UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
INSPECTOR GENERAL

MEMORANDUM

September 30, 2008

To: Honorable Christopher Cox
Chairman

From: H. David Kotz
Inspector General

Re: Report of Investigation: Case No. OIG-431
Re-Investigation of Claims by Gary Aguirre of Preferential Treatment and Improper Termination

Attached is our report of re-investigation into claims by former Enforcement attorney Gary Aguirre of preferential treatment and improper termination.

This report is being referred to management for disciplinary or performance-based action. In order to ensure that we have information necessary to comply with our reporting responsibilities, please advise us within 45 days what action is taken in response to his report.

Please understand that this report is confidential in nature and should be treated in a secure manner. We request that, when you are finished with the report, you either shred it or return it to us.

If we can be of further assistance to you, please do not hesitate to contact me.

Attachment

cc: Peter Uhlmann, Chief of Staff
Diego Ruiz, Executive Director

REPORT OF INVESTIGATION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
OFFICE OF INSPECTOR GENERAL

Case No. OIG-431

Re-Investigation of Claims by Gary Aguirre of Improper Preferential Treatment and Retaliatory Termination

September 30, 2008

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Case No. OIG-431
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REPORT OF INVESTIGATION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION OFFICE OF INSPECTOR GENERAL

Case No. OIG-431

Re-Investigation of Claims by Gary Aguirre of Improper Preferential Treatment and Retaliatory Termination

Introduction

I. Initial Securities and Exchange Commission Office of Inspector General Investigation

On October 6, 2005, the Office of Inspector General (OIG) of the Securities and Exchange Commission (SEC or Commission) opened an investigation after receiving a letter from complainant Gary Aguirre (Aguirre) addressed to Chairman Christopher Cox (Cox), dated September 2, 2005, in which Aguirre claimed, inter alia, that his supervisors in the Division of Enforcement (Enforcement) gave improper preferential treatment to the Chairman and Chief Executive Officer (CEO) of Morgan Stanley, John Mack (Mack), whom Aguirre was pursuing as a potential tipper in an insider trading investigation against Pequot Capital Management (Pequot) a hedge fund.[1] The OIG also reviewed an October 11, 2005 letter from Aguirre to Chairman Cox alleging, inter alia, that his former Assistant Director improperly created a negative supplemental evaluation to justify the termination of Aguirre, and that he was terminated for unlawful reasons, including because he complained about the preferential treatment of Mack.[2]

Specifically, the claims investigated in the initial OIG investigation were as follows:

(1) Aguirre's supervisors would not take Mack's testimony because of his "powerful political connections";

(2) The Board of Directors of Morgan Stanley's counsel, Mary Jo White (White), contacted Linda Thomsen, Director of Enforcement, bypassing him as a staff attorney;

(3) Aguirre's supervisor excluded him from conversations concerning Mack;

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[1] Documents referenced in the report are compiled in an Appendix. A copy of the September 2, 2005 letter from Gary Aguirre to Chairman Cox is attached hereto as Appendix 1.

[2] A copy of the October 11, 2005 letter from Aguirre to Chairman Cox is attached hereto as Appendix 2.

(4) A negative supplemental evaluation was created after the fact to justify Aguirre's termination; and

(5) Aguirre was improperly terminated because of his complaints about his supervisors providing preferential treatment to Mack.

During the initial investigation conducted by the OIG, OIG investigators spoke to Gary Aguirre's supervisors in Enforcement: Branch Chief Robert Hanson (Hanson), Assistant Director Mark Kreitman (Kreitman), then-Associate Director Paul Berger (Berger), and Director Linda Thomsen (Thomsen.) During this initial investigation, OIG investigators also spoke with Enforcement Supervisory Program Analyst Charles Staiger (Staiger) and Human Resources (HR) Specialist Linda Borostovik (Borostovik.) No testimony was taken on the record or under other oath in the initial investigation and Aguirre was not interviewed.

On November 29, 2005, the OIG closed the initial investigation into Aguirre's claims, finding that the evidence gathered did not show that Mack was given preferential treatment because of his complaint about not taking Mack's testimony. The initial investigation also found that the evidence showed that Aguirre's supervisor wrote the supplemental evaluation prior to Aguirre being terminated. The initial investigation did find several irregularities with the supplemental evaluation and referred several related issues to the OIG's audit staff.

II. Investigation Conducted by the U.S. Senate Committees on Finance and the Judiciary

In or about April 2006, under the leadership of U.S. Senators Charles Grassley and Arlen Specter, the staff of the Senate Committees on Finance and the Judiciary (Senate Committees) commenced an investigation into allegations made by Aguirre of lax enforcement, improper political influence, whistleblower retaliation, and improper termination within Enforcement.

The Senate Committees held three hearings related to these matters. 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 Judiciary Committee held a second hearing examining enforcement of insider trading prohibitions and insider trading by hedge funds, especially trading ahead of mergers. On December 5, 2006, the Judiciary Committee held a third hearing focusing on allegations that: (1) the SEC mishandled its investigation of Pequot; (2) the SEC fired Aguirre in retaliation for reporting evidence of improper political influence in the Pequot investigation; and (3) the OIG failed to conduct a serious, credible inquiry into Aguirre's allegations.

On January 31, 2007, Senators Arlen Specter and Charles Grassley presented interim findings on their investigation on the Senate floor. The interim findings outlined

three primary concerns expressed by Senators Specter and Grassley. First, they found that the SEC's investigation into Pequot was plagued with problems from its beginning to its abrupt conclusion. Second, they determined that the SEC's termination of Aguirre was highly suspect given its timing and circumstances. Third, Senators Specter and Grassley stated that the original investigation conducted by the SEC OIG was both seriously and fatally flawed. They further stated that the findings painted a picture of a troubled agency that faced serious questions about public confidence, the integrity of its investigations, and its ability to protect all investors, large and small, with an even hand. The interim findings also concluded that the SEC should have taken Aguirre's allegations more seriously and should not have "circled the wagons" and "shot" the whistleblower when under fire.

In August 2007, the Senate Finance and Judiciary Committees issued a final report concluding their investigation. The final report made the following findings:

(1) Pequot's trades, in advance of an acquisition by General Electric (GE) of Heller Financial (Heller) in the summer of 2001, were highly suspicious and deserved a thorough investigation.

(2) The SEC examined only a fraction of the other suspicious Pequot trading highlighted by Self Regulatory Organizations (SROs).

(3) Staff Attorney 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 connections."

