasn't familiar with it, but remembers that Staiger told her that Kreitman wanted to add something to the file, and Thomsen told Staiger to be sure that it reflected the date it was being added to the file. Thomsen also recalls that Berger may have told her that the Aguirre record is complete. Thomsen also recalls a conversation with Berger, Kreitman and Hanson in her office about Aguirre's termination, and that the process was under an accelerated time line

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because Aguirre had told them that he was resigning at the end of September, but then changed his mind.

Kelly Andrews
10/21/05

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EXHIBIT NUMBER 71

Paul Berger

OIG-431

I spoke to Paul Berger by phone today regarding this investigation. Berger told me that the Pequot Capitol Management case is an insider trading case that Gary Aguirre opened after he began work at the Commission. Initially, Aguirre worked under Assistant Director Grimes, but later was transferred to Mark Kreitman's group. Berger said that he got lots of e-mails from Aguirre, although he did not keep most of them. He is sending me those e-mails he can find. He received an e-mail from Aguirre about Aguirre's wanting to take John Mack's testimony, after having discussed it at length with Hanson and Kreitman. Berger said that it is not an issue of not taking Mack's testimony, since it likely will be taken, it is a question of when. Berger, along with Kreitman and Hanson, thought that it was not the right time to take Mack's testimony because there was no hard evidence that pointed to Mack and Enforcement still had an outstanding subpoena for documents out in the case. Enforcement had also not gotten telephone records yet in the case. Berger said that ordinarily they would take someone's testimony to lock them in, but that in this case the actions at issue were years old so that if Mack denies insider trading there is nothing left to ask him. Berger was told by one of his supervisors that Aguirre would sometimes say there is evidence to support something but that it really did not, so that Berger did not have much confidence in Aguirre. Berger said that Aguirre came to his office 4 or 5 times to discuss the case. Berger said that he is not afraid of taking testimony of people in high places, and in fact it is often done in Enforcement. Berger said that he has taken Jack Welch's and the Vice President's testimony. Berger said that at some point Aguirre gave him a memo about why Mack's testimony should be taken, but that he found it to be largely incomprehensible. Aguirre was supposed to give Berger a second memo about this, but never did according to Berger. Berger says that the decision of when to take someone's testimony involves basic experience and judgment, and that Aguirre often saw conspiracies.

Berger says that the Pequot investigation was a long and troubled investigation because of Aguirre's involvement. Aguirre seemed to think that he could conduct the whole investigation on his own with no supervision, but that a couple of subpoena's he issued violated the law, according to Berger. In addition, Berger says that he got many calls of complaint from outside counsel about Aguirre, including one from a former Chairman. Berger says that Aguirre is volatile and difficult and would often walk out and leave for the day. At one point Aguirre announced that he would resign effective the end of September 2005, so Berger suggested staffing the case in preparation. Berger said that both Hanson and Kreitman are excellent attorneys.

As to the Aguirre personnel records issue, Berger told me that at one point during the evaluation period he had an hour-long meeting with Hanson about his two problem employees, one of whom was Aguirre, because he thought that Hanson was being driven crazy and he wanted to keep Hanson since he thinks he is a great employee. Berger said that Hanson is a nice guy and that he told Hanson it was best to be straight with constructive criticism for both problem employees. Berger told Hanson to supplement the contribution statement he had already prepared for Aguirre, but Berger said that Hanson must have misunderstood him and wrote a separate statement instead of incorporating it into the contribution statement as he intended. Berger is not sure if that separate sheet of paper was in the file sent to the compensation committee, which Berger is on. But Berger does recall that he saw the statement before the committee made any decision. Berger said that Hanson wrote a separate statement for the other

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problem employee as well. At some point, possibly after Aguirre's termination, Aguirre asked for his file and Chuck Staiger sent an e-mail to Berger notifying him of this. Then someone asked Berger about the contribution statement, and Berger asked Kreitman if it was in the file. Berger can't remember when this conversation was. Berger believed that Hanson wrote the separate statement.

Berger said that he had lots of conversations with Linda Borostovitz of HR regarding Aguirre. Berger called Borostovitz about whether the separate statement could be in the file, and she checked and told Berger that it could be in the file along with the contribution statement.

Berger said that he was surprised that Hanson and Kreitman recommended Aguirre for 2 steps, and asked Kreitman why given all the problems they would do that. Kreitman told Berger that Aguirre works long hours and was trying even though he was driving every one crazy, according to Berger. Berger left the decision to Kreitman and Hanson. I asked why they then decided to terminate Aguirre, and Berger said that after the evaluation Aguirre got worse and that Kreitman came to Berger to say that he thought Aguirre should be terminated before his probationary period was up. Berger said that he would think about it, that he asked Hanson about it and then spoke to Linda Thomsen about it, who said to go ahead. Berger said that Aguirre became so difficult to work with, that he would not work in a supervisory structure or with others, including staff, outside counsel and the trial attorney who Aguirre blew up at. Basically, Berger said that Aguirre was too hard to work with and he would not reason through his decisions. This discussion relating to Aguirre's termination happened after Aguirre said that he was resigning at the end of September 2005, said Berger. Berger told me that at one point Aguirre came to his office to say that he was resigning from the Commission effective the end of September, when Aguirre told Berger that he would wrap up the Pequot investigation. Berger told him that he did not see how the investigation would be completed by then when there were outstanding subpoenas. Berger thought that this showed that Aguirre did not always appreciate reality. Aguirre later told Berger that he decided not to resign.

Kelly Andrews
10/21/05

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EXHIBIT NUMBER 72

Aguirre.

Kelly Andrews
October 26, 2005

I called Kreitman on October 25, 2005, to follow up with him about documents he e-mailed me. Specifically, I asked Kreitman if he responded to the September 30, 2005 e-mail from Chuck Staiger to Kreitman asking Kreitman if Aguirre was given a copy of the evaluation either in writing or verbally. Kreitman told me that he responded verbally to Staiger's e-mail, telling Staiger that he had "transmitted the substance" of the evaluation a number of times to Aguirre verbally. Kreitman said that he normally meets with staff twice regarding their evaluation, first to discuss their work and second to tell them their step increase and give them the written evaluations and a copy of their own contribution statement. Kreitman said that he did not have the second meeting with Aguirre because he had already been terminated at that point. Kreitman was unsure of the date that he and Hanson would have first met with Aguirre about his work performance.

Kelly Andrews
October 26, 2006

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EXHIBIT NUMBER 73

FW: audit issues identified in closing memo

Page 1 of 3

Andrews, Kelly J.

From: Lennox, Jill
Sent: Wednesday, May 24, 2006 3:17 PM
To: Andrews, Kelly J.
Cc: Egbert, Nelson N.; Sullivan, Mary Beth; Robinson, Lolita I.
Subject: RE: audit issues identified in closing memo

thanks kelly - can you put a copy of the closing memo on my desk. I'm back on july 10th - can it wait until then? if not, i can work on it from home - atleast i'll get some additional hours in.

i know lolita is retiring in july so i assume she will not get to this? let me know - i don't want to step on her shoes.

nelson - is this worth doing an audit on? memo??

sorry for all the lowercase - [REDACTED]
 thankfully!

jill

From: Andrews, Kelly J.
Sent: Tue 5/23/2006 3:51 PM
To: Lennox, Jill
Cc: Egbert, Nelson N.; Sullivan, Mary Beth
Subject: FW: audit issues identified in closing memo

Hi Jill,

[REDACTED] A while back I referred an audit matter to Lolita. Since it arose in an investigation we did involving the Division of Enforcement (and Lolita said that it is currently on hold) Mary Beth suggested that I also refer it to you. At the end of this email I excerpted the findings that we referred to audit staff. As you will see, we found problems in the merit pay system. Let me know if you want to discuss this or you want a copy of our closing memorandum in that matter.

Take care,

Kelly

From: Robinson, Lolita I.
Sent: Thursday, May 18, 2006 2:24 PM
To: Andrews, Kelly J.
Subject: RE: audit issues identified in closing memo

I am not sure it is on hold.

From: Andrews, Kelly J.
Sent: Thursday, May 18, 2006 2:16 PM

0000542

8/9/2006

FW: audit issues identified in closing memo

Page 2 of 3

To: Robinson, Lolita I.
Subject: RE: audit issues identified in closing memo

OK. Does the audit staff still plan to look at these issues at some point?

From: Robinson, Lolita I.
Sent: Thursday, May 18, 2006 2:15 PM
To: Andrews, Kelly J.
Subject: RE: audit issues identified in closing memo

This was one of the issues for the labor relations audit but we did not get that far.

From: Andrews, Kelly J.
Sent: Thursday, May 18, 2006 2:12 PM
To: Robinson, Lolita I.
Subject: FW: audit issues identified in closing memo
Importance: High

Hi Lolita,

What is the status of these audit issues I referred to you at the end of last year? We have to brief Congress on Monday, and Walt wanted me to check.

Thanks,

Kelly

From: Andrews, Kelly J.
Sent: Tuesday, November 29, 2005 3:21 PM
To: Robinson, Lolita I.
Subject: RE: audit issues identified in closing memo

That footnote is it, unless you need more information. Thanks.

From: Robinson, Lolita I.
Sent: Tuesday, November 29, 2005 3:15 PM
To: Andrews, Kelly J.
Subject: RE: audit issues identified in closing memo

Kelly, auditing is my life. Feel free to send me any information that you think will be helpful.

Lolita Robinson

Office of the Inspector General

202-██████████

0000543

8/9/2006

From: Andrews, Kelly J.
Sent: Tuesday, November 29, 2005 3:10 PM
To: Robinson, Lolita I.
Subject: audit issues identified in closing memo

Hi Lolita,

Below is a footnote from a closing memo I wrote that Walt and Mary Beth signed today. While we found no misconduct, we found a number of irregularities related to the merit pay process, specifically related to a supplemental evaluation that was prepared for an employee. Let me know if you need further information, once you start to work on this. I know you have lots of audits to do.

Take care,

Kelly [REDACTED]

"We found several irregularities with the supplemental evaluation including: it was not dated or signed; it appears to have been created after the merit pay calendar deadline; it was not sent to, or considered by, the compensation committee; it was not in Aguirre's employee personnel file (EPF); and it was separate from the initial evaluation written by Aguirre's immediate supervisor, who should be the only one who prepares a summary on behalf of each employee, according to the merit pay process guidance. We are referring these issues to the audit staff."

Confidentiality Notice

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8/9/2006

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EXHIBIT NUMBER 74

PHONE CONVERSATION

Date & Time Tuesday August 16, 2006, 10:30am
Participant(s): Walt Stachnik, OIG
Mary Beth Sullivan, OIG
Jill Lennox, Auditor, OIG
Purpose: To discuss removing a person from my sample
Document Prepared by: Jill Lennox

When the audit commenced, Walt Stachnik asked me to include any persons that had a supplemental memo prepared on their behalf (except Gary Aguirre), in my sample. Kelly Andrews, OIG, told me that such a memo was prepared for [REDACTED]

[REDACTED] memo was the same memo as Aguirre's memo. This is because write-ups on both individuals were in the same memo, which was written by Mark Kreitman in Enforcement. Mary Beth Sullivan provided me with a redacted version of the memo, which only showed the portion pertaining to [REDACTED].

Sullivan and Walt Stachnik concluded that I should delete [REDACTED] from my sample.¹ This is because [REDACTED]'s memo was the same as Aguirre's memo and any questions that I might ask about the memo could inadvertently apply to Aguirre as well as [REDACTED]. Audit work is not intended to look into Aguirre at all.

I shredded the redacted memo pertaining to [REDACTED] and gave all documents relating to [REDACTED] to Mary Beth Sullivan and deleted [REDACTED] from my sample.

¹ I chose [REDACTED] for the 2004-2005 review cycle.

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EXHIBIT NUMBER 75

PRIVILEGED & CONFIDENTIAL
LIMITED DISTRIBUTION

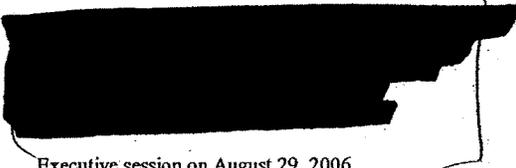
ACTION MEMORANDUM

August 18, 2006

TO: The Commission

FROM: Office of Inspector General *Mary Beth Sullivan*

SUBJECT: Request by the Chairmen of the Senate Finance Committee and the Senate Judiciary Committee for documents and information relating to the Division of Enforcement's investigation of Pequot Capital Management and the termination of Gary J. Aguirre, insofar as this request encompasses Office of Inspector General (OIG) documents and information.

RECOMMENDATION: 

ACTION REQUESTED BY: Executive session on August 29, 2006.

SUNSHINE ACT STATUS: Closed pursuant to 17 C.F.R. § 200.402(a)(2), (5), (6) & (7).

PRIOR COMMISSION ACTION: (1) At an executive session on May 25, 2006, the Commission authorized the OIG to permit the Senate Finance Committee staff to review an OIG closing memorandum under certain specified conditions (see Action Memorandum, dated May 24, 2006, Attachment A).

(2) By seriatim consideration on August 1, 2006, the Commission (a) authorized the OIG to permit the Senate Judiciary staff to review the OIG closing memorandum pursuant to the same conditions under which the Commission previously authorized the Senate Finance Committee staff to review the memorandum; and (b) granted the OIG standby authority to permit the Senate Banking Committee

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authority to permit the Senate Banking Committee to review the OIG closing memorandum under these same conditions upon their request (see Action Memorandum, dated August 1, 2006, Attachment B).

**OTHER OFFICES OR
DIVISIONS CONSULTED:**

Office of the General Counsel
Richard Humes
Meridith Mitchell
Melinda Hardy

PERSONS TO CONTACT:

Office of Inspector General
Mary Beth Sullivan
Kelly Andrews

DISCUSSION

I. **BACKGROUND**

A. **The Initial OIG Investigation**

On October 6, 2005, the OIG opened an investigation into allegations made by a former Division of Enforcement (Enforcement) attorney, Gary J. Aguirre, who was terminated during his probationary period. These included allegations that, among other things: (1) Aguirre's supervisors in Enforcement gave preferential treatment to John Mack, whom Aguirre believed may have been a tipper in an insider trading investigation of a hedge fund, Pequot Capital Management (Pequot); (2) Aguirre was unlawfully terminated for his complaints about the alleged preferential treatment of Mack; and (3) one of Aguirre's former supervisors allegedly tampered with his personnel file by retroactively creating a supplemental negative evaluation of him to justify his termination after the fact.

During its investigation, OIG staff interviewed Aguirre's former supervisors involved in the Pequot insider trading investigation and reviewed numerous e-mails and documents related to his allegations. The evidence gathered by OIG staff did not substantiate any of Aguirre's allegations, including those detailed above. Therefore, OIG staff recommended that the investigation be closed without referring the matter, and the Inspector General approved that recommendation. The OIG prepared a closing memorandum, dated November 29, 2005, which discussed in detail its investigative findings. Consistent with its normal practice, the OIG did not distribute the closing memorandum outside the OIG at that time.

The OIG closing memorandum contained non-public information about Enforcement's insider trading investigation of Pequot, which we understand is still pending. This non-

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public information included discussions of: (1) Enforcement's deliberations during the summer of 2005 regarding whether and when Mack's testimony should be taken; (2) contacts between the Director of the Division of Enforcement, Linda Thomsen, and Mary Jo White, the former United States Attorney for the Southern District of New York, during the time Morgan Stanley was considering hiring Mack as its Chief Executive Officer; (3) subpoenas issued by Aguirre in the Pequot case (although these were only discussed in general terms); and (4) an improper request made by Aguirre to former Division of Enforcement Director Gary Lynch to keep information confidential (also discussed very generally). In addition, the OIG closing memorandum discussed in detail Aguirre's personnel information, including his job performance and conduct, performance evaluation, merit pay increase and termination.

B. OIG Responses to Previous Congressional Requests

1. Senate Finance Committee Request for a Briefing and OIG Closing Memorandum

On May 12, 2006, Senator Charles Grassley, Chairman of the Senate Finance Committee, requested that the OIG provide a briefing regarding any inquiries conducted by the OIG into Aguirre's allegations regarding the Pequot investigation and the termination of his employment. Senator Grassley also requested that the OIG provide copies of any related investigative reports or closing memoranda prior to the requested briefing. The OIG initially briefed the Senate Finance Committee staff on May 22, 2006. During that briefing, the OIG discussed only those portions of its investigation that involved Aguirre's personnel issues; the OIG did not disclose any information pertaining to Enforcement's investigation of Pequot. The OIG did not provide the Senate Finance Committee staff with any documents prior to or at the May 22, 2006 briefing.