(4) Attorneys for Pequot and Morgan Stanley had direct access to the Director and an Associate Director of Enforcement.

(5) Seeking John Mack's testimony was a reasonable next step in the Pequot investigation.

(6) SEC management delayed Mack's testimony for over a year, until days after the statute of limitations expired.

(7) The SEC fired Aguirre after he reported his supervisor's comments about Mack's "political connections," despite positive performance reviews and a merit pay raise.

(8) 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; and

(9) The SEC's OIG failed to conduct a serious, credible investigation of Aguirre's claims.

Scope of the OIG Re-investigation

On July 6, 2006, the OIG reopened its investigation after a request was made by Chairman Cox to then-Inspector General (IG) Walter Stachnik.[3] In September 2007, Stachnik retired from his position as Inspector General of the SEC. On December 24, 2007, H. David Kotz was named the new IG for the SEC. In January 2008, IG Kotz personally took over the re-investigation of Aguirre's allegations.[4]

IG Kotz took on-the-record testimony under oath of complainant Gary Aguirre on five occasions: January 14, 2008, April 29, 2008, June 17, 2008, June 18, 2008 and August 26, 2008. The first testimony occurred in San Diego, California, at Aguirre's condominium, on January 14, 2008. This testimony primarily dealt with a separate investigation of claims made by Aguirre in a December 11, 2007 letter from Aguirre to IG Kotz. The second testimony occurred on April 29, 2008, at the offices of the SEC OIG and dealt almost entirely with issues in the re-investigation. Excerpted portion of this testimony are attached as Appendix 3.

Following the April 29, 2008 testimony, Aguirre requested the opportunity to rebut evidence uncovered in the re-investigation that could potentially contradict or raise doubts about the validity of contentions he made in his September 2, 2005, and October 11, 2005 complaints. On June 17, 2008, in telephonic testimony conducted on-the-record, IG Kotz provided Aguirre with an opportunity to rebut or provide contrasting evidence with regard to over 200 statements and references to records related to the re-investigation. On June 18, 2008, Aguirre provided on-the-record testimony regarding several of these statements and references, but requested additional time to provide further responses.

On August 26, 2008, Aguirre provided on-the-record testimony in response to many of the statements and documentary references provided by IG Kotz in June 2008. Excerpted portions of this testimony are attached as Appendix 4.

In addition to taking Aguirre's testimony on five separate occasions, IG Kotz engaged in numerous additional conversations with Aguirre both in person and via telephone during the course of the investigation, in an attempt to clarify Aguirre's assertions and complaints. These conversations took place throughout the entire eight-

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[3] This re-investigation is intended to supersede the previous OIG investigation and this Report of Investigation supersedes all aspects of the closing report issued November 29, 2005, and all the findings and conclusions contained therein.

[4] Because of the importance of the allegations and the criticism of the OIG in connection with the previous investigation, in taking over the re-investigation, Inspector General Kotz personally reviewed all the documents and testimonial evidence in the record to ensure a full, thorough, comprehensive, and impartial investigation. All testimony taken in the matter since January 2008, was also taken personally by IG Kotz and under oath. IG Kotz did review and reference in this report of investigation testimony and witness interviews taken prior to his joining the SEC by OIG investigators, as well as Senate officials. However, IG Kotz independently reviewed all material previously produced and prepared this report of investigation.

month investigation conducted by IG Kotz, including, but not limited to, the following dates, January 29, 2008; February 5, 2008, February 12, 2008, February 19, 2008, February 28, 2008, March 4, 2008, March 6, 2008, April 10, 2008, April 30, 2008, May 22, 2008, June 5, 2008, August 14, 2008 and August 20, 2008.

In addition to the testimony of and conversations with Aguirre, IG Kotz reviewed the following material written by Aguirre in complaints filed with administrative agencies and communications with Congressional officials:[5]

(1) Responses by Aguirre to Questions from Senator Grassley with 150 exhibits provided on or about December 5, 2006, excerpted portions of which are attached as Appendix 5;
(2) Aguirre Office of Special Counsel (OSC)[6] Complaint No. MA-06-0888 dated January 20, 2006 with 46 exhibits, excerpted portions of which are attached as Appendix 6;
(3) Aguirre OSC Complaint dated February 23, 2006 with 13 exhibits, excerpted portions of which are attached as Appendix 7;

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[5] Several efforts were made in 2006 and 2007 to obtain documents from Aguirre. On July 20, 2006, OIG investigators spoke with an attorney representing Aguirre and requested that Aguirre provide the OIG with relevant documents, as well as his testimony. After this request was denied, the OIG issued a subpoena *duces tecum* to Aguirre on August 11, 2006. The subpoena sought, among other things, (1) a copy of the sworn statement and exhibits Aguirre previously provided to the Office of Special Counsel (OSC) and the Senate Banking Committee; (2) other documents, including emails, Aguirre had provided to OSC or the Senate Banking, Finance or Judiciary Committees; (3) documents relating to the allegations contained in Aguirre's letters to SEC Chairman Christopher Cox dated September 2, 2005, and October 11, 2005; and (4) documents relating to various other allegations pertinent to the OIG's re-investigation. After further discussions, an enforcement action was brought on November 6, 2006, in the United States District Court for the District of Columbia. The OIG and Aguirre entered into a settlement agreement in early January 2006, pursuant to which Aguirre agreed to provide the following materials to the OIG: (1) Aguirre's 42-page sworn statement and attached exhibits; (2) documents pertaining to seven specific allegations, to the extent they were not privileged, in Aguirre's possession, and had not already been provided to the OIG; (3) other non-privileged documents in Aguirre's possession that supported his allegations of wrongdoing concerning the Pequot investigation or his termination from the SEC; and (4) relevant emails from August 2005 to the extent he possessed them and had not already produced them. The OIG received Aguirre's document production pursuant to the settlement agreement on February 2, 2008. In February 2008, when IG Kotz took over the re-investigation, Aguirre made available to the OIG any remaining documents in his possession pertaining to the re-investigation.

[6] OIG investigative staff also contacted OSC in an effort to obtain a copy of materials relating to Aguirre's OSC complaint. On or about August 7, 2006, OSC investigator Frank Greenwell informed an OIG investigator that OSC could not release anything from its files in the Aguirre matter to the OIG. On March 14, 2007, an OIG investigator spoke with Mr. Greenwell again and learned that OSC had closed its investigation of Aguirre's complaint because he had filed an individual right of action (IRA) with the Merit Systems Protection Board (MSPB). Mr. Greenwell declined to provide the OIG with OSC's closing report or any other information from its investigative files. In February 2008, IG Kotz also attempted to obtain witness testimony and other records from OSC in connection with its proceedings relating to Aguirre, but OSC again stated that they would not release any documents to the OIG. By that time, the OIG had received and reviewed Aguirre's OSC complaints, but was not unable to obtain the witness testimony and other OSC records.

(4) Responses by Aguirre dated March 24, 2006, to OSC Questions and Follow-up Matters additional information sought in OSC Complaint Number MA-06-0888 with 17 exhibits, excerpted portions of which are attached as Appendix 8;

(5) Response by Aguirre to Senator Specter's Questions in Light of Testimony of Linda Thomsen, Paul Berger, Mark Kreitman and Robert Hanson with 8 exhibits, excerpted portions of which are attached as Appendix 9;

(6) Letter from Aguirre dated May 30, 2006, to Senators Hagel and Dodd with 1 enclosure, attached as Appendix 10;

(7) Letter from Aguirre dated August 21, 2006, to Chairman Shelby and Ranking Member Sarbanes with 54 exhibits, excerpted portions of which are attached as Appendix 11; and

(8) Aguirre Merit Systems Protection Board appeal dated February 20, 2007, attached as Appendix 12.[7]

IG Kotz also reviewed the record of the Hearing before the Committee of the Judiciary, United States Senate, 109th Congress, Second Session, December 5, 2006, Serial No. J-109-121, *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*, which included witness testimony, formal answers to questions submitted by Senators Grassley and Specter, and written submissions for the record by Gary Aguirre, former Enforcement Associate Director Paul Berger, Enforcement Branch Chief Robert Hanson, Enforcement Assistant Director Mark Kreitman, and Enforcement Director Linda Thomsen. IG Kotz also reviewed the testimony of the Hearing before the Committee of the Judiciary, United States Senate, 109th Congress, Second Session, June 28, 2006, *Hedge Funds and Independent Analysts, How Independent are Their Relationships*, which included testimony from Gary Aguirre.

In addition, IG Kotz reviewed 72 transcripts of testimony or memoranda of interviews of 51 separate individuals with knowledge of issues relating to Aguirre's allegations. Specifically, IG Kotz reviewed the transcripts of testimonial interviews taken by the staff of the Senate Judiciary and Finance Committees of the following witnesses:[8]

(1) James Eichner, Staff Attorney, Division of Enforcement, Securities and Exchange Commission, taken on September 1, 2006, at 10:00 am, excerpted portions of which are attached hereto as Appendix 13; and continued on November 14, 2006, at 10:09 am, excerpted portions of which are attached hereto as Appendix 14.

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[7] Aguirre also provided IG Kotz numerous additional documentation during the course of the re-investigation that he prepared to buttress or substantiate certain of his claims or contentions.

[8] On March 4, 2008, Ranking Member of the Committee on Finance Senator Charles E. Grassley loaned the transcripts of testimonial interviews taken by the Senate Judicial and Finance Committees to IG Kotz for internal, informal use by the OIG in the re-investigation. The documents remained, at all times, Senate records, and were returned to Senator Grassley simultaneously with the issuance of this report of investigation.

(2) Eric Ribelin, Branch Chief, Office of Market Surveillance, Division of Enforcement, Securities and Exchange Commission, taken on September 1, 2006, at 2:37 pm, excerpted portions of which are attached hereto as Appendix 15.

(3) Robert Hanson, Branch Chief, Division of Enforcement, Securities and Exchange Commission, taken on September 5, 2006, at 1:05 pm, excerpted portions of which are attached hereto as Appendix 16; and continued on November 9, 2006, at 10:10 am, excerpted portions of which are attached hereto as Appendix 17.

(4) Mark Kreitman, Assistant Director, Division of Enforcement, Securities and Exchange Commission, taken on September 6, 2006, at 2:36 pm, excerpted portions of which are attached hereto as Appendix 18; and continued on November 15, 2006, at 1:07 pm, excerpted portions of which are attached hereto as Appendix 19.

(5) Joseph Cella, former Chief, Office of Market Surveillance, Division of Enforcement, Securities and Exchange Commission, taken on September 7, 2006, at 2:35 pm, excerpted portions of which are attached hereto as Appendix 20.

(6) Linda Chatman Thomsen, Director, Division of Enforcement, Securities and Exchange Commission, taken on September 8, 2006, at 10:35 am, excerpted portions of which are attached hereto as Appendix 21.

(7) Hilton Foster, former Senior Attorney, Division of Enforcement, Securities and Exchange Commission, taken on September 15, 2006, at 1:02 pm, excerpted portions of which are attached hereto as Appendix 22.

(8) Mary Jo White, Partner, Debevoise & Plimpton, LLP, taken on September 25, 2006, at 2:00 pm, excerpted portions of which are attached hereto as Appendix 23.

(9) Donald Chumley, Office of the Chief Counsel, Division of Enforcement, Securities and Exchange Commission, taken on October 5, 2006, at 10:01 am, excerpted portions of which are attached hereto as Appendix 24.

(10) Liban Jama, Staff Attorney, Division of Enforcement, Securities and Exchange Commission, taken on October 11, 2006, at 10:03 am, excerpted portions of which are attached hereto as Appendix 25.

(11) Thomas P. Conroy, Office of Market Surveillance, Division of Enforcement, Securities and Exchange Commission, taken on October 11,

2006, at 2:07 pm, excerpted portions of which are attached hereto as Appendix 26.

(12) Margaret A. Cain, Division of Enforcement, Securities and Exchange Commission, taken on October 13, 2006, at 2:09 pm, excerpted portions of which are attached hereto as Appendix 27.

(13) Lawrence Renbaum, Division of Enforcement, Securities and Exchange Commission taken on November 1, 2006 at 2:07 pm, excerpted portions of which are attached hereto as Appendix 28.

(14) Paul Berger, Partner, Debevoise & Plimpton, former Associate Director, Division of Enforcement, Securities and Exchange Commission, taken on November 2, 2006, at 10:10 am, excerpted portions of which are attached hereto as Appendix 29; and continued on November 7, 2006 at 10:33 am, excerpted portions of which are attached hereto as Appendix 30.

In addition, OIG investigators conducted the following interviews of persons with potential knowledge of the claims asserted by Aguirre:

(1) Walter Ricciardi, former Deputy Director, Division of Enforcement, Securities and Exchange Commission, conducted on July 11, 2006, excerpted portions of which are attached hereto as Appendix 31; and follow-up interview on June 20, 2007, excerpted portions of which are attached hereto as Appendix 32.