Because the OIG closing memorandum contained non-public information about Enforcement's ongoing Pequot insider trading investigation, Commission regulations required that the OIG obtain Commission approval prior to disclosing this document to Congress. The OIG prepared an action memorandum, dated May 24, 2006,

Attachment A. At an executive session held on May 25, 2006, the Commission authorized the OIG to permit the Senate Finance Committee staff to review an unredacted copy of the OIG closing memorandum under the following conditions: (1) the review would take place at Commission headquarters under the supervision of OIG staff; (2) the Senate Finance Committee staff could take notes concerning the closing memorandum, but could not copy the document; and (3) the contents of the document were not to be disclosed outside the Senate. The Senate Finance Committee staff reviewed the closing memorandum under these conditions on June 15, 2006. At that time, OIG staff also answered the Senate Finance Committee staff's questions concerning that document and the OIG's closed investigation.¹

¹ During the executive session, the Commission also decided that Enforcement should provide a document containing an updated status of the Pequot insider trading investigation to the Senate Finance

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2. Senate Judiciary Committee Request for OIG Closing Memorandum

On July 25, 2006, Senate Judiciary Committee staff contacted the OIG and requested that they be permitted to review the OIG closing memorandum that the Senate Finance Committee staff previously reviewed.² The Senate Judiciary Committee staff indicated that they would be willing to abide by the same conditions under which the Senate Finance Committee staff reviewed the memorandum.

The OIG prepared an action memorandum, dated August 1, 2006, [REDACTED]

[REDACTED]³ The Commission, by seriatim consideration, granted the authority requested by the OIG. The Senate Judiciary Committee staff reviewed the OIG closing memorandum under the authorized conditions on August 7, 2006, and OIG staff answered the Judiciary Committee staff's questions concerning that document and the OIG's closed investigation.

3. Meeting with Senators Specter and Grassley and Committee Staff

On or about August 2, 2006, Senator Arlen Specter, Chairman of the Senate Judiciary Committee, requested a meeting with the Inspector General concerning the Aguirre matter. In response to that request, on August 4, 2006, the Inspector General and Counsel to the Inspector General met with Senators Specter and Grassley and the Senate Finance and Judiciary Committee staff. Senator Grassley thanked the Inspector General for the cooperation previously provided to the Senate Finance Committee staff in arranging for them to review the OIG closing memorandum. Nonetheless, Senator Grassley raised concerns about the Inspector General's independence and questioned why

Committee staff for review under the same conditions as pertained to the OIG closing memorandum. The Senate Finance Committee staff reviewed the Enforcement document on June 15, 2006, at SEC Headquarters, under the supervision of an Enforcement Deputy Director, Walter Ricciardi. The OIG did not review this document at that time, [REDACTED]

² Aguirre testified at a Senate Judiciary Committee public hearing on hedge funds and independent analysts on June 28, 2006. During his testimony, Aguirre alleged that his former supervisors in Enforcement halted the Pequot insider trading investigation because of John Mack's powerful political connections, and terminated Aguirre in retaliation for his complaints about Mack's favorable treatment.

³ While the Senate Banking Committee, which has oversight jurisdiction over the SEC, had not asked to review the OIG closing memorandum, [REDACTED]

the Inspector General went to the Commission before providing documents to Committee staff. Senator Specter criticized specific aspects of the OIG's investigation and expressed his surprise about what the OIG had done in this matter to date. Senator Specter then indicated that the Committees intended to investigate the OIG, in addition to their continued pursuit of Aguirre's allegations.

C. Reopening of the OIG Investigation

Subsequent to the closing of its initial investigation on November 29, 2005, the OIG learned of new information pertinent to Aguirre's allegations. The OIG also became aware of allegations that its initial investigation was incomplete. On July 6, 2006, the SEC Chairman requested that the OIG reopen its investigation into Aguirre's allegations. After considering all relevant factors, the Inspector General decided to reopen the OIG's investigation of Aguirre's allegations.

The OIG reopened its investigation on July 6, 2006, and that investigation is ongoing. In the ongoing investigation, the OIG is re-examining all of the allegations it reviewed during its initial investigation and is examining some additional allegations that have come to its attention.

II. THE SENATE COMMITTEES' CURRENT REQUEST FOR DOCUMENTS AND INFORMATION

On August 2, 2006, the Chairmen of the Senate Finance Committee and the Senate Judiciary Committee sent to SEC Chairman Christopher Cox an extensive request for documents and information related to Enforcement's Pequot insider trading investigation and the termination of Aguirre's employment. Attachment C.⁴ The Committees' document requests are as follows:

- (1) All documents created by the SEC or SEC/OIG staff related to the investigation of Pequot Capitol Management (PCM) including but not limited to all communications or records of communications in any form, such as email, sent or received by any of the following individuals:
 - a. Gary Aguirre
 - b. Eric Ribelin
 - c. Mark Kreitman

⁴ The August 2, 2006 letter also requested that the SEC Chairman make certain SEC staff members available for interviews. This request does not directly impact the OIG.

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- d. Robert Hanson
- e. Linda Thomsen
- f. Paul Berger
- g. Joseph Cella
- h. James Eichner

- (2) All documents related to the termination of the employment of Mr. Gary Aguirre including but not limited to all communications in any form, such as email sent or received by any of the above named individuals.

These requests include, but are not limited to, the following records:

- a. The full employment personnel file of Gary Aguirre, both formal and informal.
- b. All documents, communications, or records of communications, in any form, such as email, sent or received by Linda Thomsen or Mary Jo White that relate to Gary Aguirre, John Mack, Pequot Capital Management, or Morgan Stanley.
- c. The SEC/OIG Closing Memorandum (file # OIG-431), prepared by Ms. Kelly J. Andrews, Associate Counsel to the Inspector General.
- d. The memorandum presented to the Finance Committee Staff on June 15, 2006 prepared by Mr. Walter Ricciardi, Deputy Director, Division of Enforcement.
- e. All communications or records of communications in any form, such as email, sent or received by any representative of the SEC or Arthur Samberg, or any designated representative of Samberg.
- f. All communications or records of communications in any form such as email, sent or received by SEC or SEC/OIG staff regarding Congressional inquiries related to Mr. Gary Aguirre.

On August 4, 2006, Chairman Cox wrote to both Committee Chairmen, informing them that he has directed Associate General Counsel Richard Humes to respond promptly and in detail to the Committees' request. On August 9, 2006, Humes informed Senate Finance Committee staff that, because Enforcement's insider trading investigation is ongoing, he cannot provide any documents or other information without Commission authorization.⁵ Because of the independence required by the Inspector General Act of 1978, as amended, the OIG intends to respond separately to the Committees' requests, to the extent they seek documents in the OIG's possession.

⁵ On August 14, 2006, Senator Richard Shelby, Chairman of the Senate Banking Committee, wrote to SEC Chairman Cox, requesting that the Senate Banking Committee be copied on any documents and information provided to Congress regarding Aguirre's allegations.

III. LEGAL ANALYSIS

A. The Scope of the Inspector General's Duty to Report to Congress

The Inspector General Act of 1978, as amended, created the offices of Inspector General as independent and objective units to, among other things, "provide a means of keeping the head of the [agency] and the Congress fully and currently informed about problems and deficiencies relating to the administration of [agency] programs and operations and the necessity for and progress of corrective action . . ." 5 U.S.C. Appx. § 2(3). *See also* 5 U.S.C. § 4(5) (each Inspector General has the duty and responsibility to "keep the head of [the agency] and the Congress fully and currently informed, by means of the reports required by section 5 [of the Inspector General Act] and otherwise . . ."). Under Section 5 of the Inspector General Act, 5 U.S.C. Appx. § 5, each Inspector General must provide semiannual reports to Congress that shall include, among other things, "a summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted . . ."

The Inspector General's reporting obligations to Congress do not require an Inspector General to disseminate to Congress confidential information about open criminal investigations. *See* Congressional Requests for Information from Inspectors General concerning Open Criminal Investigations, 13 Op. O.L.C. 77 (Mar. 24, 1989), Attachment D, at 7. Similarly, "[l]ong-established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of executive privilege, require that in the absence of extraordinary circumstances an IG must decline to provide confidential information about an open criminal investigation in response to a request pursuant to Congress' oversight authority."⁶ *Id.* In reaching this conclusion, the Department of Justice's Office of Legal Counsel weighed "the nature of Congress' oversight interest in the information and the interest of the executive branch in maintaining confidentiality for the information." *Id.* at 2.

The same considerations that warrant the protection of information concerning open criminal investigations apply to all open Inspector General investigations, whether they be criminal, civil or administrative in nature. *Cf.* Letter from Assistant Attorney General Robert Raben to the Honorable John Linder (Jan. 27, 2000), at 3, Attachment E (citing the Department of Justice's long standing policy to decline to provide Congressional committees with access to open law enforcement files). As explained in Assistant Attorney General Raben's letter, "[d]ecisions about the course of an investigation must be made without reference to political considerations." *Id.* at 4. "[T]he Executive Branch cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation." *Id.* (quotations and citation omitted). Moreover, "nothing in the text of [the applicable Inspector General Act provisions]

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provides that confidential law enforcement materials pertaining to ongoing cases must be transmitted to Congress." 13 Op. O.L.C. 77, Attachment D, at 5.

The concerns with providing information about open Inspector General investigations to Congress are lessened after an investigation has been closed. "Once an investigation has been closed without further prosecution, some of the considerations [applicable to open investigation] lose their force." *Id.* at 8 n.9. "Access by Congress to details of closed investigations does not pose as substantial a risk that Congress will be a partner in the investigation and prosecution or will otherwise seek to influence the outcome of the prosecution . . ." *Id.* Nonetheless, "such records are not automatically disclosed to Congress"; certain information, such as unpublished details of allegations against particular individuals, confidential sources, and investigative techniques and methods, would still require protection. *Id.* at 8-9 n.9. Therefore, the potential "chilling effect" of a disclosure of details of the prosecutorial deliberative process in a closed case must be weighed against the immediate needs of Congress.⁷ *Id.* at 9 n.9.

B. The Privacy Act of 1974

The Privacy Act of 1974, 5 U.S.C. 552a, which limits the disclosure of certain records pertaining to individuals, does not preclude an Inspector General from providing information to Congressional committees. An exception to that Act permits disclosure of records about individuals to any committee of Congress to the extent the matter is within its jurisdiction. 5 U.S.C. § 552a(b)(9).

IV. CATEGORIES OF OIG DOCUMENTS THAT ARE RESPONSIVE TO THE COMMITTEES' REQUESTS

The OIG has the following categories of documents that are responsive to the Committees' requests:

- A. The OIG closing memorandum (OIG-431), dated November 29, 2005, prepared by Kelly J. Andrews, Associate Counsel to the Inspector General (item c on page 3 of the document request).

As discussed above, this memorandum contains non-public information concerning Enforcement's Pequot insider trading investigation, as well as Aguirre's personnel information. The Senate Finance and Judiciary Committee staff previously reviewed an unredacted copy of the OIG closing memorandum. However, consistent with the conditions imposed by the Commission on that review, no copies of the memorandum were provided to the Committees or their staff.

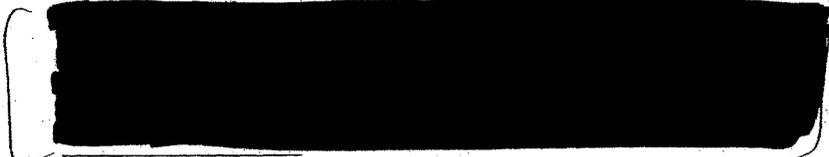
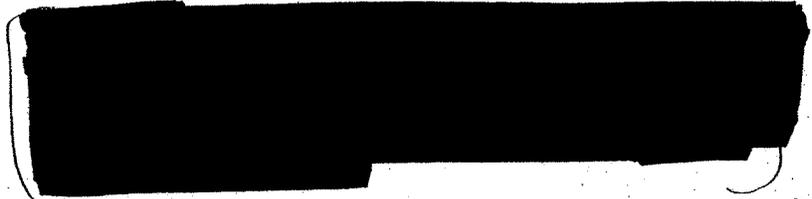
⁷ As discussed in more detail below (see Section IV.B), the OIG has segregated its closed investigative file concerning Aguirre's allegations from its open investigative file.

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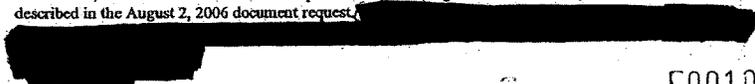


- B. Substantial portions of the file in the OIG's initial investigation that was closed on November 29, 2005 (covered by items 1, 2, a and c on pages 2-3 of the document request).

The OIG's initial investigative file includes the closing memorandum (discussed in Section IV.A above), the OIG investigative plan, e-mails, facsimiles, correspondence, memoranda, notes, policies and regulations, printouts from the NRSI (Name Relationship Search Index) database, memoranda of witness interviews, notes of these interviews, documents from Aguirre's official personal file and other personnel documents. Many of these documents discuss or relate to Enforcement's Pequot insider trading investigation, while many pertain to Aguirre's personnel issues, including the termination of his employment. Prior to August 2, 2006, the Senate Finance and Judiciary Committees made no formal request for the OIG's closed initial investigative file (beyond the closing memorandum). To date, Committee staff have not reviewed any of this material other than the closing memorandum.



³ Certain records contained in the closed OIG investigative file, e.g., case opening and closing documents, notices of rights signed by the subjects of the investigation, and certain materials printed from the Internet, do not refer or relate to the Pequot investigation, Aguirre's termination, or the other items described in the August 2, 2006 document request.



C. E-mails pertaining to the suspension of Aguirre's e-mail account (covered by item 2 on page 2 of the document request).

The OIG has e-mails that were sent and received during June and July 2006 concerning whether Aguirre's e-mails account was suspended after he was terminated and whether the account had been used since his termination. These e-mails mention Aguirre's termination in September 2005 and, therefore, appear to be responsive to Item 2 of the document request. The Office of Information Technology determined that the account was disabled upon Aguirre's termination (meaning Aguirre could not log into the account), but that the account had not been deleted from the e-mail system at the Office of General Counsel's (OGC's) request. The OIG obtained these e-mails as part of its review of an allegation that Aguirre may have accessed the Commission's e-mail system after his termination. As this was determined not to be the case, the OIG did not open a preliminary inquiry or an investigation into this issue.

D. E-mails received from and sent to members of the public (covered by items 1 and 2 on page 2 of the document request).

The OIG has an electronic mail box to which members of the public may send e-mails. In July 2006, after it had reopened its investigation, the OIG received a few messages from members of the public requesting an investigation into Aguirre's case. One of these e-mails mentioned the SEC's shutting down of an insider trading case and firing of the attorney in charge of the case. The OIG replied to these e-mails, thanking the senders for their views and stating that the OIG planned to take appropriate action.

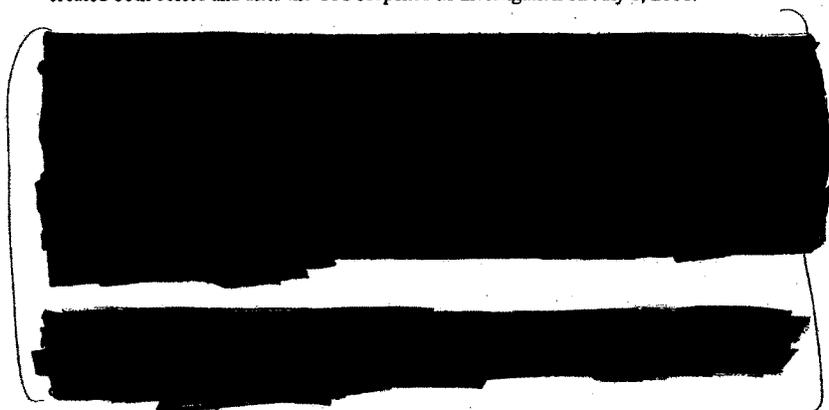
E. Documents pertaining to Congressional inquiries related to Aguirre's allegations (item f on page 3 of the document request).

Item f of the August 2, 2006 document request asks for "[a]ll communications or records of communications in any form such as email, sent or received by SEC or SEC/OIG staff regarding Congressional inquiries related to Mr. Gary Aguirre." Attachment C, at 3. The OIG has numerous documents, including e-mails, notes, briefing documents and action memoranda to the Commission, pertaining to the OIG's response to various Congressional requests. These requests include: the Senate Finance Committee's request for a briefing and the OIG closing memorandum; the Senate Judiciary Committee's request for the OIG

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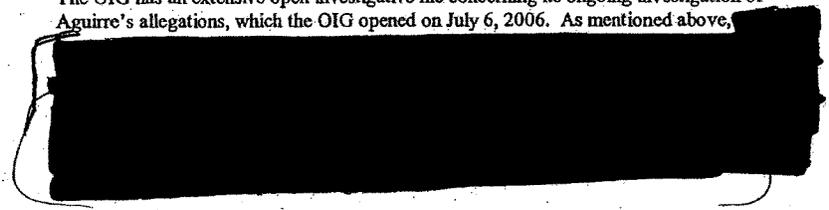
closing memorandum; Senator Specter's request for a meeting with the Inspector General; and the August 2, 2006 document request.

The OIG documents that are responsive to item f include: records of communications between the Inspector General and OIG staff and the Congressional Committee Chairmen and staff; internal communications among the Inspector General and OIG staff; communications between the Inspector General and OIG staff and the Commission, including the OIG action memoranda and the discussion at the May 25, 2006 executive session; communications between OIG staff and OGC staff and Chairman's and Commissioners' staffs; and communications between OIG staff and counsel from other Offices of Inspector General throughout the federal government. These documents were created both before and after the OIG reopened its investigation on July 6, 2006.