(2) Gregory Cobert, Information Technology (IT) Specialist, Division of Enforcement, Securities and Exchange Commission, conducted on July 25, 2006, excerpted portions of which are attached hereto as Appendix 33.

(3) Charles Cain, Branch Chief (now Assistant Director), Division of Enforcement, Securities and Exchange Commission, conducted on July 31, 2006, excerpted portions of which are attached hereto as Appendix 34.

(4) Hilton Foster, former Senior Attorney, Division of Enforcement, Securities and Exchange Commission, conducted on August 1, 2006, excerpted portions of which are attached hereto as Appendix 35.

(5) Richard Grime, former Assistant Director, Division of Enforcement, Securities and Exchange Commission, conducted on August 1, 2006, excerpted portions of which are attached hereto as Appendix 36.

(6) Eric Ribelin, Branch Chief, Office of Market Surveillance, Division of Enforcement, Securities and Exchange Commission, conducted on August 3, 2006, excerpted portions of which are attached hereto as Appendix 37.

(7) Peter Uhlmann, Senior Advisor to Chairman Christopher Cox, Securities and Exchange Commission, conducted on August 4, 2006, excerpted portions of which are attached hereto as Appendix 38.

(8) Christopher Cox, Chairman, Securities and Exchange Commission, August 4, 2006, excerpted portions of which are attached hereto as Appendix 39.

(9) Joseph Cella, former Chief, Office of Market Surveillance, Division of Enforcement, Securities and Exchange Commission, conducted on August 17, 2006, excerpted portions of which are attached hereto as Appendix 40; and follow-up interview on March 1, 2007, excerpted portions of which are attached hereto as Appendix 41.

(10) Staff Attorney referred to as "John Smith"[9] in the report for confidentiality purposes, Division of Enforcement, Securities and Exchange Commission, conducted on September 14, 2006, excerpted portions of which are attached hereto as Appendix 42; and follow-up interviews on October 3, 2006, October 16, 2006 and March 26, 2007, excerpted portions of which are attached hereto as Appendices 43, 44 and 45.

(11) Kevin O'Rourke, Assistant Chief Litigation Counsel, Division of Enforcement, Securities and Exchange Commission, conducted on September 18, 2006, excerpted portions of which are attached hereto as Appendix 46.

(12) James Eichner, Staff Attorney, Division of Enforcement, Securities and Exchange Commission, conducted on September 27, 2006, excerpted portions of which are attached hereto as Appendix 47.

(13) Liban Jama, Staff Attorney, Division of Enforcement, Securities and Exchange Commission, conducted on October 12, 2006, excerpted portions of which are attached hereto as Appendix 48.

(14) Richard Simpson, Chief Litigation Counsel, Division of Enforcement, Securities and Exchange Commission, conducted on October 25, 2006, excerpted portions of which are attached hereto as Appendix 49.

(15) Christopher Conte, Associate Director, Division of Enforcement, Securities and Exchange Commission, conducted on October 30, 2006, excerpted portions of which are attached hereto as Appendix 50.

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[9] This individual, a staff attorney with the SEC Division of Enforcement, requested confidentiality and asked that his name not appear in this report of investigation.

(16) [redacted], former Intern, Division of Enforcement, Securities and Exchange Commission, conducted on November 14, 2006, excerpted portions of which are attached hereto as Appendix 51.

(17) Stephen Glascoe, Market Surveillance Specialist, Division of Enforcement, Securities and Exchange Commission, conducted on November 15, 2006, excerpted portions of which are attached hereto as Appendix 52.

(18) Thomas Conroy, Market Surveillance Specialist, Division of Enforcement, Securities and Exchange Commission, conducted on November 16, 2006, excerpted portions attached hereto as Appendix 53.

(19) S. Craig Miller, Senior Surveillance Specialist, Division of Enforcement, Securities and Exchange Commission, conducted on November 20, 2006, excerpted portions of which are attached hereto as Appendix 54.

(20) Eric Dinallo, former Managing Director for Regulatory Affairs, Morgan Stanley, conducted on February 16, 2007, excerpted portions of which are attached hereto as Appendix 55.

(21) David Anders, Counsel, Wachtell, Lipton, Rosen & Katz, and former Assistant U.S. Attorney, Southern District of New York, conducted on March 6, 2007, excerpted portions of which are attached hereto as Appendix 56.

(22) Fiona Philip, Partner, Howrey LLP, conducted on March 12, 2007 and follow-up conversation on March 14, 2007, excerpted portions of which are attached hereto as Appendix 57 and 58.

(23) David Esseks, former Assistant U.S. Attorney and Chief, Securities Unit, Southern District of New York, conducted on March 29, 2007, excerpted portions of which are attached hereto as Appendix 59.

(24) Susan Markel, Chief Accountant, Division of Enforcement, Securities and Exchange Commission, conducted on April 16, 2007, excerpted portions of which are attached hereto as Appendix 60.

(25) Benjamin Lawsky, Deputy Counselor and Special Assistant to the New York State Attorney General, and former Assistant U.S. Attorney, Southern District of New York, conducted on April 27, 2007, excerpted portions of which are attached hereto as Appendix 61.

(26) David Makol, Special Agent, Brooklyn-Queens Resident Agency, Federal Bureau of Investigation, conducted on June 22, 2007, excerpted portions of which are attached hereto as Appendix 62.

(27) Peter Bresnan, former Deputy Director, Division of Enforcement, Securities and Exchange Commission, conducted on August 22, 2007 and follow-up interview on August 23, 2007, excerpted portions of which are attached hereto as Appendix 63 and 64.

(28) Stephen Cutler, former Director, Division of Enforcement, Securities and Exchange Commission, conducted on August 23, 2007, excerpted portions of which are attached hereto as Appendix 65.

OIG investigators also took testimony on-the-record and under oath of the following individuals:

(1) Patrick Patalino, former Managing Director, Morgan Stanley, taken on April 24, 2007, excerpted portions of which are attached hereto as Appendix 66.

(2) Eric Ribelin, Branch Chief, Office of Market Surveillance, Division of Enforcement, Securities and Exchange Commission, taken on November 9, 2007, excerpted portions of which are attached hereto as Appendix 67.

(3) Mary Jo White, Partner, Debevoise & Plimpton, LLP, taken on February 16, 2007, excerpted portions of which are attached hereto as Appendix 68.

(4) Gary Lynch, Executive Vice President and Chief Legal Officer, Morgan Stanley, taken on March 5, 2007, excerpted portions of which are attached hereto as Appendix 69.

(5) John Mack, CEO and Chairman of Morgan Stanley, taken on March 5, 2007, excerpted portions of which are attached hereto as Appendix 70.

(6) Ashley Wall, former Vice President, Legal Division, Morgan Stanley, conducted on April 24, 2007, excerpted portions of which are attached hereto as Appendix 71.

SEC IG David Kotz personally took testimony on-the-record and under oath of the following individuals after he assumed responsibility for the re-investigation:

(1) David Fielder, former Branch Chief, Division of Enforcement, Securities and Exchange Commission taken on April 14, 2008, excerpted portions of which are attached hereto as Appendix 72.

(2) Robert Anderson, former attorney, Division of Enforcement, Securities and Exchange Commission, taken on April 17, 2008 (Robert Anderson), excerpted portions of which are attached hereto as Appendix 73.

(3) [redacted], former Senior Counsel, Securities and Exchange Commission, taken on April 18, 2008, excerpted portions of which are attached hereto as Appendix 74.

(4) Robert Bayless, former Associate Chief Accountant, Division of Enforcement, Securities and Exchange Commission, taken on April 24, 2008, excerpted portions of which are attached hereto as Appendix 75.

(5) Liban Jama, Senior Counsel, Division of Enforcement, Securities and Exchange Commission taken on April 24, 2008, excerpted portions of which are attached hereto as Appendix 76.

(6) Linda Thomsen, Director, Division of Enforcement, Securities and Exchange Commission, taken on April 28, 2008, excerpted portions of which are attached hereto as Appendix 77.

(7) Witness 1,[10] former attorney, Division of Enforcement, Securities and Exchange Commission, taken in April 2008, excerpted portions of which are attached hereto as Appendix 78 .

(8) Witness 2, current attorney, Division of Enforcement, Securities and Exchange Commission, taken in April 2008, excerpted portions of which are attached hereto as Appendix 79.

(9) Witness 3, current attorney, Division of Enforcement, Securities and Exchange Commission, taken in April 2008, excerpted portions of which are attached hereto as Appendix 80.

(10) Witness 4, current attorney, Division of Enforcement, Securities and Exchange Commission, taken in April 2008, excerpted portions of which are attached hereto as Appendix 81.

(11) Witness 5, former attorney, Division of Enforcement, Securities and Exchange Commission, taken in April 2008, excerpted portions of which are attached hereto as Appendix 82.

[10] Several current and former attorneys in the Division of Enforcement provided testimony under oath but asked that they names be kept confidential. Because these witnesses' supervisors may have become aware of the particular dates that they met with OIG, the specific dates of their testimony will not be revealed in this report. These individuals will be identified as Witness 1, 2, 3, etc., in this report of investigation.

(12) Witness 6, former attorney, Division of Enforcement, Securities and Exchange Commission, taken in April 2008, excerpted portions of which are attached hereto as Appendix 83.

(13) Witness 7, former attorney, Division of Enforcement, Securities and Exchange Commission, taken in April 2008, excerpted portions of which are attached hereto as Appendix 84.

(14) Witness 8, current attorney, Division of Enforcement, Securities and Exchange Commission, taken in April 2008, excerpted portions of which are attached hereto as Appendix 85.

(15) Witness 9, former attorney, Division of Enforcement, Securities and Exchange Commission, taken in April 2008, excerpted portions of which are attached hereto as Appendix 86.

(16) Eric Dinallo, former Managing Director for Regulatory Affairs, Morgan Stanley, taken on May 9, 2008, excerpted portions of which are attached hereto as Appendix 87.

(17) Charles Cain, Branch Chief (now Assistant Director), Division of Enforcement, Securities and Exchange Commission, taken on August 29, 2008, excerpted portions of which are attached hereto as Appendix 88.

(18) Richard Grime, former Assistant Director, Division of Enforcement, Securities and Exchange Commission, conducted on September 2, 2008, excerpted portions of which are attached hereto as Appendix 89.

(19) Robert Hanson, Branch Chief, Division of Enforcement, Securities and Exchange Commission, conducted on July 15, 2008, excerpted portions of which are attached hereto as Appendix 147.

(20) Mark Kreitman, Assistant Director, Division of Enforcement, Securities and Exchange Commission, conducted on July 17, 2008, excerpted portions of which are attached hereto as Appendix 149.

In addition to the above, the OIG conducted the following searches for documents. The OIG requested from the Office of Information Technology (OIT) Aguirre's e-mails for his entire tenure at the Commission (September 7, 2004 through September 2, 2005). The OIG obtained and reviewed all of these e-mails, with the exception of his August and September 2005 emails, which were not available. The OIG also requested from OIT e-mails of the following individuals for months of June through August 2005: Linda Thomsen, Paul Berger, Mark Kreitman, Robert Hanson, Charles Staiger and Linda Borostovik. The OIG obtained these e-mails, with the exception of certain months that were not available.

An OIG auditor searched all the e-mails obtained for e-mails that may be relevant or significant to the re-investigation. The auditor then printed and organized these e-mails by individual, month and topic, and brought significant emails to the attention of the OIG investigators. The auditor also prepared a timeline of events based upon the e-mails reviewed and analyzed. At the OIG's request, an OIT forensic expert seized the hard drive of Mark Kreitman's computer on August 3, 2006. The expert made a forensically-sound image of the hard drive and performed forensic analysis to determine whether Kreitman had altered computer metadata[11] (specifically, by modifying the system time on his computer) for the file containing the supplemental evaluation of Aguirre. The expert provided the OIG with a final forensic report on September 12, 2006.

Throughout the course of the re-investigation, the OIG also obtained documents and information from the Office of General Counsel (OGC), which had gathered a multitude of relevant documents during the course of responding to Senate requests for information and in defending various litigation brought by Aguirre. In order to ensure it obtained all pertinent information in OGC's possession, OIG investigators reviewed the index of OGC's production to the Senate and requested and obtained copies of various documents listed on the index. OIG investigators also requested and obtained from OGC documents that were not included in the Senate production but were identified by witnesses in OIG interviews. The OIG also obtained from OGC copies of relevant documents filed in Aguirre's MSPB appeal and his Freedom of Information Act (FOIA) litigation against the SEC. Finally, the OIG received from OGC Aguirre's response to the SEC request for production of documents with Bates Nos. 00002-000850.