- F. Substantial portions of the file in the OIG's ongoing investigation that was opened on July 6, 2006 (covered by items (1) and (2) on page 2 of the document request and some of the specific requests in items a through f on pages 2-3).

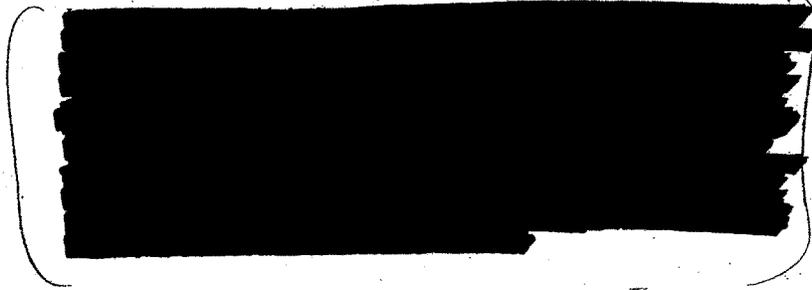
The OIG has an extensive open investigative file concerning its ongoing investigation of Aguirre's allegations, which the OIG opened on July 6, 2006. As mentioned above,



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RECOMMENDATION



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EXHIBIT NUMBER 76



OFFICE OF THE
INSPECTOR GENERAL

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

By Hand Delivery

August 28, 2006

The Honorable Charles E. Grassley
Chairman
United States Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510-6200

The Honorable Arlen Specter
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairmen Grassley and Specter:

As you know, on Friday the Securities and Exchange Commission authorized me to provide you with certain Commission non-public information contained in Office of Inspector General (OIG) files. Immediately upon learning of this authorization, my staff provided you with a copy of the OIG closing memorandum you had requested. In a further effort to cooperate with your Committees, I am today providing you with the additional information that the Commission authorized the OIG to provide in response to your August 2, 2006 document request. A detailed response to that document request, as it pertains to documents in the OIG's possession, is included as an attachment to this letter.

I will continue to cooperate with your Committees' inquiries to the greatest extent possible. Please do not hesitate to contact me if you have any questions or I can be of further assistance.

Sincerely,

A handwritten signature in cursive script that reads "Walter Stachnik".

Walter Stachnik
Inspector General

Enclosures

cc: The Honorable Richard Shelby

Attachment**OIG Response to August 2, 2006 Document Request****Response to Document Requests**

(1) All documents created by SEC or SEC/OIG staff related to the investigation of Pequot Capital Management (PCM) including but not limited to all communications or records of communications in any form, such as email, sent or received by any of the following individuals:

- a. Gary Aguirre
- b. Eric Ribelin
- c. Mark Kreitman
- d. Robert Hanson
- e. Linda Thomsen
- f. Paul Berger
- g. Joseph Cella
- h. James Eichner

The OIG closing memorandum provided to you on August 25, 2006 (Bates Stamp Nos. 000001-000007) is responsive to this request. In addition, we are enclosing the following responsive documents: the OIG closed investigative file in Case OIG-431 (Bates Stamp Nos. 000075-000495); emails received from and sent to members of the public requesting an investigation into Mr. Aguirre's allegations (Bates Stamp Nos. 000028-000042); the relevant portion of the Inspector General's April 28, 2006 Semiannual Report to Congress (Bates Stamp Nos. 000008-000011); the relevant portion of several drafts of the Inspector General's April 28, 2006 Semiannual Report to Congress (Bates Stamp Nos. 000012-000027); and a copy of Mr. Aguirre's June 28, 2006 testimony before the Senate Judiciary Committee (Bates Stamp Nos. 000064-000074). You will note that we have twice redacted the name of an individual from a page of the closed investigative file (Bates Stamp No. 000183) containing a discussion of another matter that has no relevance to Mr. Aguirre's allegations.

Responsive documents also include materials contained in the OIG's open investigative file and internal deliberative documents pertaining to the OIG's responses to Congressional inquiries relating to Mr. Aguirre. The confidentiality interests applicable to these materials are discussed below.

(2) All documents related to the termination of the employment of Mr. Gary Aguirre including but not limited [to] all communications in any form, such as email sent or received by any of the above named individuals.

Responsive documents include the OIG closing memorandum (Bates Stamp Nos. 000001-000007) and the documents described in response to Item (1) above. In addition,

we are enclosing the following responsive documents: e-mails sent and received during June and July 2006 concerning whether Mr. Aguirre's e-mail account was suspended after his termination (Bates Nos. 000043-000062), and handwritten notes concerning the suspension of Mr. Aguirre's SEC identification badge upon his termination (Bates No. 000063).

Responsive documents also include materials contained in the OIG's open investigative file and internal deliberative documents pertaining to the OIG's responses to Congressional inquiries relating to Mr. Aguirre. The confidentiality interests applicable to these materials are discussed below.

- a. The full employment personnel file of Mr. Gary Aguirre, both formal and informal.

Responsive documents are contained in the closed investigative file for Case OIG-431 that is being provided (Bates Nos. 000075-000495). Additional responsive documents are contained in the OIG's open investigative file. The confidentiality interests applicable to the OIG's open investigative file are discussed below.

- b. All documents, communications, or records of communications, in any form, such as email sent or received by Linda Thomsen or Mary Jo White that relate to Gary Aguirre, John Mack, Pequot Capital Management, or Morgan Stanley.

Responsive documents are contained in the closed investigative file for Case OIG-431 that is being provided (Bates Nos. 000075-000495). Responsive documents also may include materials obtained during the OIG's open investigation. The confidentiality interests applicable to the OIG's open investigative file are discussed below.

- c. The SEC/OIG Closing Memorandum (file # OIG-431), prepared by Ms. Kelly J. Andrews, Associate Counsel to Inspector General.

We provided a copy of this document to you on August 25, 2006 (Bates Stamp Nos. 000001-000007).

- d. The memorandum presented to Finance Committee Staff on June 15, 2006 prepared by Mr. Walter Ricciardi, Deputy Director, and Division of Enforcement.

The OIG's only copy of this document is contained in the OIG's open investigative file. We understand, however, that the SEC's Office of Legislative Affairs provided this memorandum to you on August 25, 2006.

- e. All communications or records of communications in any form, such as email, sent or received by any representative of the SEC or Mr. Arthur Samberg, or any designated representative of Mr. Samberg.

We are unsure of the intended scope of this request. However, to our knowledge, the OIG does not possess any e-mails to or from Arthur Samberg, or any representative of Arthur Samberg.

- f. All communications or records of communications in any form such as email, sent or received by SEC or SEC/OIG staff regarding Congressional inquiries related to Mr. Gary Aguirre.

The OIG documents that are responsive to this request include e-mails, notes, briefing documents and memoranda that reflect the internal deliberations of the OIG, the Commission and Commission staff. The confidentiality interests applicable to these materials are discussed below.

Confidentiality Interests

The OIG recognizes its responsibility under the Inspector General Act of 1978, as amended, to keep the Congress fully and currently informed about problems and deficiencies relating to the administration of agency programs and operations and the necessity for and progress of corrective action. 5 U.S.C. Appx. § 2(3). At the same time, the OIG is cognizant of its responsibility to protect the confidentiality of sensitive, non-public information, in particular, information contained in open law enforcement files. Therefore, in responding to your requests, we have striven to cooperate with your Committees and provide the information you have requested, while at the same time protecting important confidentiality interests. Accordingly, we have set forth below the confidentiality interests of certain categories of documents that have been requested.

Information regarding open investigations

Notwithstanding the fact that the OIG has reopened its investigation into Mr. Aguirre's allegations, in an effort to cooperate with your Committees, the OIG is providing to you the entire file from its initial investigation of Mr. Aguirre's allegations that was closed on November 29, 2005.

Documents that are responsive to your requests are also contained within the OIG's file of its ongoing, active investigation of Mr. Aguirre's allegations. The executive branch's interest in protecting the confidentiality and integrity of ongoing law enforcement investigations requires that such information not be provided to Congress, absent extraordinary circumstances. *See* Congressional Requests for Information from Inspectors General concerning Open Criminal Investigations, 13 Op. O.L.C. 77 (Mar. 24, 1989). *See also* Letter from Assistant Attorney General Robert Raben to the Honorable John Linder (Jan. 27, 2000), at 3 (citing the Department of Justice's longstanding policy to decline to provide Congressional committees with access to open law enforcement files). Decisions about the course of an investigation must be made without reference to political considerations. *Id.* at 4. Moreover, the disclosure of documents from open investigative files could provide a road map of an ongoing investigation and could seriously prejudice the investigation. *Id.*

Accordingly, while the OIG has provided its entire file from its initial closed investigation of Mr. Aguirre's allegations, we cannot disclose information pertinent to our ongoing investigation of his allegations.

Information regarding internal deliberations

The documents that are responsive to Item f of the August 2, 2006 document request contain the internal deliberations of the OIG, the Commission and Commission staff in connection with the OIG's efforts to be responsive to Congressional inquiries, while at the same time protecting the confidentiality of non-public Commission information. The disclosure of these internal deliberations would no doubt have a chilling effect and seriously hamper the ability of the OIG to engage in open and frank discussions when responding to Congressional requests for information. In particular, because e-mails are inherently susceptible to mischaracterization, staff would be reluctant to use e-mail in the future, which would negatively impact the OIG's ability to provide timely responses to Congressional requests. Therefore, we have not provided materials in our possession that reflect the internal deliberations of the OIG, the Commission and Commission staff regarding the OIG's responses to Congressional inquiries.

Request that Documents Be Kept Non-Public

The documents that we are providing with this response contain sensitive, non-public information. We understand that, absent extraordinary circumstances, it is not the practice of Congressional Committees to make public disclosure of sensitive, non-public materials without prior consultation with the responsible agency. Therefore, we respectfully request that the Committees follow that practice in this instance. Consistent with this practice, we are also requesting that this response be kept non-public.

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EXHIBIT NUMBER 77



OFFICE OF THE
INSPECTOR GENERAL

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

August 11, 2006

Mr. Gary J. Aguirre
[REDACTED]

Washington, DC [REDACTED]

Re: Case OIG-431; Subpoena No. 06-07

Dear Mr. Aguirre:

Pursuant to the Inspector General Act of 1978, as amended, the Inspector General of the Securities and Exchange Commission has issued the enclosed subpoena *duces tecum*, which requires you to produce certain records.

No personal appearance pursuant to the subpoena will be required at the time and place indicated on the subpoena if, on or before the return date indicated on the subpoena, the required records are delivered or faxed to the undersigned at the following address or facsimile number:

U.S. Securities and Exchange Commission
Office of Inspector General
100 F Street, NE
Washington, D.C. 20549-2736
Facsimile No. (202) 772-9265

Fully legible and complete copies of the records called for by the subpoena will be accepted in response to the subpoena provided that the original records will be made available to employees of the Office of Inspector General, upon request, during normal working hours. Otherwise, original documents (including copies as maintained in your files) should be produced.

If for any reason you do not produce any of the records called for by the subpoena, list and indicate the location of each such record and state the reason for non-production.

This request for information is confidential and should not be construed as an indication by the Inspector General or his staff that any violation of law has occurred or as a reflection on any person related to the enclosed subpoena.

Mr. Gary J. Aguirre
August 11, 2006
Page 2

If you have any questions, please call me at (202) [REDACTED] Thank you for your cooperation.

Sincerely,



Kelly J. Andrews
Associate Counsel to the Inspector General

Enclosures

1. Subpoena and Attachment
2. Privacy Act Notice



No. 06-07

SUBPOENA DUCES TECUM**UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION
OFFICE OF THE INSPECTOR GENERAL**

To: Gary J. Aguirre

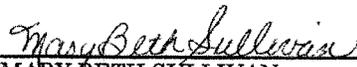
[REDACTED]
Washington, DC [REDACTED]

YOU ARE HEREBY COMMANDED TO DELIVER the material listed in the Attachment, to Kelly J. Andrews, Associate Counsel to the Inspector General, Office of the Inspector General, 100 F Street, NE, Room 2735, Washington, D.C. 20549-2736, on the 31st day of August 2006, at 10 o'clock a.m., in connection with:

Case OIG-431, an investigation into misconduct, including allegations of preferential treatment, unlawful termination and document tampering, being conducted pursuant to the Inspector General Act of 1978, as amended, 5 U.S.C. App. (Inspector General Act or Act).

This material is necessary to carry out a legitimate law enforcement inquiry under the authority of the Inspector General Act. Under this Act, the Inspector General has the duty and responsibility to conduct and supervise audits and investigations, to promote economy, efficiency and effectiveness in the administration of, and to prevent and detect fraud and abuse in and relating to, the programs and operations of the Securities and Exchange Commission.

IN TESTIMONY WHEREOF, the
Undersigned Counsel to the Inspector
General of the Securities and
Exchange Commission has hereunto
set her hand at Washington, D.C., this
11th day of August 2006.



MARY BETH SULLIVAN
Counsel to the Inspector General

ATTACHMENT
(Aguirre Subpoena No. 06-07)

DEFINITIONS

As used herein, the following terms have the designated meanings:

1. "Documents" means all paper writings and electronically or magnetically stored information or data in your possession, custody or control, in whatever form, including but not limited to, diskettes, schedules, lists, agreements, calendars, daytimers, appointment books, address and telephone listings, telephone messages and logbooks, notebooks, diaries, journals, records of oral conversations, correspondence, e-mails, notes and memoranda, including drafts.
2. "Documents relating to" any given subject means any document that constitutes, contains, embodies, evidences, reflects, identifies, states, refers to, deals with, bears upon, or is in any way pertinent to that subject, including but not limited to, documents that were at any time attached, annexed or appended to or used in the preparation of any document called for by this subpoena.

DOCUMENTS TO BE PRODUCED

1. A copy of the sworn statement and all exhibits that you previously provided to the Office of Special Counsel and the Senate Banking Committee.
2. All other documents, including e-mails, that you have provided to the Office of Special Counsel, the Senate Banking Committee, the Senate Finance Committee or the Senate Judiciary Committee.
3. All documents, including e-mails, that support, refer or relate in any way to the allegations made in your September 2, 2005 and October 11, 2005 letters to Securities and Exchange Commission Chairman Christopher Cox.
4. All documents, including e-mails, that support, refer or relate in any way to the following allegations, or any similar or related allegations:
 - a. That a Division of Enforcement insider trading investigation was abruptly and improperly halted because of outside political influence;
 - b. That a potential tipper in the insider trading investigation was given favorable treatment because of that individual's powerful political connections;
 - c. That your former supervisors improperly excluded you from meetings about the insider trading investigation;
 - d. That outside counsel improperly bypassed normal protocol of contacting the staff attorney and instead went directly to a manager;

e. That the Division of Enforcement terminated your employment in retaliation for your complaints that the potential tipper was being given favorable treatment; and

f. That your personnel file was tampered with when one of your former supervisors retroactively created a supplemental negative evaluation of you to justify your termination.

SECURITIES AND EXCHANGE COMMISSION
OFFICE OF INSPECTOR GENERAL

PRIVACY ACT NOTICE

[To accompany subpoena *duces tecum*]

Pursuant to the Privacy Act of 1974, as amended, 5 U.S.C. 552a, you are advised of the following:

1. Authority for Solicitation of Information. The Inspector General Act of 1978, as amended, 5 U.S.C. App., authorizes the Inspector General of the Securities and Exchange Commission to issue subpoenas necessary in the performance of audits and investigations of programs and operations of the Commission. Disclosure of the information specified in the subpoena is mandatory, subject to the valid assertion of a legal right or privilege.
2. Principal Purposes for Solicitation of Information. The principal purposes for soliciting the information are to assist the Office of Inspector General in auditing evaluating the Commission's program and operations and investigating possible violations of law, rule or regulation, or other misconduct by Commission staff or contractors.
3. Routine Uses of the Solicited Information. The routine uses of the solicited information are published in the Federal Register, at 71 FR 31230 (June 1, 2006), and include disclosure:

(1) Where there is an indication of a violation or a potential violation of law, whether civil, criminal or regulatory in nature, whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, to the appropriate agency, whether Federal, foreign, state, or local, or to a securities self-regulatory organization, charged with enforcing or implementing the statute, or rule, regulation or order.

(2) To Federal, foreign, state, or local authorities in order to obtain information or records relevant to an Office of Inspector General investigation or inquiry.

(3) To Federal, foreign, state, or local governmental authorities in response to their request in connection with the hiring or retention of an employee, disciplinary or other administrative action concerning an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision in the matter.

(4) To non-governmental parties where those parties may have information the Office of Inspector General seeks to obtain in connection with an investigation or inquiry.

(5) To independent auditors or other private firms or individuals with which the Office of Inspector General has contracted to carry out an independent audit, or provide support for audits, reviews, investigations or other inquiries. These contractors will be required to maintain Privacy Act safeguards with respect to such records.

(6) To respond to subpoenas in any litigation or other proceeding.

(7) To the Department of Justice and/or the Office of the General Counsel of the Commission when the defendant in litigation is: (a) Any component of the Commission or an employee of the Commission in his or her official capacity; (b) the United States where the Commission determines that the claim, if successful, is likely to directly affect the operations of the Commission; or (c) any Commission employee in his or her individual capacity where the Department of Justice and/or the Office of General Counsel of the Commission agree to represent such employee.

(8) To a Congressional office in response to an inquiry from the Congressional office made at the request of an individual but only from the record of that individual.