In addition, upon opening the re-investigation, OIG investigators obtained Aguirre's official personnel folder and conduct file from the Office of Human Resources, and copied these files. OIG investigators also requested relevant personnel documents from Charles Staiger, Supervisory Program Analyst, Division of Enforcement. Staiger provided files containing relevant emails and other documents to the OIG investigators, who reviewed and analyzed these documents.

On July 18, 2006, OIG investigators met with Ethics Counsel William Lenox and Assistant Ethics Counsel [redacted] concerning communications the SEC Ethics Office had with Aguirre. Thereafter, Lenox and [redacted] provided the OIG with copies of relevant documents, including their correspondence with Aguirre. OIG investigators also contacted the SEC's Office of Equal Employment Opportunity (EEO) and obtained and reviewed copies of files pertaining to Aguirre. These included the file on the EEO Office's inquiry into Aguirre's Age Discrimination in Employment Act (ADEA) claim against the SEC, and the EEO Counselor's Written Report and related attachments in EEO Complaint No. 26-05, alleging discriminatory harassment and termination.

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[11] Metadata is "data about data" and can include information about various aspects of the data it describes, including its structure content, quality context, origin, ownership and condition.

In addition, OIG investigators obtained and reviewed various documents pertaining to Enforcement's insider trading investigation of Pequot Capital Management, HO-09818, including: (1) printouts from the Name Relationship Search Index (NRSI)[12] pertaining to the investigation; (2) the action memorandum seeking a formal order of investigation, dated December 16, 2004; (3) the formal order of investigation, dated January 14, 2005; (4) transcripts of investigative testimony of Pequot Chairman and Chief Executive Officer Arthur Samberg, dated May 3, 2005, June 7, 2005, and January 23, 2006; (5) a listing of subpoenas issued in the investigation and copies of many of those subpoenas; (6) Enforcement's outline for the August 1, 2006 testimony of John Mack; (7) the transcript of the investigative testimony of John Mack, dated August 1, 2006; (8) a memorandum prepared by former Enforcement Deputy Director Walter Ricciardi on June 15, 2006, concerning the status of the investigation; and (9) the case closing report, dated November 30, 2006.

In addition to obtaining documents from Commission Divisions and Offices, the OIG also obtained documents directly from individual witnesses. Finally, during the re-investigation, the OIG obtained some documents from counsel for third-party witnesses interviewed by the OIG, including investigative subpoenas served on Morgan Stanley and redacted notes from the Morgan Stanley Board Meeting on June 30, 2005.

Issues Addressed in the OIG Re-investigation

Because of the multitude of issues involved in this matter, and the facts that two investigations have already been conducted and many of the events pertinent to the investigation occurred more than three years ago, this investigation focused on what the OIG deemed to be the most critical and salient issues that needed to be addressed, as follows:

(1) Did the SEC give improper preferential treatment to John Mack in connection with the Pequot investigation and block Gary Aguirre's efforts to take Mack's testimony because of his political connections[13] and/or prominence?[14]

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[12] The NRSI application provides a cross-reference of data by name that is contained in multiple internal and external automated SEC systems. It enables agency staff members to cross-reference information available in these automated information systems by entering a partial or full name of an individual or company. All NRSI information is not for public release.

[13] The re-investigation focused more on the allegation that Mack's "prominence" led to preferential treatment, rather than his political connections to the Republican party and President George W. Bush, as there was little evidence that Aguirre's supervisors were aware of Mack's political connections or were motivated by any such connections. Aguirre himself stated that he did not believe it made much difference whether the motivation was Mack's political connections or prominence, although Aguirre provided some evidence of Mack's political connections. Transcript of Testimony of Gary Aguirre before SEC IG on August 26, 2008 (hereinafter, "Tr. Aguirre 8/26/08 testimony") at pgs. 10; 15-17.

[14] The following specific allegations made by Aguirre are subsumed within this general issue: (a) the Enforcement Division would not allow him to take John Mack's testimony because of his powerful political connections or prominence; (b) other Enforcement investigations were "killed" for political connections, prominence or other inappropriate reasons; (c) the Pequot investigation was narrowed and

(2) Did SEC senior Enforcement officials improperly provide representatives of Morgan Stanley nonpublic information about the Pequot investigation and, specifically, the Enforcement Division's intentions with respect to Mack?[15]

(3) Did the SEC Enforcement Division take insufficient actions to investigate Mack and improperly close the Pequot investigation after Aguirre was terminated because of Mack's political connections and/or prominence?[16]

(4) Did the SEC Enforcement Division improperly terminate Aguirre in retaliation for his complaints about preferential treatment of Mack and to block his efforts to take Mack's testimony?[17]

In the course of investigating the above issues, the OIG uncovered specific information related to the conduct and performance of Aguirre's supervisors, Branch Chief Robert Hanson and Associate Director Mark Kreitman, that is also described in this report of investigation.

There are several additional issues raised by Gary Aguirre that are not addressed at length in this re-investigation. Specifically, allegations regarding former Associate Director Paul Berger's improper contacts with the law firm of Debevoise & Plimpton and failure to recuse himself from the Pequot investigation were not addressed because Berger no longer works for the Commission. In addition, allegations that Aguirre was retaliated against because of Aguirre's brother's comments in the press about Chairman Christopher Cox, or because of Aguirre's brother's representation of investors in a lawsuit against Chairman Cox's former law firm and Chairman Cox were not found to be substantiated.[18] Finally, Aguirre's allegation that Associate General

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many suspicious transactions were excluded approximately two weeks before Pequot's attorney, Audrey Strauss met with Former Enforcement Director Stephen Cutler; and (d) Enforcement Associate Director Mark Kreitman refused to let Aguirre contact Irving Pollack and Larry Storch, attorneys retained by Pequot in connection with investigation.

[15] The following specific allegation made by Aguirre is subsumed within this general issue: that Mary Jo White contacted Enforcement Director Linda Thomsen, thereby improperly bypassing Aguirre as staff attorney.

[16] The following specific allegations made by Aguirre are subsumed within this general issue: (a) after Aguirre was terminated, the Pequot investigation was abruptly halted and all further inquiries in the matter were suspended indefinitely; and (b) John Mack's testimony was taken four days after the statute of limitations expired on July 27, 2006.

[17] The following specific allegations made by Aguirre are subsumed within this general issue: (a) Aguirre's supervisors improperly and retroactively created a supplemental negative evaluation of Aguirre to justify his termination after the fact; (b) Branch Chief Robert Hanson prepared negative supplemental evaluations of Aguirre and Smith in retaliation for their complaints about Mark Kreitman; (c) Aguirre's termination was at least partially motivated by age discrimination; and (d) Office of the General Counsel attorneys improperly participated in Aguirre's termination for their own litigation purposes and as reprisal for filing an EEO case.

[18] Chairman Cox stated in an interview with OIG investigators that he was not personally involved in Gary Aguirre's termination and did not even know Aguirre's name until after he had left the Agency. Notes of

Counsel Richard Humes directs that cases remain open after the work is completed so Freedom of Information Act (FOIA) exemption 7(A) may be invoked will be addressed by the OIG in a separate and future audit/investigation.

Relief Sought by Complainant Aguirre

In Aguirre's September 2, 2005 letter to Chairman Cox, Aguirre requested that Chairman Cox "take whatever steps are appropriate to put [the Pequot investigation] back on track, consistent with the Commission's mission."[19] In Aguirre's October 11, 2005 letter to the Chairman, Aguirre requested that Chairman Cox instruct Enforcement Director Linda Thomsen to direct Enforcement staff to preserve all memoranda, e-mails, and other documents, which Aguirre indicated would be critical for the courts and governmental agencies to determine if Enforcement violated the law by firing him.[20]

In a May 13, 2008 letter to Inspector General Kotz, Aguirre expanded on the relief he is seeking through the re-investigation, stating that "[t]hose who gave preferential treatment, according to the Senate report, to John Mack are still at the SEC drawing their paychecks almost three years later." Letter from Aguirre to Kotz dated May 13, 2008 at p. 9, attached hereto as Appendix 90. Aguirre, referring to himself, also noted that the "whistleblower who reported their misconduct has been out of a job for thirty-two months, was threatened with criminal prosecution, had to defend an SEC lawsuit to get his communications with the Senate, has spent thousands of dollars on legal fees, and has more years to litigate." Id.

Relevant Statutes, Regulations and Case Law

I. Whistleblower Protection Act

A. Reprisal for Whistleblowing (Corrective Action)

Under the Whistleblower Protection Act of 1989 (WPA), as amended, 5 U.S.C. § 2302(b)(8), it is a prohibited personnel practice to take or fail to take, or to threaten to take or fail to take, a personnel action with respect to any employee or applicant because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences: (1) a violation of law, rule, or regulation; (2) gross mismanagement; (3) a gross waste of funds; (4) an abuse of authority; or (5) a substantial and specific danger to public health or safety.

OIG Investigator Interview with Cox of August 4, 2006 at p. 1. Senior advisor to the Chairman Peter Uhlmann confirmed that Chairman Cox was not involved in Aguirre's termination, and no evidence was presented to the contrary. Notes of OIG Investigator Interview with Uhlmann of August 4, 2006 at p. 1.

[19] A copy of Aguirre's September 2, 2005 letter to Chairman Cox is attached hereto as Appendix 1.

[20] A copy of Aguirre's October 11, 2005 letter to Chairman Cox is attached hereto as Appendix 2.

"Abuse of authority" occurs when there is an "arbitrary and capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." Embree v. Dep't of Treasury, 70 M.S.P.R. 79, 85 (1996). "Both the Federal Circuit and the [MSPB] have stated that there is a presumption that public officials perform their duty correctly, fairly, in good faith, and in accordance with the law and governing regulations unless there is 'irrefragable proof to the contrary.'" Gryder v. Dep't of Transportation, 2005 MSPB LEXIS 259 at * 36 (January 21, 2005).

To establish a violation of § 2302(b)(8), the OSC, or the aggrieved employee, must show the following four elements by a preponderance of the evidence:

(1) A disclosure of information protected by § 2302(b)(8);

(2) A personnel action;

(3) Knowledge of the protected disclosure; and

(4) The protected disclosure was a contributing factor in the personnel action.

1. Disclosure of Information

The test for whistleblowing is whether a reasonable person in the employee's position would believe that the disclosure evidenced a violation of law, rule or regulation; an actual violation need not be proven. Garst v. Dep't of the Army, 60 M.S.P.R. 514 (1994). See also Reid v. MSPB, 508 F.3d 674 (Fed. Cir. 2007) (finding that an allegation of a reasonable belief of a potential violation is sufficient).

The disclosure of information may be made to "any" person; there is no requirement that the whistleblowing occur through any specific channel. See, e.g., Sirgo v. Dep't of Justice, 66 M.S.P.R. 261 (1995). However, discussions and even disagreements with supervisors over job-related duties are considered to be a normal part of most occupations, and the WPA was not intended to extend that far. Huffman v. Office of Personnel Management, 263 F.3d 1341 (Fed. Cir. 2001.) The Federal Court has also found that when "[i]n complaining to his supervisors, [complainant] has done no more than voice his dissatisfaction with his superior's decision . . . and has taken no action to bring an issue to the attention of authorities in a position to correct fraudulent or illegal activity," the disclosures were not protected under the WPA. Willis v. Dep't of Agric., 141 F.3d 1139, 1143 (Fed. Cir. 1998)

2. Personnel Action

Personnel actions covered by the WPA include, among other things, "adverse action covered by chapter 75 or other disciplinary or corrective action," and "any other

significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(A)(iii) & (xi).

3. Knowledge of the Protected Disclosure

The official responsible for the personnel decision being challenged must have knowledge (either actual or constructive) of the disclosure at the time the decision was made. McClellan v. Dep't of Defense, 53 M.S.P.R. 139 (1992). However, a mistaken belief that the employee engaged in protected whistleblowing is sufficient. Special Counsel v. Dep't of the Navy, 46 M.S.P.R. 274 (1990)("[a]n employee who does not engage in protected activity may nonetheless be covered by the WPA where a retaliatory personnel action is taken against him based upon the belief that he had engaged in protected activity"). See also Sirgo, 66 M.S.P.R. 261 (employee might be entitled to the protection of the WPA if he could show that the agency official who allegedly retaliated against him perceived him as a whistleblower).

4. Contributing Factor

In order to establish a prima facie case under the WPA, the OSC or an individual pursuing an action must establish by preponderant evidence that the protected disclosure was a "contributing factor" to the challenged personnel action, although "any 'weight' given to the protected disclosure, either alone or even in combination with other factors, can satisfy the 'contributing factor' test." Marano v. Dep't of Justice, 2 F.3d 1137, 1140-41 (Fed. Cir. 1993). A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Id., (quoting 135 Cong. Rec. 5033 (1989)(Explanatory statement on S. 20)).