(9) To inform complainants, victims, and witnesses of the results of an investigation or inquiry.

(10) To qualified individuals or organizations in connection with the performance of a peer review or other study of the Office of Inspector General's audit or investigative functions.

(11) To a Federal agency responsible for considering debarment or suspension action if the record would be relevant to such action.

(12) To the Department of Justice for the purpose of obtaining its advice on Freedom of Information Act matters.

(13) To the Office of Management and Budget for the purpose of obtaining its advice on Privacy Act matters.

(14) To a public or professional licensing organization if the record indicates, either by itself or in combination with other information, a violation or potential violation of professional standards, or reflects on the moral, educational, or professional qualifications of an individual who is licensed or who is seeking to become licensed.

(15) To the Office of Government Ethics (OGE) to comply with agency reporting requirements established by OGE in 5 CFR part 2638, subpart F.

(16) To the news media and the public when there exists a legitimate public interest (e.g., to provide information on events in the criminal process, such as an indictment).

(17) To the Integrity Committee of the President's Council of Integrity and Efficiency and the Executive Council on Integrity and Efficiency, another Federal Office of Inspector General, or other Federal law enforcement office, in connection with an investigation, inquiry or review conducted pursuant to Executive Order 12993, or at the request of the SEC Inspector General.

4. Effect of Noncompliance. Failure to comply with the subpoena may result in the Inspector General requesting a court order for compliance. If such an order is obtained and you thereafter fail to supply the information, you may be subject to civil and/or criminal sanctions for contempt of court.

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EXHIBIT NUMBER 78

SETTLEMENT AGREEMENT

WHEREAS the Securities and Exchange Commission's Office of Inspector General ("SEC-OIG") issued a subpoena duces tecum to Mr. Gary J. Aguirre ("Mr. Aguirre") on August 11, 2006 (the "Subpoena"); and

WHEREAS, the Parties dispute whether and to what extent Mr. Aguirre must comply with that Subpoena; and

WHEREAS, on November 3, 2006, the United States of America and the SEC-OIG ("Petitioners") filed the miscellaneous action United States v. Aguirre, No. 05-485 (JR), in the United States District Court for the District of Columbia seeking summary enforcement of the Subpoena ("Subpoena Enforcement Action") against Mr. Aguirre; and

WHEREAS, it is the mutual desire of the Parties to this Settlement Agreement ("Agreement") to resolve all matters related to the aforementioned proceeding without the need for further litigation.

NOW, THEREFORE, the Parties to the above-captioned proceeding, individually and through undersigned counsel, hereby enter into this Agreement and agree as follows:

1. Mr. Aguirre will provide the 42-page sworn statement and all attached exhibits that he provided to the Office of Special Counsel and the Senate Committees, as requested in paragraph 1 of the Subpoena.
2. To the extent that he possesses any documents (not protected by the attorney-client privilege) described below in this paragraph that he has not already provided to SEC-OIG, Mr. Aguirre will produce documents relating to the following seven allegations. If Mr. Aguirre possesses no such documents, he will so state in writing.
 - A. That former Associate Director Paul Berger authorized an unnamed SEC

employee to contact Debevoise & Plimpton on his behalf concerning possible future employment on or about September 8, 2005.

B. That Branch Chief Robert Hanson made comments about John Mack's political connections over a speaker phone in the presence of Mr. Aguirre and approximately three other individuals.

C. That Division of Enforcement investigations other than the PCM investigation have been "killed" or halted for political or other inappropriate reasons.

D. That Mr. Aguirre's supervisors blocked a subpoena to John Mack for documents (as opposed to testimony).

E. That on June 23, 2005, Assistant Director Mark Kreitman and former Associate Director Paul Berger had an exchange by speaker phone in Mr. Aguirre's presence regarding an inquiry from Eric Dinallo, head of Morgan Stanley's regulatory compliance group, and that following this call there was an abrupt shift in the way the PCM investigation was handled.

F. That other SEC staff encouraged Mr. Aguirre to withdraw his resignation and that one colleague suggested that Mr. Aguirre's departure guaranteed the GE-Heller investigation would end.

G. That in early February 2005, approximately two weeks after an influential PCM attorney met with former Enforcement Director Steven Cutler, Assistant Director Mark Kreitman directed that the PCM investigation be narrowed to two or three matters and implied that this directive came from former Associate Director Paul Berger.

3. Mr. Aguirre will produce any documents not protected by the attorney-client

privilege that he possesses that (1) are not attached to his 42-page sworn statement or to his August 21, 2006 letter to Senator Shelby later forwarded to SEC Chairman Christopher Cox ("August 21 letter"), (2) support his allegations of wrongdoing concerning either (a) the Pequot Capital Management investigation or (b) his termination from the SEC, and (3) existed prior to the creation of either the 42-page sworn statement or the August 21 letter. Specifically, the allegations of wrongdoing for this category are limited to those in Mr. Aguirre's September 2, 2005 and October 11, 2005 letters to SEC Chairman Cox and the items listed as 4a. through 4f. of the Subpoena. If Mr. Aguirre possesses no such documents, he will so state in writing.

4. To the extent that he possesses them and has not already produced them to the SEC-OIG (or will not otherwise produce them pursuant to this Agreement), Mr. Aguirre will provide SEC-OIG any relevant emails from August 2005 (sent or received at his SEC email address) that concern (1) the allegations made in his 42-page sworn statement, (2) the allegations made in his August 21 letter, or (3) any other allegation referenced in paragraphs 2 and 3 of this Agreement.

5. If Mr. Aguirre withholds any documents under this Agreement pursuant to the attorney-client privilege, he shall so state in writing. Documents that may be withheld pursuant to attorney-client privilege may include direct communications between attorney and client but shall not include pre-existing documents attached to such communications.

6. Nothing in this Agreement shall require Mr. Aguirre to produce any communications with, or documents that were created for, any Senate committees (or the staff or members thereof), but this exclusion does not exempt Mr. Aguirre from producing pre-existing documents that might have been attached to communications with Senate committees (or the

staff or members thereof) and are called for under the terms of this Agreement.

7. Immediately upon execution of this Agreement, the Parties shall report to the Court that they have reached a settlement of this matter, and will jointly request a 30-day extension of the briefing schedule and the show cause hearing in the Subpoena Enforcement Action, in the form of the attached Exhibit A.

8. Within three business days of receiving Mr. Aguirre's production and a written statement from his counsel saying that Mr. Aguirre has complied with the terms of this Agreement, Petitioners shall dismiss the Subpoena Enforcement Action with prejudice.

9. Upon the condition that Mr. Aguirre commits no material breach of this Agreement, SEC-OIG shall not issue any additional subpoenas duces tecum to Mr. Aguirre for documents related to (1) the SEC's investigation of Pequot Capital Management, (2) Mr. Aguirre's termination from the SEC, or (3) any other allegation specifically referenced in (a) Mr. Aguirre's September 2, 2005 and October 11, 2005 letters to Chairman Cox, (b) the 42-page sworn statement or (c) the August 21 letter. This Agreement should not be construed to waive SEC-OIG's subpoena power under 5 U.S.C. app. 3 § 6(a)(4) (2000) in any investigation not related to the SEC's investigation of Pequot Capital Management, Mr. Aguirre's termination from the SEC, or any other allegation not referenced in Mr. Aguirre's September 2, 2005 and October 11, 2005 letters to Chairman Cox, the 42-page sworn statement, or the August 21 letter. Nor shall this Agreement be construed as an admission or concession by Mr. Aguirre that the SEC-OIG has authority to issue such subpoenas to Mr. Aguirre.

10. This Agreement contains the entire understanding between the Parties concerning the subject matter hereof and supersedes all prior negotiations and proposed agreements, written

and oral. No representations, understandings, or agreements have been made or relied upon in the making of this Agreement other than those specifically set forth herein. This Agreement can be modified only in a writing signed by the Parties.

11. The Parties through their counsel have negotiated the terms of this Agreement. Any rule of construction providing that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement. This Agreement shall be construed as if drafted by both Parties.

12. Each party shall bear its own costs, expenses and attorney's fees associated with the Subpoena Enforcement Action and this Agreement. The Parties mutually waive any claim for costs and attorney's fees against each other in the Subpoena Enforcement Action.

GARY J. AGUIRRE,
Respondent

David E. Mills, D.C. Bar No. 401-979
W. Bradley Ney, D.C. Bar No. 486-363
DOW LOHNES PLLC
1200 New Hampshire Ave., N.W.
Suite 800
Washington, DC 20036
Telephone: (202) [REDACTED]
Facsimile: (202) [REDACTED]
E-mail: [REDACTED]

Counsel for Respondent Gary J. Aguirre

Walter J. Stachnik
WALTER J. STACHNIK, Petitioner
Inspector General of the
Securities and Exchange Commission

PETER D. KEISLER
Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

Michael P. Abate
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Fax: (202) [REDACTED]
E-mail: [REDACTED]

OF COUNSEL:
MARY BETH SULLIVAN
KELLY ANDREWS
Securities and Exchange Commission
Office of Inspector General
100 F. St. N.E.
Washington, D.C. 20549

Attorneys for Petitioners

APPENDIX II: CORRESPONDENCE

United States Senate
WASHINGTON, DC 20510

April 17, 2006

Via Electronic Transmission

The Honorable Christopher Cox
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

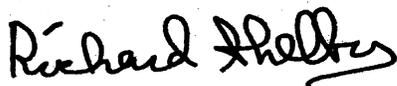
Dear Chairman Cox:

As members of the United States Senate, and as Chairman of the Committee on Banking, Housing and Urban Affairs and Chairman of the Committee on Finance, we write today regarding allegations presented to our offices concerning an investigation which was suspended by the Securities and Exchange Commission (SEC).

More specifically, our offices recently received information regarding a SEC investigation into the trading of securities by a large national hedge fund, Pequot Capital Management (PCM). The information alleges, among other things, that this investigation was abruptly halted and that all further inquiries into this matter have been suspended indefinitely. Supporting these concerns is the attached letter which was sent to your office in September of 2005 outlining the resources expended thus far in conducting this investigation.

Accordingly, we request that your office provide a confidential briefing to our Committee staff as soon as possible regarding the allegations set forth in the attached letter and the disposition of the investigation surrounding this matter. We thank you in advance for having your staff coordinate with ours no later than close of business on May 1, 2006. Any questions or concerns should be directed to Emilia DiSanto or Nick Podsiady of Senator Grassley's staff at (202) 224-4515 or Mark Oesterle of Senator Shelby's staff at (202) 224-3227.

Sincerely,



Richard Shelby
United States Senator
Chairman, Committee on Banking,
Housing & Urban Affairs



Charles E. Grassley
United States Senator
Chairman, Committee on
Finance

Enclosure

Cc: The Honorable Cynthia A. Glassman
The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Annette L. Nazareth



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT
100 F ST., N.E.
WASHINGTON, D.C. 20549

WATER'S DIRECT DIAL LINE
(202) 551-4437

September 2, 2005

Via Facsimile to 202-772-9200 and Regular Mail

Chairman Christopher Cox
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20037

Re: In the Matter of Trading in Certain Securities: HO-9818

Dear Chairman Cox:

I am compelled to write to you today, my last day with the Commission, out of a sense of duty to the Commission's mission—to maintain the integrity of the financial markets and to protect the investor. Unfortunately, my supervisors—as far up the chain as I can see—have lost sight of that mission in the above matter. I state the facts briefly below, though there is much more to be said.

I have been the staff attorney in the above matter from mid-September 2004 through today. It is an investigation of suspected insider trading by one of the largest hedge funds in the nation, Pequot Capital Management ("PCM"), arising out of eighteen SRO referrals. Staff who worked on this matter from the beginning—Hilton Foster, Eric Ribelin, Thomas Conroy, and I—believe that PCM engages in an institutionalized form of insider trading that corrupts the financial markets and creates an un-level playing field for honest investors.

As the investigation progressed, one matter dwarfed all others, suspected insider trading by PCM's CEO, Arthur Samberg, during July 2001, just before the General Electric Company ("GE") acquired Heller Financial, Inc. ("Heller"). Mr. Samberg bought \$44 million in Heller stock and shorted \$36 million in GE stock shortly before the public announcement of the acquisition on July 30, 2001, making an \$18 million profit. On the two occasions I took Mr. Samberg's testimony, he could offer no credible explanation for these trades. Everyone involved in this investigation has informed me of their belief Mr. Samberg obtained material non-public information prior to these trades. The only question is: from whom?

Only one person meets the tipper's profile: John Mack, the current CEO of Morgan Stanley. I began informing my supervisors of this evidence in early June. Later in the month, I suggested that Mr. Mack's testimony be taken. On approximately June 23, my Branch Chief, Robert Hanson, told me that it would be very difficult to obtain approval to take Mr. Mack's testimony because of his powerful political connections. Mr. Hanson later repeated the same

statements to me on several other occasions. Some are confirmed by e-mails. Assistant Director Kreitman participated in one of these discussions.

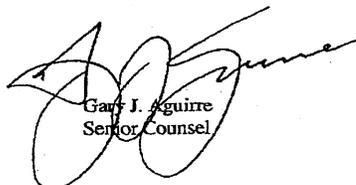
Other events also suggest the decision to take Mr. Mack's testimony has not been handled in the normal course. For example, I have issued approximately 100 subpoenas in this matter and all responsive documents came directly to me. When I served a subpoena on Morgan Stanley seeking documents relating to contacts between Messrs Mack and Samberg, its counsel did not initially send them to me. Rather, she first sent them to Linda Thomsen. Likewise, Morgan Stanley's counsel, Mary Jo White, bypassed the normal protocol of dealing with the staff attorney. Instead, she dealt directly with Ms. Thomsen by correspondence and phone. Of hundreds of contacts with defense counsel, this is the first time any defense counsel began discussions at the top of the chain of command. Further, at the same time, my supervisors excluded me from the discussions involving Mr. Mack.

To avoid any misunderstanding, from late June through late August, I sent multiple e-mails to my Branch Chief Robert Hanson, Assistant Director Mark Kreitman, and Associate Director Paul Berger, as well as a brief e-mail to Linda Thomsen, expressing my concerns. I had no success in obtaining their approval to take Mr. Mack's testimony. Instead, they fired me. Immediately prior to the Mack controversy arising, my Branch Chief and Assistant Director congratulated me for the excellent job I was doing in this investigation. Indeed, Mr. Kreitman gave what he called his highest "Perry Mason award" in mid-June.

I bring these facts to your attention in hopes that you will take whatever steps are appropriate to put this investigation back on track, consistent with the Commission's mission.

I must add that other improper motives also led to my termination, but there is no productive reason to discuss them here.

Sincerely,



Gary J. Aguirre
Senior Counsel

CC: Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth
(By fax and Regular Mail)

CHARLES E. GRASSLEY, IOWA, CHAIRMAN
 ORRIN G. HATCH, UTAH
 TRENT LOTT, MISSISSIPPI
 OLYMPIA J. SNOWE, MAINE
 JON KYL, ARIZONA
 CRAIG THOMAS, WYOMING
 RICK SANTORUM, PENNSYLVANIA
 BILL FRIST, TENNESSEE
 GORDON SMITH, OREGON
 JIM BUNNING, KENTUCKY
 MIKE CRAPO, IDAHO

MAX BAUCUS, MONTANA
 JOHN D. ROCKEFELLER IV, WEST VIRGINIA
 KENT CONRAD, NORTH DAKOTA
 JAMES M. JEFFORDS III, VERMONT
 JEFF BLINGAMAN, NEW MEXICO
 JOHN F. KERRY, MASSACHUSETTS
 BLANCHE L. LIKOLN, ARKANSAS
 RON WYDEN, OREGON
 CHARLES E. SCHUMER, NEW YORK

KOLAN DAVIS, STAFF DIRECTOR AND CHIEF COUNSEL
 RUSSELL SULLIVAN, DEMOCRATIC STAFF DIRECTOR

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

May 12, 2006

Via Electronic Transmission

The Honorable Walter Stachnik
 Office of Inspector General
 Securities and Exchange Commission
 100 F Street, NE
 Washington, DC 20549-2736

Dear Inspector General Stachnik:

I am conducting a preliminary review of various allegations brought to my attention by Gary Aguirre, former Senior Counsel to the Securities and Exchange Commission (SEC), Enforcement Division.

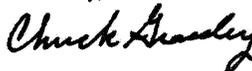
More specifically, my staff recently received information regarding an SEC investigation into the trading of securities by a large national hedge fund, Pequot Capital Management (PCM). According to the allegations, this investigation was abruptly halted and all further inquiries into the matter were suspended indefinitely. Supporting these concerns is the attached letter which was sent to Chairman Christopher Cox in September 2005, outlining the resources expended thus far in conducting this investigation. Moreover, Mr. Aguirre alleged that his employment was improperly terminated for raising the concerns expressed in his letter internally.

In response to a previous request for a briefing, my office was advised last week by the SEC Enforcement Division that you completed a review of both the personnel matters and insider trading allegations brought to our attention by Mr. Aguirre. Accordingly, we request that you provide a briefing as soon as possible regarding any inquiries conducted by your office related to Mr. Aguirre's underlying allegations, the termination of his employment, and/or PCM. Prior to the briefing, please provide copies of any related investigative reports or closing memoranda.

My staff will be contacting yours today to schedule a mutually agreeable time for the briefing. Any questions or concerns should be directed to Emilia DiSanto or Nick Podsiadly at (202) 224-4515.

Thank you in advance for your cooperation in this important matter.

Sincerely,



Charles E. Grassley
 Chairman



OFFICE OF THE
INSPECTOR GENERAL

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

July 20, 2006

The Honorable Charles E. Grassley
Chairman
United States Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510-6200

Dear Chairman Grassley:

As was discussed with your staff members yesterday, July 19, 2006, the Office of Inspector General of the U.S. Securities and Exchange Commission (SEC) is requesting copies of documents in the possession of the Senate Finance Committee pertaining to allegations made by former SEC attorney Gary Aguirre. In particular, we are requesting copies of the following materials:

- a. Mr. Aguirre's 42-page sworn statement outlining his allegations, with 46 supporting exhibits, that he provided to the Senate Banking Committee;
- b. E-mails relevant to Mr. Aguirre's allegations, including but not limited to an August 24, 2005 e-mail previously referenced by your staff;
- c. Documentation of any awards Mr. Aguirre received while employed at the SEC;
- d. Notes and/or memoranda of all interviews conducted by the Committee staff regarding Mr. Aguirre's allegations; and
- e. Any additional relevant evidence in the Committee's possession.

We are also requesting that you provide us with the identity of certain individuals your staff previously mentioned as being relevant to their investigation. My staff provided your staff with specific requests for this information on July 19, 2006.

We are making these requests in connection with an ongoing Inspector General investigation into Mr. Aguirre's allegations. As we previously informed your staff, all Inspector General investigations are non-public, and the fact that we are conducting an investigation should not be disclosed outside the Senate.

The Honorable Charles E. Grassley
July 20, 2006
Page 2

Thank you for your prompt attention to our requests.

Sincerely,

A handwritten signature in black ink that reads "Walter Stachnik". The signature is written in a cursive style with a large, looping "W" and "S".

Walter Stachnik
Inspector General

cc: Jason A. Foster
Emilia DiSanto
Nick Podsiadly
Mark Oesterle
Joe Cwiklinski

United States Senate
WASHINGTON, DC 20510

August 2, 2006

Via Electronic Transmission

The Honorable Christopher Cox
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Cox:

As members of the United States Senate, and as Chairman of the Committee on Finance and Chairman of the Committee on the Judiciary, we write today continuing our oversight of matters related to the Enforcement Division of the Securities and Exchange Commission (SEC).

On April 17, 2006, Senator Grassley and Senator Shelby wrote to you regarding allegations that an investigation of insider trading by the hedge fund Pequot Capital Management (PCM) had been suspended for political reasons. In response to that letter, Linda Thomsen met with Finance Committee staff and provided a confidential briefing on May 3, 2006, regarding the status of ongoing investigations. During this briefing, SEC staff cited a SEC policy which restricts discussion of active, ongoing investigations. SEC staff indicated that the matter had been referred to the Office of the Inspector General (SEC/OIG) and that SEC/OIG conducted a complete and thorough review and had subsequently closed the case.

Shortly thereafter, Senator Grassley's Finance Committee Staff met with the SEC/OIG and requested a copy of the SEC/OIG's closeout memorandum. At a third meeting, held at SEC headquarters on June 15, 2006, SEC/OIG allowed Finance Committee staff to see the final six page closeout memorandum prepared by SEC/OIG, however Finance Committee staff was not allowed to retain a copy. Finance Committee staff also viewed an additional two page summary memorandum describing the SEC Enforcement Divisions actions to-date, which was prepared by an SEC staff member at the Commission's request.

Further oversight of this matter continued on June 28, 2006, when Senator Specter held a Judiciary Committee hearing entitled "Hedge Funds and Independent Analysts: How Independent are Their Relationships?" At the hearing, Mr. Gary Aguirre, a former SEC attorney, testified regarding experience working on the PCM matter at SEC, and his alleged termination for objecting to the SEC's failure to aggressively pursue the case. Following the Judiciary Committee hearing, our staffs began working together to better understand the Enforcement Division and procedures at the SEC for investigating and prosecuting violations of the federal securities laws.

Despite the SEC's cooperation thus far, many questions regarding the handling of the PCM matter remain unanswered. For example, the quality of the SEC/OIG investigation and the SEC summary memoranda are of particular concern. Both reviews were troubling for numerous reasons, including but not limited to the following:

- (1) Mr. Aguirre, the complainant, was never interviewed by either SEC staff or that of the SEC/OIG,
- (2) SEC and SEC/OIG staff were seemingly unaware of the existence of certain material documents,
- (3) The SEC and SEC/OIG were seemingly unaware of one or more meetings that were material to the investigation, and,
- (4) SEC and SEC/OIG accounts of certain events were inconsistent, incomplete, and contradicted by documentary evidence.

Accordingly, we hereby request that the SEC produce the following documents and information to facilitate our ongoing review of this matter:

- (1) All documents created by SEC or SEC/OIG staff related to the investigation of Pequot Capital Management (PCM) including but not limited to all communications or records of communications in any form, such as email, sent or received by any of the following individuals:
 - a. Gary Aguirre
 - b. Eric Ribelin
 - c. Mark Kreitman
 - d. Robert Hanson
 - e. Linda Thomsen
 - f. Paul Berger
 - g. Joseph Cella
 - h. James Eichner
- (2) All documents related to the termination of the employment of Mr. Gary Aguirre including but not limited all communications in any form, such as email sent or received by any of the above named individuals.

These requests include, but are not limited to, the following records:

- a. The full employment personnel file of Mr. Gary Aguirre, both formal and informal.
- b. All documents, communications, or records of communications, in any form, such as email, sent or received by Linda Thomsen or Mary Jo White that relate to Gary Aguirre, John Mack, Pequot Capital Management, or Morgan Stanley.

- c. The SEC/OIG Closing Memorandum (file # OIG-431), prepared by Ms. Kelly J. Andrews, Associate Counsel to Inspector General.
- d. The memorandum presented to Finance Committee Staff on June 15, 2006 prepared by Mr. Walter Ricciardi, Deputy Director, Division of Enforcement.
- e. All communications or records of communications in any form, such as email, sent or received by any representative of the SEC or Mr. Arthur Samberg, or any designated representative of Mr. Samberg.
- f. All communications or records of communications in any form such as email, sent or received by SEC or SEC/OIG staff regarding Congressional inquiries related to Mr. Gary Aguirre.

Additionally, we request that you make the following SEC staff members available for interviews:

- (1) Mark Kreitman
- (2) Robert Hanson
- (3) Linda Thomsen
- (4) Eric Ribelin
- (5) Joseph Cella
- (6) James Eichner

Please advise the aforementioned individuals that they have the right to speak directly and independently to Congress, or to a Committee of Congress, without interference from the SEC if they wish, in accordance with 5 U.S.C. § 7211. Retaliation against these individuals, or any other SEC employees, who communicate with Congress in reference to this matter, or any other, will not be tolerated. Such conduct is further punishable by 18 U.S.C. § 1505 and false statements and perjury are likewise punishable pursuant to 18 U.S.C. § 1001. Further, under 5 U.S.C. § 2302(b)(8), a federal employee authorized to take any personnel action may not take any personnel action against an employee because of protected whistleblowing.

Please also note that P.L. 109-115 enunciates a government-wide prohibition on the use of appropriated funds to pay the salary of any federal official who prohibits or threatens to prevent a federal employee from communicating with Congress, regardless of whether the employee or Congress initiated the contact.

We respectfully request that all SEC employees involved directly or indirectly with this matter be immediately provided with a copy of this letter to inform them of their right to speak and to cooperate with Congress. All SEC employees should be informed that no documents, records, data or information related, directly or indirectly, to this matter shall be destroyed, modified, removed or otherwise made inaccessible to Congress. Further, if any SEC employee believes that they have been subject to

retaliation for meeting with Congressional staff and/or for anything associated with the ongoing investigation of this matter, the employee should contact our staffs immediately.

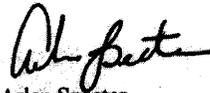
Finally, it has come to our attention that recently, both the SEC and the SEC/OIG have reopened investigations into this matter. Based upon our review of the SEC/OIG's previous investigation, we have serious concerns regarding whether SEC/OIG is capable of conducting a re-investigation worthy of any public confidence.

We thank you in advance for your continued cooperation as we review this important matter. Please have your staff coordinate with ours for delivery of the requested documents no later than close of business on August 15, 2006. Further, the individual contacting our staff should be prepared to schedule interviews with the requested SEC staff members. Any questions or concerns should be directed to Emilia DiSanto or Nick Podsiadly of Senator Grassley's staff at (202) 224-4515, or Harold Kim, Seema Singh or Hannibal Kemerer of Senator Specter's staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
United States Senator
Chairman, Committee on
Finance



Arlen Specter
United States Senator
Chairman, Committee on the
Judiciary

Enclosures

Cc: The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Annette L. Nazareth
The Honorable Kathleen L. Casey
The Honorable Walter Stachnik, Inspector General

GENERAL INSTRUCTIONS

1. Please note that, for purposes of responding to this document request, the term "document" should be interpreted in accordance with the general definitions attached to this letter.
2. In complying with this document request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. In addition, produce documents that you have a legal right to obtain, documents that you have a right to copy or have access to, and documents that you have placed in the temporary possession, custody, or control of any third party.
3. No documents, records, data or information requested by the Committees shall be destroyed, modified, removed or otherwise made inaccessible to the Committee.
4. If the document request cannot be complied with in full, it shall be complied with to the extent possible, which shall include an explanation of why full compliance is not possible.
5. In complying with this document request, respond to each enumerated request by repeating the enumerated request and identifying the responsive document(s).
6. In the event that a document is withheld on the basis of privilege, provide the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
7. Each document produced shall be produced in a form that renders the document susceptible of copying.
8. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same document.
9. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, or control.
10. This request is continuing in nature. Any document, record, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon location or discovery subsequent thereto.

All documents shall be Bates stamped sequentially and produced sequentially.

GENERAL DEFINITIONS

1. The term "Securities and Exchange Commission" or "SEC" means the United States Securities and Exchange Commission as defined in 15 U.S.C § 78d, the Commission, the Commissioners, any staff member, including but not limited to, officers, attorneys, economists, examiners, and any other employee or contract employee of the Commission.
2. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to the following: memoranda, reports, statistical or analytical reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra office communications, electronic mail (E-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, discs, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disc, or videotape. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
3. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape

recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.

4. The terms "relate," "related," "relating," or "regarding" as to any given subject means anything that discusses, concerns, reflects, constitutes, contains, embodies, identifies, deals with, or is any manner whatsoever pertinent to that subject, including but not limited to documents concerning the preparation of other documents.
5. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this document request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa to bring within the scope of this document request any information which might otherwise be construed to be outside its scope. The masculine includes the feminine and neuter genders to bring within the scope of this document request any information that might otherwise be construed to be outside its scope.
6. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, written, electronic, by document or otherwise, and whether face to face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise. Documents that typically reflect a "communication" include handwritten notes, telephone memoranda slips, daily appointment books and diaries, bills, checks, correspondence and memoranda, and includes all drafts of such documents.

CHRISTOPHER COX
CHAIRMAN

HEADQUARTERS
100 F STREET, NE
WASHINGTON, DC 20549



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

REGIONAL OFFICES
NEW YORK, CHICAGO,
LOS ANGELES, DENVER, MIAMI
DISTRICT OFFICES
BOSTON, PHILADELPHIA, ATLANTA,
FORT WORTH, SALT LAKE CITY,
SAN FRANCISCO

August 4, 2006

The Honorable Charles E. Grassley
Chairman
Committee on Finance
United States Senate
Washington, DC 20510-6200

Dear Chairman Grassley:

Thank you for your letter of August 2, 2006 concerning your oversight of matters related to the Enforcement Division of the Securities and Exchange Commission, and in particular allegations raised by a former SEC attorney concerning the agency's investigation of insider trading at Pequot Capital Management and his termination by the SEC allegedly in connection therewith.

As we have done since the initial April 17, 2006 request from you and Senator Shelby, we will of course be pleased to continue this agency's cooperation with your most recent investigative requests. In addition, at the request of the Senate Committee on Banking, Housing, and Urban Affairs, we will contemporaneously provide our responses to all such requests to that committee.

To this end, I have directed Mr. Richard Humes, Associate General Counsel, to respond promptly and in detail to your requests. Mr. Humes is the senior SEC official in the Office of the General Counsel who is not recused pursuant to government ethics rules or prudentially precluded from participation in these matters. As a result, Mr. Humes will be responsible for directing on a regular basis the agency's continuing cooperation with your review.

As you requested, the Commission staff will coordinate with your respective staffs concerning the production of documents and your interviews of designated Commission personnel. In the meantime, please feel free to directly contact Mr. Humes with respect to any and all aspects of your investigation at (202) 551-5140.

Sincerely,
Handwritten signature of Christopher Cox in cursive.

Christopher Cox
Chairman

cc: The Honorable Richard Shelby
Chairman, Committee on Banking, Housing, and Urban Affairs

CHAIRMANOFFICE@SEC.GOV
WWW.SEC.GOV



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

August 9, 2006

Via Facsimile

Nick Podsiadly
Counsel
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, DC 20510-6200

Re: Pequot Capital Management

Dear Mr. Podsiadly:

I am writing to follow-up on our conversation this morning regarding Senators Grassley and Specter's August 2, 2006 letter to Chairman Christopher Cox. As I stated in our conversation, because the Commission's investigation of Pequot Capital Management is active and ongoing, I cannot provide any documents or other information without Commission authorization. We will seek to present this matter to the Commission on August 29, 2006, which is the first available meeting where we can do so.

We also discussed potential problems associated with providing information and documents regarding ongoing investigations, and I referred to Commission rules that restrict employees from disclosing information from ongoing investigations without appropriate approval. The relevant rules provide as follows:

Information or documents obtained by the Commission in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public, but the Commission approves the practice whereby officials of the Divisions of Enforcement, Corporation Finance, Market Regulation and Investment Management and the Office of International Affairs at the level of Assistant Director or higher, and officials in Regional Offices at the level of Assistant Regional Director or District Administrator or higher, may engage in and may authorize members of the Commission's staff to engage in discussions with persons identified in § 240.24c-1(b) of this chapter concerning information obtained in individual investigations or examinations, including formal

Nick Podsiadly
August 9, 2006
Page 2

investigations conducted pursuant to Commission order. 17 CFR 203.2.¹

Unless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public. (17 CFR 203.5)

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 8(e) or 20(a) (48 Stat. 80, 86; 15 U.S.C. 77h(e), 77t(a)) shall, unless made a matter of public record, be deemed confidential. Except as provided by 17 CFR 203.2, officers and employees are hereby prohibited from making such confidential information or documents or any other non-public records of the Commission available to anyone other than a member, officer or employee of the Commission, unless the Commission or the General Counsel, pursuant to delegated authority, authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. . . . (17 CFR 230.122)

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 17(a) (48 Stat. 897, section 4, 49 Stat. 1379; 15 U.S.C. 78q(a)) or 21(a) (48 Stat. 899; 15 U.S.C. 78u(a)) shall, unless made a matter of public record, be deemed confidential. Except as provided by 17 CFR 203.2, officers and employees are hereby prohibited from making such confidential information or documents or any other non-public records of the Commission available to anyone other than a member, officer or employee of the Commission, unless the Commission or the

¹ Section 240.24c-1 provides in relevant part:

(b) The Commission may, in its discretion and upon a showing that such information is needed, provide nonpublic information in its possession to any of the following persons if the person receiving such nonpublic information provides such assurances of confidentiality as the Commission deems appropriate:

(1) A federal, state, local or foreign government or any political subdivision, authority, agency or instrumentality of such government;

(c) Nothing contained in this section shall affect:

(1) The Commission's authority or discretion to provide or refuse to provide access to, or copies of, nonpublic information in its possession in accordance with such other authority or discretion as the Commission possesses by statute, rule or regulation

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Nick Podsiadly
August 9, 2006
Page 3

General Counsel, pursuant to delegated authority, authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. . . . (17 CFR 240.0-4)

I also promised to provide the citation to the *Wheeling Pittsburgh* case which raises the prospect that contacts about the investigation between the Commission and Congress, including contacts regarding whom the Commission should subpoena and when, could be viewed as unduly prejudicial to the subject of an investigation, raise questions about the independence of the Commission's enforcement process, or otherwise jeopardize any Commission enforcement actions that may result from this investigation. See *Securities and Exchange Commission v. Wheeling-Pittsburgh Steel Corp.*, 482 F. Supp. 555 (W.D. Pa. 1979), *vacated and remanded on other grounds*, 648 F.2d 118 (3d Cir. 1981).

We appreciate the Committees' interest in this matter and look forward to working with you on these issues.

Sincerely,



Richard M. Humes
Associate General Counsel

cc: Jason Foster, Senate Committee on Finance
Emilia DiSanto, Senate Committee on Finance
Harold Kim, Senate Committee on the Judiciary
Justin Daly, Senate Committee on Banking, Housing, and Urban Affairs

08/09/2006 5:18PM

CHARLES E. GRASSLEY, IOWA, CHAIRMAN
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 CHARLES E. SCHUMER, NEW YORK

KOLAN DAVIS, STAFF DIRECTOR AND CHIEF COUNSEL
 RUSSELL SULLIVAN, DEMOCRATIC STAFF DIRECTOR

United States Senate
 COMMITTEE ON FINANCE
 WASHINGTON, DC 20510-6200

August 21, 2006

Via Electronic Transmission

The Honorable Christopher Cox
 Chairman
 U.S. Securities and Exchange Commission
 100 F Street, NE
 Washington, DC 20549

Dear Chairman Cox:

On August 2, 2006, Senator Specter and I sent a formal request for documents and information from the Securities and Exchange Commission (SEC) regarding events surrounding the investigation of the hedge fund Pequot Capital Management (PCM) and allegations that this investigation was suspended for political reasons. By letter dated August 4, 2006, you pledged your continued cooperation with this Congressional inquiry and appointed Richard Humes, Associate General Counsel at the SEC as our point of contact for continued inquiries into this matter. Pursuant to your letter, members of my staff contacted Mr. Humes on August 9, 2006, to discuss the request for production of documents and the scheduling of interviews with requested staff members.

During the conversation between Humes and my staff a number of issues were discussed, including the timeframe for the requested documents and interviews. Mr. Humes informed my staff that SEC policy required full commission approval before any documents can be disclosed or any interviews scheduled and that the earliest this would be possible is the date of the next scheduled SEC meeting, August 29, 2006. Mr. Humes reiterated this position in a letter dated August 9, 2006, memorializing the conversation held between our staffs. While I am pleased with the prompt initial response from SEC, I have serious concerns about indications that the SEC plans to impose unnecessary delays on Congress' ability to get to the bottom of this important matter.

In my view, Congress' ability to obtain information in a timely manner should not be hindered by the arbitrary calendar of pre-scheduled SEC meetings. Therefore, I request that you use whatever procedures are necessary to obtain whatever authorization is necessary between scheduled meetings in order to comply with our requests. In particular, the Commission has already authorized SEC staff to make two documents available for staff review: (1) the SEC/IG's closing memorandum in the Aguirre matter, and (2) a two-page summary memorandum regarding the status of the underlying

investigation Aguirre alleges was halted for political reasons. My staff and Judiciary Committee staff have reviewed these documents at SEC, but were not allowed to retain copies. I request that the SEC provide copies of these two documents immediately so that Senator Specter and I may review them personally and so that staff may use them to prepare for witness interviews.

Additionally, I am concerned about the position taken by your staff that SEC regulations prohibit employees from “disclosing” information about ongoing investigations. These investigations (both the underlying PCM matter as well as the IG’s inquiry into Aguirre’s firing) were closed or inactive at the time Congress started its inquiry. Re-opening these investigations after Congress begins to ask questions and then citing the fact that they are active as a pretext to deny or delay Congressional requests is unacceptable. It gives the appearance of a sort of gamesmanship that would be inconsistent with your previous pledges of full cooperation. While SEC regulations state that any non-public information shall not be “disclosed,” the regulations also clearly allow for the Commission to, “provide nonpublic information in its possession to any of the following persons if the person receiving such nonpublic information provides such assurances of confidentiality as the Commission deems appropriate.”¹ Further, this regulation provides for the disclosure of nonpublic information if the “person” requesting the information is “a federal, state, local or foreign government.”²

As a Constitutional body of the federal government, the United States Senate, Committees of the Senate, and members of the Senate clearly fall within the definition provided in 17 CFR § 240.24c-1(b)(1) of the SEC regulations. Moreover, Senate rule XXIX recognizes procedures for the review of confidential, nonpublic documents by the Senate and Committees thereof. Regardless of how these regulations might be interpreted, longstanding Constitutional precedent clearly establish that independent agency regulations cannot prohibit the disclosure of information to the United States Senate acting pursuant to its oversight responsibilities. In fact, even in the context where there is a statutory prohibition on public disclosure, unless it explicitly refers to Congress “courts have consistently held that agencies and private parties may not deny Congress access to such information on the basis of such provisions.”³ In other words, “Release to a congressional requestor is not deemed to be disclosure to the public generally.”⁴

Another of my concerns with the response from SEC’s Office of the General Counsel is its citation of *Securities and Exchange Commission v. Wheeling-Pittsburgh Steel Corp.*⁵ SEC has cited *Wheeling-Pittsburgh* in response to the letter sent by Senator Specter and me to highlight concerns at the SEC that defense counsel for potential targets of SEC enforcement actions may try to argue that compliance with legitimate Congressional oversight requests are evidence of improper political influence on the SEC investigation.

¹ 17 C.F.R. § 240.24c-1 (2006)

² *Id.*

³ Congressional Research Service, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, p. 21 (citing *F.T.C. v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970, (D.C. Cir. 1980); *Exxon Corp. v. F.T.C.*, 589 F.2d 582, 585-86 (D.C. Cir. 1978), *cert denied*, 441 U.S. 943 (1979); *Ashland Oil Co., Inc. v. F.T.C.* 548 F.2d 977, 979 (D.C. Cir. 1976)).

⁴ *Id.*

⁵ 482 F. Supp. 555(W.D. Pa 1979), *vacated and remanded on other grounds*, 648 F.2d 118 (3d Cir. 1981).

Raising this case is ironic, given that the focus of our inquiry is whether the SEC allowed political influence to derail its investigation in the first place. If the SEC were genuinely interested in protecting its Enforcement Division from improper political influence, one would have expected its Inspector General to conduct a more thorough investigation of Aguirre's allegation that he was prevented from taking the testimony of John Mack because of Mack's "political clout." Instead, the IG closed its inquiry, claiming it found no evidence that SEC officials had referenced Mack's political clout. Contrary to the IG report, however, documentary evidence of such statements exists and corroborates Aguirre's claims.

Senator Specter and I share your goal of ensuring that ongoing enforcement actions are free from political influence. In fact, that is the very purpose of our inquiry. As such, it is nothing like the *Wheeling* case, in which a Senator used his position on behalf of one company by pressuring the SEC to investigate one its competitors. Rather than an attempt to exert improper political influence on an investigation, this inquiry is the opposite: an attempt to investigate allegations of improper influence. If you are aware of any evidence that the Congressional interest in this matter is motivated by anything other than a legitimate exercise of our Constitutional oversight responsibilities, please let us know what it is. Otherwise, the SEC must refrain from implying that we have an improper purpose by citations to cases like *Wheeling*.

I thank you in advance for your continued cooperation as we review this important matter. Our request letter originally asked that production begin by August 15, 2006. That has not occurred. Accordingly, please have your staff coordinate as soon as possible to ensure that you can expedite the production of documents and witnesses. The individual contacting our staff should be prepared to schedule interviews with the requested SEC staff members. Any questions or concerns should be directed to Emilia DiSanto, Nick Podsiadly, or Jason Foster of my staff at (202) 224-4515.

Sincerely,



Charles E. Grassley
Chairman

Cc: The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Annette L. Nazareth
The Honorable Kathleen L. Casey
The Honorable Walter Stachnik, Inspector General

Senator Arlen Specter, Chairman, Senate Committee on the Judiciary

08/22/06 17:37 FAX

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OFFICE OF THE
GENERAL COUNSEL
 UNITED STATES
 SECURITIES AND EXCHANGE COMMISSION
 WASHINGTON, D.C. 20548

August 22, 2006

Via Facsimile

Nick Podsiadly
 Counsel
 Committee on Finance
 U.S. Senate
 219 Dirksen Senate Office Building
 Washington, D.C. 20510-6200

Re: Pequot Capital Management

Dear Mr. Podsiadly:

I am writing to confirm our discussions of earlier today regarding Senator Grassley's August 21, 2006 letter to Chairman Cox concerning the pending request for information related to the Securities and Exchange Commission's ongoing investigation involving Pequot Capital Management (PCM). At the outset, I wish to reaffirm our intention to respond promptly and in detail to this inquiry.

In my August 9, 2006 letter to you, I noted the various Commission rules that restrict the ability of staff members to disclose information from ongoing investigations. As a member of the Commission's staff, I am subject to those limitations. You will note that one provision I cited, and that was also quoted in Senator Grassley's letter, provides that "the Commission" may authorize the staff to disclose information from ongoing investigations. Accordingly, as I mentioned in my letter of August 9, 2006, I arranged for this matter to be heard at the Commission's August 29, 2006 meeting, which is the first meeting where I could present this matter. Senator Grassley's letter urges us to use other procedures to have this matter decided by the Commission at an earlier date. As I indicated in our conversation, while the Commission does have duty officer and seriatim procedures, in my view, those procedures are not appropriate for this matter because they do not provide for joint deliberations among the Commissioners.

Senator Grassley's letter also requests that we make available immediately: (1) the SEC/IG's closing memorandum in the Aguirre matter; and (2) a two-page summary memorandum regarding the status of the investigation involving PCM. When those documents were shared with the Senate staff in June, it was pursuant to specific Commission authorization as to the manner in which the documents could be reviewed. Thus, I have to obtain prior Commission

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approval to release those documents without observing those protocols. However, I assured you that this matter will be addressed at the August 29th Commission meeting.

We also discussed the scheduling of Commission staff members for interviews pending Commission consideration of this matter. I stated that we would contact the individual staff members regarding their availability and develop a tentative schedule and contact you on Monday August 28th to discuss timing.

Once again, we look forward to helping to assure your Committees and the public as to the integrity of the Commission's investigative process.

Sincerely,



Richard M. Humes
Associate General Counsel

cc: Jason Foster, Senate Committee on Finance
Emilia DiSanto, Senate Committee on Finance
Harold Kim, Senate Committee on the Judiciary
Justin Daly, Senate Committee on Banking, Housing, and Urban Affairs

CHARLES E. GRASSLEY, IOWA, CHAIRMAN
 ORRIN G. HATCH, UTAH
 TRENT LOTT, MISSISSIPPI
 OLYMPIA J. SNOWE, MAINE
 JON KYL, ARIZONA
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KOLAN DAVIS, STAFF DIRECTOR AND CHIEF COUNSEL
 RUSSELL SULLIVAN, DEMOCRATIC STAFF DIRECTOR

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

August 24, 2006

Via Electronic Transmission

The Honorable Christopher Cox
 Chairman
 U.S. Securities and Exchange Commission
 100 F Street, NE
 Washington, DC 20549

Dear Chairman Cox:

I am writing to ask that you designate another individual within the SEC to deal with my staff regarding the August 2, 2006, request for documents and interviews related to the allegations of former SEC attorney Gary Aguirre. After Chairman Specter and I sent that request, you designated SEC Associate General Counsel Richard Humes to coordinate with Senate staff on this inquiry, stating that he was "the senior SEC official...who is not recused pursuant to government ethics rules or prudentially precluded from participation in these matters."

As I continue to review the allegations, at least two major issues have arisen that preclude me from allowing my staff to continue to deal with Mr. Humes on these matters. First, Mr. Humes is mentioned in Mr. Aguirre's complaint filed with the Office of Special Counsel (OSC). While you may not be privy to that OSC complaint and may have been unaware of this fact, it nevertheless raises a conflict that is contrary to the assurances in your August 4, 2006, letter. Based upon this fact alone, I believe Mr. Humes should be recused from dealing with these matters on prudential grounds, and another contact should be appointed.

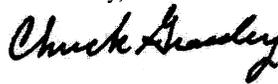
Second, Mr. Humes has repeatedly represented in telephone conversations that the first opportunity for the Commission to meet and authorize compliance with our requests would be August 29th. He reiterated this claim in a letter to my staff dated August 22nd. In fact, however, according to the Commission's website, a meeting was announced on August 18th to be held today, August 24th. Mr. Humes never advised my staff or Senator Specter's staff of this scheduled meeting even in the face of repeated inquiries about potential ways to begin complying with our requests before the Commission's August 29th meeting. If Mr. Humes had been candid and forthcoming—as I would have expected of someone representing you in a good faith effort to fully cooperate with our inquiry—then he would have mentioned today's SEC meeting and at least discussed the possibility of presenting our requests for information to the Commission at that time.

Additionally, it is my understanding that a number of individuals have officially recused themselves from this matter at the SEC. In order to ensure that we are not contacting

any individual who has recused himself please provide a list of all individuals that are recused and the stated reason for the recusal. I would appreciate this list as well as your response as soon as possible.

This inquiry has already been delayed substantially. Our original request for documents and witnesses was August 2nd, nearly a month ago. Therefore, I would appreciate a prompt written reply from you (as opposed to one from your staff), which addresses the concerns outlined above, as well as those outlined in my August 21st letter to you. Thank you for your continued cooperation on these important matters. Any questions or concerns should be directed to Nick Podsiadly or Jason Foster of my staff at (202) 224-4515.

Sincerely,

A handwritten signature in black ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley
Chairman

Cc: The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Annette L. Nazareth
The Honorable Kathleen L. Casey

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary

CHRISTOPHER COX
CHAIRMAN

HEADQUARTERS
100 F STREET, NE
WASHINGTON, DC 20549



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

REGIONAL OFFICES
NEW YORK, CHICAGO,
LOS ANGELES, DENVER, MIAMI

DISTRICT OFFICES
BOSTON, PHILADELPHIA, ATLANTA,
FORT WORTH, SALT LAKE CITY,
SAN FRANCISCO

August 24, 2006

The Honorable Charles E. Grassley
Chairman
Committee on Finance
United States Senate
219 Dirksen Senate Building
Washington, DC 20510

Dear Chairman Grassley:

Thank you for your letters of August 21, 2006, and of this evening, which came just now via e-mail fax. I had been traveling this past week and arrived back in the U.S. only this morning, but read press accounts in Europe of the August 21 letter, and so had already intended to respond immediately. In addition, I called immediately upon receiving your letter this evening, but your office was closed. I do look forward to talking with you at your earliest convenience.

As you properly noted in your letters, I have pledged the complete cooperation of the Securities and Exchange Commission with your committee's inquiry into the agency's investigation of alleged insider trading at a major hedge fund. We have made the same pledge of cooperation to the Committee on the Judiciary and the Committee on Banking, Housing, and Urban Affairs.

Your August 21 letter asks that, because Commission authorization is necessary to release documents or testimony to your committee pursuant to your request of August 2, 2006, we use emergency procedures for obtaining that authorization. The Commission earlier today completed such emergency action, as you requested.

On a separate matter, your letter of this evening states that you have instructed your staff not to deal with Richard Humes, the agency's Associate General Counsel, because you believe he should be recused. The letter also states that this view is based upon documents and information which the SEC may not possess. I have asked our Ethics Counsel to follow up with your staff immediately on this and the other recusal matters raised in that letter. In the meantime, since Mr. Humes is on a brief vacation in any event, Sam Forstein, Assistant General Counsel, will follow up with your staff on the further production of documents as well as the scheduling of interviews with relevant agency staff.

The Honorable Charles E. Grassley
August 24, 2006
Page 2

The SEC will continue to take every legally proper step to insure that the questions that have been posed about the integrity of the agency's investigation are fully answered to the satisfaction of the Congress and the investing public. The allegations of improper conduct in this matter are utterly inconsistent with the mission and professionalism of this agency – and as Chairman, I assure you that if they are proven true, the consequences will be swift and severe.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Cox", with a long horizontal flourish extending to the right.

Christopher Cox
Chairman

cc: Hon. Max Baucus
Chairman Arlen Specter
Hon. Patrick Leahy
Chairman Richard Shelby
Hon. Paul Sarbanes

United States Senate
WASHINGTON, DC 20510

August 28, 2006

Via Electronic Transmission

The Honorable Walter Stachnik
Inspector General
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-2736

Dear Inspector General Stachnik:

As part of our ongoing review of events surrounding the investigation of Pequot Capital Management (PCM), the termination of former Securities and Exchange Commission (SEC) Attorney Gary Aguirre, and the related investigation conducted by the Office of the Inspector General (SEC/OIG), we write today seeking clarification on a number questions.

On June 15, 2006, Finance Committee staff was allowed to review the closing memorandum for SEC/OIG file # OIG-431 dated November 29, 2005. On August 4, 2006, you met with both of us to discuss a number of issues including the reopening of your investigation into Mr. Aguirre's allegations. In this meeting you stated your willingness to cooperate with our investigation, as a matter of follow-up from that meeting, we request that you provide detailed, written responses to the following:

- (1) On what date did the SEC/OIG officially begin to review the allegations presented by Gary Aguirre? Please describe when and how the SEC/OIG first learned of Aguirre's allegation and what, if anything relevant occurred before SEC/OIG formally decided to investigate?
- (2) What was the nature and purpose of the SEC/OIG opening the investigation detailed in file # OIG-431?
- (3) What was the scope of the investigation into the allegations raised by Mr. Aguirre?
- (4) Why was the complainant, Gary Aguirre, not interviewed before closing the initial investigation?
- (5) How many staff members from the SEC/OIG were involved in conducting the investigation into file OIG-431? Please provide the name each individual involved in conducting the investigation as well as a detailed description of their involvement. (e.g. did they conduct interviews, take depositions, review documents...etc.).

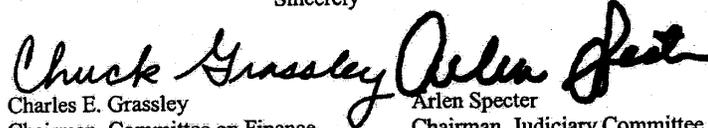
- (6) During the investigation, how many requests for documents, either official or unofficial, were issued by your office? How many documents were received by the SEC/OIG as a result of these requests? Please provide copies of any and all written document requests, a description of any oral requests, and an explanation of the extent, completeness, and timeliness of the response to each request.
- (7) How many individuals were interviewed by SEC/OIG regarding this matter prior to the issuance of the closing memorandum dated November 29, 2005?
 - a. Provide a list of all individuals interviewed and the dates on which they were interviewed.
 - b. Note when and where the interviews were conducted, who was present during the interviews, whether they were conducted in-person, whether they were sworn, and whether they were transcribed.
 - c. Provide any transcripts or notes taken by SEC/OIG staff during the course of the interviews.
 - d. Provide any summary memoranda created by SEC/OIG related to the interviews.
- (8) Please identify and describe in detail, including dates, any and all contacts between your office and the SEC Office of General Counsel (SEC/OGC) relating to the investigation.
- (9) On what date did the SEC/OIG officially re-open its review of the allegations presented by Gary Aguirre? Please describe when and how you decided to reopen the Aguirre investigation and what, if anything relevant, occurred before you decided to formally re-open it?
- (10) Please identify and describe in detail, including dates, any and all contacts your office had regarding the decision to re-open the investigation?
- (11) What is the nature and purpose of the newly re-opened investigation and how, if at all, does it differ from the nature and purpose of your first investigation?
- (12) Please explain the nature of your relationship with the SEC/OGC and your policies regarding sharing information about your ongoing inquiries with that office. For example, when you subpoena documents in the course of an investigation, does your office have any written policy that would prohibit sharing those documents with SEC/OGC? If so, what exceptions exist? If not, why not?
- (13) After re-opening your inquiry, you issued a subpoena to Gary Aguirre, which calls for records of his communications with Congress. Please

describe in more detail the purpose and scope of your current inquiry, explain why you are seeking such records, and clarify exactly how Aguirre's communications with Congress are relevant to that inquiry.

- (14) Is it possible that you might share any such documents with SEC/OGC or with potential witnesses before Congress has an opportunity to question those witnesses? If so, under what circumstances and for what purpose might you do so?

We thank you in advance for your prompt response addressing this matter no later than September 15, 2006. In responding to the questions please list the enumerated question followed by your response. Should you or your staff have any questions or concerns please contact Nick Podsiadly or Jason Foster of the Finance Committee staff at (202) 224-4515 or Harold Kim, Seema Singh or Hannibal Kemerer on the Judiciary Committee staff at (202) 224-5225.

Sincerely


Charles E. Grassley
Chairman, Committee on Finance

Arlen Specter
Chairman, Judiciary Committee

Cc: The Honorable Christopher Cox
The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Annette L. Nazareth
The Honorable Kathleen L. Casey



OFFICE OF THE
INSPECTOR GENERAL

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

By Hand Delivery

September 5, 2006

The Honorable Charles E. Grassley
Chairman
United States Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510-6200

The Honorable Arlen Specter
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairmen Grassley and Specter:

On August 28, 2006, the Office of Inspector General (OIG) provided you with numerous documents in response to your August 2, 2006 document request. As we told your Committees' staff last week, we have identified additional responsive documents that are described below and enclosed with this letter.

- 1) Additional e-mails, notes and other documents pertaining to the OIG closed investigation and related audit follow-up, Bates Stamp Nos. 000496-000554 and 000635-000652 (responsive to Items 1, 2, and b of the August 2, 2006 document request).¹
- 2) Additional e-mails pertaining to the suspension of Mr. Gary Aguirre's e-mail account, Bates Stamp Nos. 000555-000569 and 000592-000622 (responsive to Item 2 of the August 2, 2006 document request).
- 3) E-mails attaching or referencing press materials and Mr. Aguirre's testimony before the Senate Judiciary Committee, Bates Stamp Nos. 000570-000591 and 000623-000634 (responsive to Items 1 and 2 of the August 2, 2006 document request).

¹ We have redacted certain information on some of these documents that is unrelated to Mr. Aguirre's allegations.

The Honorable Charles E. Grassley and Arlen Specter
September 5, 2006
Page 2

- 4) Mr. Aguirre's December 30, 2005 Freedom of Information Act and Privacy Act request and a forwarding e-mail, Bates Stamp Nos. 000653-000658 (responsive to Item 2 of the August 2, 2006 document request).
- 5) An e-mail dated August 7, 2006, containing a document preservation notice pertaining to Commission investigation HO-9818 and Mr. Aguirre, Bates Stamp No. 000659 (responsive to Item 1 of the August 2, 2006 document request).
- 6) Additional e-mails received in the OIG's electronic mailbox from members of the public that mention the Pequot Capital Management insider trading investigation and/or Mr. Aguirre's termination, and related e-mails, Bates Stamp Nos. 000660-000720 (responsive to Items 1 and 2 of the August 2, 2006 document request).

After we responded to your document request on August 28, 2006, your staff requested a log describing each document withheld and the particular reason for withholding it. During a conference call on August 29, 2006, we told your staff that we could not provide a log for the documents contained in the OIG's open investigative file. As we explained in the call, providing such a log is inconsistent with the legal opinions recognizing the need to protect the confidentiality of open law enforcement investigations and would provide a road map of the OIG's ongoing investigation.

The other documents we have withheld reflect the internal deliberations of the OIG, the Commission and Commission staff and have been withheld for the reasons stated in our August 28, 2006 response.² The attachment describes the various categories of deliberative documents we have withheld and should assist your Committees in better understanding the deliberative nature of the withheld materials.

We would like to reiterate our understanding that, absent extraordinary circumstances, it is not the practice of Congressional Committees to make public disclosure of sensitive, non-public materials without prior consultation with the responsible agency. Because the materials being disclosed include sensitive, non-public information, we respectfully request that the Committees follow that practice in this instance. Consistent with this practice, we are also requesting that this letter and the attachment be kept non-public.

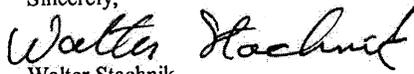
² We also have not provided copies of final correspondence between the OIG and your Committees because you already have this material.

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The Honorable Charles E. Grassley and Arlen Specter
September 5, 2006
Page 3

Please contact me if you have any questions or I can be of further assistance.

Sincerely,



Walter Stachnik
Inspector General

Attachment and Enclosures

cc: The Honorable Richard Shelby
The Honorable Chuck Hagel
The Honorable Paul S. Sarbanes
The Honorable Christopher J. Dodd

Categories of OIG Deliberative Documents Withheld

Drafts and outlines of correspondence and responses from the OIG to the Senate Finance and Judiciary Committees in response to their inquiries related to Gary Aguirre

E-mails and memoranda between and among the Inspector General and OIG staff pertaining to the OIG's response to the Senate Committees' inquiries related to Gary Aguirre

Internal OIG briefing documents prepared for meetings with the Senate Committee Chairmen and Committee staff related to Gary Aguirre

Internal OIG briefing document prepared for a meeting with the Office of the Chairman regarding Congressional inquiries related to Gary Aguirre

Notes prepared by OIG staff regarding meetings and telephone conversations with the Senate Committee Chairmen and Committee staff related to Gary Aguirre

E-mails between the Inspector General and OIG staff, and staff from the Office of General Counsel (OGC) and the Office of the Chairman regarding the OIG's response to the Senate Committee inquiries related to Gary Aguirre

Notes prepared by OIG staff regarding communications with staff from OGC, the Office of the Chairman and the Office of Legislative Affairs regarding the OIG's response to the Senate Committee inquiries related to Gary Aguirre

Three action memoranda and one supplemental action memorandum to the Commission requesting authorization to provide non-public Commission information to the Senate Committees, and draft action memoranda

E-mails and memoranda between the Inspector General and OIG staff, and staff from OGC, the Office of the Secretary, the Office of the Chairman, and the Offices of the Commissioners regarding the OIG's action memoranda and Commission executive sessions on the action memoranda

Notes and outlines prepared by the Inspector General and OIG staff regarding a Commission executive session on one of the OIG's action memoranda

Notes prepared by OIG staff regarding the OIG's response to press inquiries related to Gary Aguirre

E-mails between and among OIG staff regarding press articles and the OIG's response to press inquiries related to Gary Aguirre

E-mails between the Inspector General and the Office of Public Affairs and other Commission Divisions and Offices regarding responses to press inquiries related to Gary Aguirre

E-mails between OIG staff and Walter Ricciardi, Deputy Director, Division of Enforcement, regarding meeting with the Senate Finance Committee staff

Copies of the OIG closing memorandum in Case OIG-431 with proposed redactions

E-mails between OIG staff and staff from other federal agencies regarding the OIG's response to Senate Committee inquiries related to Gary Aguirre

Notes and summaries prepared by OIG staff of communications between OIG staff and staff from other federal agencies regarding the OIG's response to Senate Committee inquiries related to Gary Aguirre

E-mails and memoranda between OIG staff and staff from OGC and the FOIA/Privacy Act Office regarding responses to Gary Aguirre's FOIA request

Copies of e-mails from OGC forwarding the Congressional Committees' August 2, 2006 document request to various Commission employees and a list of the recipients

MICHAEL G. OXLEY, OH, CHAIRMAN
 JAMES A. LEACH, IA
 RICHARD H. BAKER, LA
 DEBORAH PRYCE, OH
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 JUDY BINGERT, IL
 CHRISTOPHER SHAYS, CT
 VITO FOSSELLA, NY

ROBERT U. FOSTER III
 Chief of Staff

U.S. House of Representatives
 Committee on Financial Services
 2129 Rayburn House Office Building
 Washington, DC 20515

September 7, 2006

BARNEY FRANK, MA, RANKING MEMBER
 PAUL E. KANJORSKI, PA
 MAXINE WATERS, CA
 CAROLYN B. MALONEY, NY
 LUIS V. GUTIERREZ, IL
 NYDIA M. VELAZQUEZ, NY
 MELVIN L. WATT, NC
 GRANT L. ACKERMAN, NY
 DARLENE HOOLEY, OR
 JULIA CARSON, IN
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 GREGORY W. MEERS, NY
 DENNIS MOORE, KS
 BARBARA LEE, CA
 MICHAEL E. CAPRIANO, MA
 HAROLD E. FORD, JR., TN
 RUBEN HINOJOSA, TX
 JOSEPH CROWLEY, NY

WHI LACT CLAY, MO
 STEVE ISRAEL, NY
 CAROLYN MCCARTHY, NY
 JOE BACA, CA
 JIM MATHESON, UT
 STEPHEN F. LYNCH, MA
 BRAD MILLER, NC
 DAVID SCOTT, GA
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 AL GREEN, TX
 EMANUEL CLEEVER, MO
 MELISSA L. BEAN, IL
 DEBBIE WASSERMAN
 SCHULTZ, FL
 OWEN MOORE, WI
 BERNARD SANDERS, VT

The Honorable Christopher Cox
 Chairman
 Securities and Exchange Commission
 100 F Street, N.E.
 Washington, D.C. 20549

Dear Chairman Cox:

The Committee is aware of investigations being conducted by Senator Charles Grassley as Chairman of the Committee on Finance and Senator Arlen Specter as Chairman of the Committee on the Judiciary concerning allegations made by former Securities and Exchange Commission enforcement attorney Gary J. Aguirre regarding his termination from the Commission. Mr. Aguirre recently briefed staff of the Committee on Financial Services on these allegations.

Although duplication of the Senate Committee investigations may not contribute to the timely resolution of this matter, the allegations should be promptly and thoroughly addressed. I, therefore, request that the Commission cooperate fully with these investigations in order to ensure a timely determination of the validity of Mr. Aguirre's claims. The Commission's cooperation will help to maintain confidence in the integrity of our capital markets by ensuring that the Commission's enforcement process is fair and unbiased.

Yours truly,

 Michael G. Oxley
 Chairman

United States Senate
WASHINGTON, DC 20510

September 8, 2006

Via Electronic Transmission

The Honorable Christopher Cox
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington DC 20549

Dear Chairman Cox:

We write to express our concern regarding the SEC's refusal to allow its employees to discuss certain subject areas with our staff in connection with the joint investigation currently being undertaken by our respective Committees into allegations of potential abuse of authority at SEC in the handling on an insider trading matter. While the SEC has provided our staff with access to requested witnesses, it has authorized them to speak only on subject matters that are narrower than the focus of our joint investigation. Specifically, each SEC witness who has appeared for an interview has declined to discuss facts or events that occurred *after* Mr. Gary Aguirre's termination on September 2, 2005. Of particular interest are the circumstances of the SEC's recent taking of Mr. John Mack's testimony, about which witnesses have not been allowed to testify. The record will reflect that the witnesses' failure to answer is attributed directly to a letter dated August 31, 2006 from the SEC's Office of the Secretary that each witness received last Friday morning (indeed, the very morning that the first SEC witness was scheduled to appear for an interview). The letter specifically proscribes their disclosures to us.

The SEC's unilateral limiting of information interferes with Congress' oversight authority and is contrary to your agreement to cooperate fully with our oversight efforts. We therefore, ask that you permit your witnesses to re-appear before both Committees with specific instructions to respond to all questions from staff. Moreover, we ask that you provide the following information that we have requested during the course of interviews conducted to date:

1. The Commission order limiting or authorizing limitation of the scope of witness testimony and/or document production in connection with the Senate Judiciary and Finance Committees' current investigation into potential abuse of authority at the SEC.
2. Resumes/CVs for all witnesses interviewed by both Committees.

3. An organization chart depicting the supervisory structure that Gary Aguirre worked under during his employment at SEC.
4. A list of all subpoenas issued in the Pequot insider trading investigation (both documentary and testimonial, including the date, identity of the individual who issued or signed the subpoena, and identity of recipient).
5. A list of all SEC employees/Commissioners who have recused themselves from the Pequot investigation.
6. A list of all SEC employees/Commissioners who have recused themselves in the Gary Aguirre matter and/or our investigation of his allegations.
7. Documents regarding any recusal guidance or training provided to SEC employees.
8. Any and all documents regarding Paul Berger's resignation from SEC.
9. Any and all documents regarding Paul Berger's recusal from the Pequot investigation.

We ask for your immediate action on our request to remove the existing impediments imposed by SEC on its witnesses' disclosures to us. We also ask for production of documents requested herein by no later than Wednesday, September 13, 2006.

Sincerely,



Arlen Specter
United States Senator
Chairman, Committee on the Judiciary



Charles E. Grassley
United States Senator
Chairman, Committee on Finance

CHARLES E. GRASSLEY, IOWA, CHAIRMAN
 ORRIN G. HATCH, UTAH
 TRENT LOTT, MISSISSIPPI
 OLYMPIA J. SNOWE, MAINE
 JON KYE, ARIZONA
 CRAIG THOMAS, WYOMING
 RICK SANTORUM, PENNSYLVANIA
 BILL FROST, TENNESSEE
 GORDON SMITH, OREGON
 JIM BUNNING, KENTUCKY
 MIKE CRAPO, IDAHO

MAX BAUCUS, MONTANA
 JOHN D. ROSSPELLER IV, WEST VIRGINIA
 KENT CONRAD, NORTH DAKOTA
 JAMES M. JEFFORDS III, VERMONT
 JEFF BINGAMANN, NEW MEXICO
 JOHN F. KERRY, MASSACHUSETTS
 BLAINE L. LINCOLN, ARKANSAS
 RON WYDEN, OREGON
 CHARLES E. SCHUMER, NEW YORK

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

KOLAN DAVIS, STAFF DIRECTOR AND CHIEF COUNSEL
 RUSSELL SULLIVAN, DEMOCRATIC STAFF DIRECTOR

September 18, 2006

Via Electronic Transmission

The Honorable Walter Stachnik
 Inspector General
 Securities and Exchange Commission
 100 F Street, NE
 Washington, DC 20549-2736

Dear Inspector General Stachnik:

Thank you for your letters of September 5 and September 11, 2006.

Rather than providing all documents responsive to the Finance and Judiciary Committees' August 2, 2006, request, I understand that you are declining to produce certain records. In response to requests for a privilege log describing which particular documents you have chosen to withhold and why, you have instead provided a list of general categories of responsive documents being withheld. With regard to most of the 19 categories of documents on your list, I am willing to delay for now consideration of whether those documents are being properly withheld.

However, three of the categories you specified need to be addressed immediately. They are:

- (1) "Three action memoranda and one supplemental action memorandum to the Commission requesting authorization to provide non-public Commission information to the Senate Committees, and draft action memoranda;"
- (2) "E-mails and memoranda between the Inspector General and OIG staff, and staff from OGC, the Office of the Secretary, the Office of the Chairman, and the Offices of the Commissioners regarding the OIG's action memoranda and Commission executive sessions on the action memoranda;" and
- (3) "E-mails and memoranda between OIG staff and staff from OGC and the FOIA/Privacy Act Office regarding responses to Gary Aguirre's FOIA request."¹

All responsive documents in these three categories should be produced to the Committees immediately. Without conceding that it is necessary or appropriate and only

¹ Since you may not be aware of the predicate for insisting on production of this category of documents, you should know that the Committees have received allegations from multiple sources that raise questions the integrity of the SEC's responses to FOIA requests generally. Therefore, we are attempting to determine, among other things, whether the SEC FOIA/Privacy Act office ever denies requests on the grounds that disclosure would prejudice an open case when, in fact, the case allegedly prejudiced is closed or inactive.

in good faith recognition of your concerns, I would be willing to accept copies of these documents with any internal advice redacted, so long as factual information contained in the documents remains readable.

I thank you in advance for your prompt response addressing this matter no later than September 22, 2006. Should you or your staff have any questions or concerns please contact Nick Podsiadly or Jason Foster of the Finance Committee staff at (202) 224-4515.

Sincerely

A handwritten signature in black ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley
Chairman

Cc: The Honorable Christopher Cox
The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Annette L. Nazareth

Senator Arlen Specter, Chairman
Senate Committee on the Judiciary

CHARLES E. GRASSLEY, IOWA, CHAIRMAN
 ORRIN G. HATCH, UTAH
 TREN'T LOTT, MISSISSIPPI
 OLYMPIA J. SNOWE, MAINE
 JON KYL, ARIZONA
 CRAIG THOMAS, WYOMING
 RICK SANTORUM, PENNSYLVANIA
 BILL FRIST, TENNESSEE
 GORDON SMITH, OREGON
 JIM BUNNING, KENTUCKY
 MIKE CRAPO, IDAHO

MAX BAUCUS, MONTANA
 JOHN D. ROCKEFELLER IV, WEST VIRGINIA
 KENT CONRAD, NORTH DAKOTA
 JAMES M. JEFFORDS III, VERMONT
 JEFF BINGAMAN, NEW MEXICO
 JOHN F. KERRY, MASSACHUSETTS
 BLANCHE L. LINCOLN, ARKANSAS
 RON WYDEN, OREGON
 CHARLES E. SCHUMER, NEW YORK

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

September 19, 2006

Via Electronic Transmission

The Honorable David M. Walker
 Comptroller General
 United States Government Accountability Office
 441 G Street, NW
 Washington, D.C. 20548

Dear Comptroller Walker:

As Chairman of the Committee on Finance (Committee) and a senior member of the United States Senate, I have a constitutional duty to conduct oversight into the activities of government agencies. Recently, I have received a number of allegations surrounding the activities of the Securities and Exchange Commission (SEC) and the Enforcement Division thereof. Upon initiating an investigation into these allegations, a number of further questions have arisen surrounding the role that the various market participants play in referring cases for review to the SEC through self-regulation.

Self-regulatory organizations (SROs) are exchanges and associations that operate markets—such as the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD)—that govern the securities markets subject to oversight by the SEC. Section 16(g) of the Securities Exchange Act of 1934 provides authority for various market participants to self regulate with oversight conducted by the SEC. At the time this system was created, Congress, regulators, and market participants recognized that this structure possessed inherent conflicts of interest due to the conflicting role of SROs as both market operators and regulators. This system of industry self-regulation with federal oversight, as opposed to federal regulation, was adopted to prevent excessive government involvement in market operations, potentially hindering competition and innovation. Also, Congress concluded that self-regulation with federal oversight would be more efficient and less costly to taxpayers.

This system of self-regulation via the SROs can function effectively, however, for it to do so, SEC must vigilantly ensure that SROs are fulfilling their regulatory responsibilities related to, among other things, member conduct, market activity, and trading practices, as proscribed in section 16(g). SEC must also have effective programs to deter and detect potential abuses of SRO authority arising from inherent conflicts of interest.

Accordingly, I request GAO to review the actions taken by SEC to ensure that SROs are enforcing member compliance with federal securities laws and preventing potential abuses of SRO authority as a result of conflicts of interest. Specifically, I ask that GAO examine:

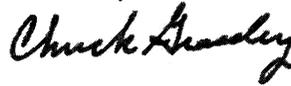
- (1) The structure of SEC's SRO inspection program. For example, frequency and duration of inspections, process for determining coverage of inspections, and level of resources dedicated to this function.
- (2) Compare the SRO inspection program with the approach used by banking regulators as part of their large bank examination program, particularly in areas such as examination planning, allocation of examination resources, ongoing monitoring, and communication of examination results.
- (3) A review of SEC's oversight of the SRO that addresses the following:
 - a. How does the SEC ensure that SROs vigorously oversee their own members as opposed to the outside public in transactions (e.g. Are referrals disproportionately of non-members of each SRO? Is there an inherent conflict with SROs referring members?).
 - b. How does the SEC ensure that the SROs maintain a wide net of referrals? For instance, do they cast a wider net on sell side transactions or buy side transactions?
 - c. How does the SEC ensure that SRO's are rigorous in catching aberrational trading that far predates a material announcement? Do the SROs focus only on the preceding few weeks of a material announcement, or do they scope a wider period of time?
 - d. How does the SEC ensure that SROs review potential repeat offenders?
 - e. Does the SEC ever inquire into the integrity and security of data maintained by the SROs? Is there adequate protection to ensure that influential individuals do not have access to SRO data that is non-public?
- (4) A review of how effectively the Office of Compliance Inspections and Examinations (CIE) coordinates with other SEC divisions, such as Market Regulation and Enforcement, in overseeing SRO activities.
- (5) Determine how well SEC measures the effectiveness of its oversight of SROs including an analysis of any enforcement actions taken by the SEC against any SROs pursuant to the SEC's authority in § 16(g)(2) of the Securities Exchange Act of 1934 (codified at 15 U.S.C. § 78s (2006)). In conducting this review please highlight what action, if any, SEC has taken against any SRO under the authority available under the Act.

In closing, I thank you for your cooperation in addressing my concerns regarding SROs. The American public relies upon these organizations to ensure that the trading of securities is efficient, equitable, and fair. Any failure by either the SROs or the SEC in failing to prevent violations or in failing to report them cannot be tolerated. Should you

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have any questions regarding this matter please contact Emilia DiSanto or Nick Podsiadly of my staff at 202-224-4515. Additionally, I ask that GAO keep my staff apprised of this matter as it is ongoing and request regular meetings and communications with my staff while conducting this review with the issuance of the final report no later than June 2007.

Sincerely,

A handwritten signature in black ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley
Chairman

CHARLES E. GRASSLEY, IOWA, CHAIRMAN
 ORRIN D. HATCH, UTAH
 TRENT LOTT, MISSISSIPPI
 OLYMPIA J. SNOWE, MAINE
 JEN SHYR, ARIZONA
 CRAIG THOMAS, WYOMING
 NICK SANTORUM, PENNSYLVANIA
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 RON WYDEN, OREGON
 CHARLES E. SCHUMER, NEW YORK

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

KOLAN DAVIS, STAFF DIRECTOR AND CHIEF COUNSEL
 RUSSELL SULLIVAN, DEMOCRATIC STAFF DIRECTOR

September 19, 2006

Via Electronic Transmission

The Honorable David M. Walker
 Comptroller General
 United States Government Accountability Office
 441 G Street, NW
 Washington, D.C. 20548

Dear Comptroller Walker:

The Securities and Exchange Commission (SEC) plays a critical role in helping to ensure the integrity of our financial markets and, by extension, capital formation and the health of the U.S. economy. The stated mission of the SEC is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." Based upon allegations I have received over the past few months, I have become increasingly concerned regarding the operations of the SEC, and whether the SEC is faithfully adhering to its mission. Accordingly, as Chairman of the Committee on Finance, I ask that you conduct a review regarding the operation of the Enforcement Division and the Office of Compliance, Inspection, and Examination (CIE)—including the district field offices—at SEC.

One of the most important authorities at SEC's disposal is bringing civil enforcement actions and administrative proceedings against individuals and companies who violate our securities laws and regulations. SEC's Enforcement Division and CIE, play vital roles in this process and must be adequately staffed with well-trained attorneys and support personnel and effectively managed. This includes having a well-established resource allocation process, regular coordination with other law enforcement agencies, and a system to prioritize cases to ensure that the most egregious violators are punished and serve as an example to deter others from similar offenses.

One area I am particularly concerned about is whether SEC is effectively managing the substantial increase in funds allocated to the Enforcement and CIE Divisions subsequent to the passage of the Sarbanes-Oxley Act in 2002. Without an independent evaluation, the Committee, Congress, and the public cannot be assured that SEC has taken all feasible steps to ensure the effective operation of the Enforcement and CIE Divisions and that additional resources are being used effectively.

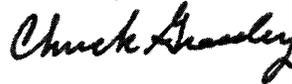
There are several issues that I believe should be included in the requested GAO evaluation of the SEC's Enforcement and CIE divisions. Specifically, GAO should address the following:

- The planning, oversight, control and other management processes within the Enforcement and CIE Divisions,

- The processes for initiating and tracking investigations, civil actions, and referrals to law enforcement, administrative tribunals and/or prosecuting bodies,
- The timeframes for completing investigations, civil actions, administrative proceedings, and the reasons thereof,
- An analysis of the different types of investigations, civil actions, and administrative proceedings, brought by the SEC,
- An analysis of SEC dockets and ongoing caseloads compared against the referrals made by Self-Regulatory Organizations (SRO's) to determine how many referred cases actually become part of a regulatory action,
- The reported success rate in initiated investigations, civil actions, administrative proceedings, as well as penalties obtained in those actions,
- The number of cases that result in a civil regulatory or administrative proceedings, but face no criminal action – with specific attention to cases under investigation past the criminal statute of limitations,
- The processes for determining allocations to investors under the Fair Fund provisions of Sarbanes-Oxley and distributions of related funds;
- A review of Enforcement Division-wide measures for assessing and evaluating performance of division personnel,
- A review of human capital performance (e.g. statistics on attorney, accountant, and other compliance personnel, vacancy fill rate, and workload issues), and
- A review of the coordination with other agency divisions and law enforcement authorities.

Thank you in advance for your attention to this important matter. Should you have any questions please contact Emilia DiSanto or Nick Podsiadly of my staff at (202) 224-4515. Additionally, I request that GAO keep my staff apprised as this matter is ongoing including meetings with GAO staff throughout the course of the project and request a final report no later than June 2007.

Sincerely,



Charles E. Grassley
Chairman

DEBEVOISE & PLIMPTON LLP

919 Third Avenue
New York, NY 10022
Tel 212 909 6000
Fax 212 909 6836
www.debevoise.com

October 2, 2006

BY FACSIMILE AND U.S. MAIL

Mr. Jason A. Foster
Investigative Counsel
Committee on Finance
United States Senate
219 Dirksen Building
Washington, DC 20510

Dear Jason:

I am writing to follow up on our conversation of Tuesday, September 26, 2006, regarding the documents you requested from Debevoise & Plimpton LLP. As you know from your recent interview of Mary Jo White, Debevoise represented Morgan Stanley & Co. during the period June 24-June 30, 2005, for the purpose of advising its Board of Directors in connection with their decision whether to offer the CEO position to John Mack. Debevoise did not represent Mr. Mack or any other party in connection with the SEC's investigation relating to Pequot.

On September 25, 2006, at the request of the staffs of the Finance Committee and Judiciary Committee, Ms. White, with the consent of Morgan Stanley, met with you to respond fully and completely to all questions the staff posed regarding the steps Debevoise took during that six-day period in June 2005, in particular, all contacts Ms. White had with the staff of the SEC, which we understand is the focus of the Committees' inquiry. Towards the end of the questioning, you asked whether Debevoise would provide a copy of the fax cover sheet Ms. White sent to the SEC on June 27, 2005, and a copy of the draft talking points she used to brief the Morgan Stanley Board. During our telephone conversation last week, you also asked whether Debevoise would provide not only the fax cover sheet, but the documents that were attached to it.

We understand that the SEC has previously or will shortly be producing to you the fax cover sheet and the documents that were attached to it. Since the SEC has an ongoing investigation, we believe it is more appropriate for you to obtain those documents directly from the SEC.

Mr. Jason A. Foster

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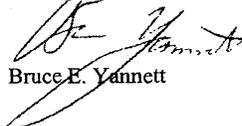
October 2, 2006

The draft talking points are attorney work product prepared by Debevoise lawyers for our internal purposes only on a confidential client representation. The document has not been provided to anyone outside the firm, including anyone at Morgan Stanley. The draft talking points cover not only Ms. White's conversations with the SEC, but also other matters that have no bearing on the conduct of the SEC. It is important to note that the draft talking points do not purport to set forth the exact language of the conversations with the SEC. As I also noted in our telephone call, Ms. White gave an oral report to the Board and would not have read the draft talking points verbatim at the Board meeting.

Nevertheless, in an effort to be responsive to your request, I read to you all portions of the draft talking points that address Ms. White's conversations with the SEC. But we respectfully decline to produce the draft talking points. While I recognize that it may have been cumbersome for you to take notes on those portions of the draft talking points, I believe that we have provided you with the factual information the Committee seeks. I would also be happy to re-read them to you or Mr. Podsiadly at your convenience.

Please feel free to contact me if you have any further questions or if Debevoise can be of further assistance to the Committee.

Sincerely yours,



Bruce E. Yarnett

cc: Harold H. Kim
Chief Civil Counsel
Committee on the Judiciary
United States Senate

Congress of the United States

Washington, DC 20510

October 27, 2006

Via Electronic Transmission

The Honorable Walter Stachnik
Inspector General
US Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-2736

Dear Inspector General Stachnik:

On August 4, 2006, you met with us to address our concerns surrounding the investigation conducted by your office, the Office of the Inspector General, Securities and Exchange Commission (SEC/OIG) related to allegations presented by Gary Aguirre, a former Senior Attorney with the Enforcement Division of the Securities and Exchange Commission (SEC). During this meeting, we informed you that our inquiry was not limited to only the termination of Mr. Aguirre, but included actions taken by your office as well. As part of our ongoing review of matters related to the termination of Mr. Aguirre, we write today seeking your continued cooperation with our ongoing inquiry.

In an effort to address our concerns, we request that you make yourself available for an interview with Committee staff. Additionally, please make the following individuals available for interviews with our Committee staffs:

- (1) Ms. Mary Beth Sullivan – Counsel to the Inspector General
- (2) Ms. Kelly Andrews – Associate Counsel to the Inspector General
- (3) Mr. Richard Woodford – Associate Counsel to the Inspector General

Please advise the aforementioned individuals that they have the right to speak directly and independently to Congress, or to a Committee of Congress, without interference from the SEC if they wish, in accordance with 5 U.S.C. § 7211. Retaliation against these individuals, or any other SEC employees, who communicate with Congress in reference to this matter, or any other, will not be tolerated. Such conduct is further punishable by 18 U.S.C. § 1505 and false statements and perjury are likewise punishable pursuant to 18 U.S.C. § 1001. Further, under 5 U.S.C. § 2302(b)(8), a federal employee authorized to take any personnel action may not take any personnel action against an employee because of protected whistleblowing.

Further, please also note that P.L. 109-115 enunciates a government-wide prohibition on the use of appropriated funds to pay the salary of any federal official who

prohibits or threatens to prevent a federal employee from communicating with Congress, regardless of whether the employee or Congress initiated the contact.

Finally, we request that the employees involved directly or indirectly with this matter be immediately provided with a copy of this letter to inform them of their right to speak and to cooperate with Congress. These employees should also be informed that no documents, records, data or information related, directly or indirectly, to this matter shall be destroyed, modified, removed or otherwise made inaccessible to Congress. If any employee believes that they have been subject to retaliation for meeting with Congressional staff and/or for anything associated with the ongoing investigation of this matter, the employee should contact our staffs immediately.

We thank you in advance for your continued cooperation as we review this important matter. Please have your staff coordinate with ours to schedule interviews with both you and the other requested individuals no later than November 9, 2006. Any questions or concerns should be directed to Nick Podsiadly or Jason Foster of Senator Grassley's staff at (202) 224-4515, or Stephanie Middleton or Hannibal Kemerer of Senator Specter's staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
United States Senator
Chairman, Committee on
Finance



Arlen Specter
United States Senator
Chairman, Committee on the
Judiciary

Cc: The Honorable Christopher Cox
The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Annette L. Nazareth
The Honorable Kathleen L. Casey

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

May 16, 2007

Jason Foster
Investigative Counsel
Committee on Finance
U.S. Senate
219 Dirksen Senate Office Building
Washington, DC 20510-6200

Dear Mr. Foster:

Per your request, this letter confirms that the Securities and Exchange Commission has completed its production of requested documents in full cooperation with the joint investigation conducted by Senators Grassley and Specter. As you know, the Commission took the extraordinary step of providing the investigators access to its non-public files to facilitate a full and complete investigation of this matter and we appreciate the sensitive manner in which those files have been handled.

I look forward to the Senators' final report on this matter and to any recommendations the report may contain as the Commission continues to pursue its mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

Consistent with the ordinary practice of Congressional committees, we request that this letter be kept non-public. Please call me at (202) 551-2016 if you have any further questions regarding this matter.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Burks".

Jonathan Burks

cc: Harold Kim, Senate Committee on the Judiciary
Mark Oesterle, Senate Committee on Banking, Housing and Urban Affairs
Dean Shahinian, Senate Committee on Banking, Housing and Urban Affairs