The October 1994 Amendments to the WPA amended §1221(e) to provide that an employee may satisfy the contributing factor test merely by demonstrating a time connection between the protected disclosure and the personnel action. "The [complainant] may show that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action." Simmons v. Dep't of Air Force, 99 M.S.P.R. 28, 38 (2005.)

Once an employee has met the contributing factor test, the burden of proof shifts to the agency. "[T]he agency must bear the burden of proving by clear and convincing evidence that the personnel action would have been taken in the absence of the protected disclosure." Marano, 2 F.3d at 1143. "When determining whether the agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board considers the following factors: the strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision; and

any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated." Simmons, 99 M.S.P.R. at 38. In Yunus v. Dep't of Veterans Affairs, 242 F.3d 1367 (Fed. Cir. 2001), the Court found that where the evidence the agency had before it to remove complainant was strong, the agency's motivation to retaliate was slight, at best, and the evidence did not show that the agency treated complainant differently than it treated similarly situated employees who were not whistleblowers, the agency was able to show by clear and convincing evidence that it would have removed complainant even in the absence of the protected disclosure. See also Redschlag v. Dep't of the Army, 89 M.S.P.R. 589 (2001) (finding that although agency officials had a substantial motive to retaliate against the complainant, the motive was outweighed by the strength of evidence the agency had before it when it took the removal action and by the lack of evidence to suggest that complainant was treated differently than similarly situated non-whistleblowers).

B. Reprisal for Whistleblowing (Disciplinary Actions)

Under 5 U.S.C. § 1215, the OSC may request disciplinary action against an employee for committing a prohibited personnel practice, including engaging in reprisal for whistleblowing. However, the burden of proof is different in a disciplinary action than when corrective action is sought. To establish a violation of 5 U.S.C. § 2303(b)(8) in a disciplinary action proceeding, the OSC must prove:

> (1) the acting official has the authority to take, recommend, or approve any personnel action;
>
> (2) the aggrieved employee made a disclosure protected under section 2303(b)(8);
>
> (3) the acting official used his authority to take, or refuse to take, a personnel action against the aggrieved employee; and
>
> (4) the acting official took, or failed to take, the personnel action against the aggrieved employee because of the protected disclosure.

Eidmann v. MSPB, 976 F.2d 1400 (Fed. Cir. 1992).

The "contributing factor" test does not apply to disciplinary actions against employees for engaging in reprisal for whistleblowing. Rather, the OSC must show by a preponderance of the evidence that "retaliation was a significant factor in the action or actions at issue" in order to discipline the retaliator. Special Counsel v. Santella & Jech, 65 M.S.P.R. 452, 458 (1994). The term, "significant factor," refers only to factors "that played an important role in the allegedly retaliatory action . . . ." Id. Moreover, the significant factor test is not met unless the motivation for the action was improper. Id. Evidence that the allegedly retaliatory action was merely tangentially related to the protected conduct will not meet the significant factor test. Id. See also Special Counsel

v. Costello, et. al, 75 M.S.P.R. 562, 612 (1997) (finding that even if the evidence establishes that the agency would have taken the personnel action in the absence of the protected disclosures, the protected disclosures would be considered a "significant factor" in the agency's decision where the agency reasons for its actions are unpersuasive and unsupported by the record).

C. Commission Table of Penalties

The Commission's Table of Penalties, SECR 6-10, Attachment 3 (Nov. 12, 1990), provides that the typical penalty for "[r]eprisal against an employee for providing information to an Office of Inspector General (or equivalent), the Office of Special Counsel, to an EEO investigator, or for testifying in an official proceeding" is reprimand to removal for the first offense, and removal for the second or third offense.

The Commission's Table of Penalties SECR 6-10, Attachment 3 (Nov. 12, 1990), further provides that the typical penalty for "Violation of prohibited personnel practices," which include engaging in reprisal for whistleblowing, i.e., to take, fail to take, or threaten to take or fail to take a personnel action with respect to any employee . . . because of any disclosure of information by the employee that he or she reasonably believes evidences a violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority, is reprimand to removal for the first offense, and removal for the second or third offense.

II. Standard for Agency Personnel Action During Trial Period

The Code of Federal Regulations prescribes a probationary period of employment for competitive service employees. 5 U.S.C. § 3221(a)(1) provides for "a period of probation . . . before an appointment in the competitive service becomes final." 5 C.F.R. § 315.803 provides that "[t]he agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment."

5 C.F.R. § 315.804(a) describes the procedures for terminating a probationary employee because his "conduct or work performance during this period fails to demonstrate his fitness or his qualifications for continued employment." Section 315.804(b) denotes that the probationary period ends when the "employee completes his or her scheduled tour of duty on the day before the anniversary date of the employee's appointment."

However, Title 5 of the United States Code provides that positions may be specifically excluded from the competitive service by or under statute. 5 U.S.C. § 2101(a)(1)(A). Members of the "excepted service" are subject to less rigorous entrance requirements, and are accorded fewer procedural protections than are members of the competitive service. See Morales v. Dep't of Homeland Sec. 2007 MSPB LEXIS 8121

(November 28, 2007) (dismissing complainant's challenge to her termination on the basis that excepted service employee have no rights of appeal to the MSPB).

Excepted service employees in the Commission (including attorneys) are subject to the completion of a one-year trial period beginning on the date of their appointment. Notification of this fact is made through the vacancy announcement and/or the Standard Form (SF) 50 which further provides that during this one-year time period, the employee's conduct and performance will be monitored in order to determine if the employee will be retained.

Probationary or trial period employees do retain the right to challenge their termination on the basis that it was in retaliation for the employee's engaging in whisteblowing. Thorne v. Dep't of Health and Human Servs., 79 M.S.P.R. 583 ((1998).

III. Regulations Concerning Conduct of Members and Employees of the Securities and Exchange Commission

A. Commission Canon of Ethics

17 CFR § 200.51: Policy: "It is characteristic of the administrative process that the Members of the Commission and their place in public opinion are affected by the advice and conduct of the staff, particularly the professional and executive employees. It shall be the policy of the Commission to require that employees bear in mind the principles specified in the Canons."

17 CFR § 200.53: Preamble (a): "Members of the Securities and Exchange Commission are entrusted by various enactments of the Congress with powers and duties of great social and economic significance to the American people. It is their task to regulate varied aspects of the American economy, within the limits prescribed by Congress, to insure that our private enterprise system serves the welfare of all citizens. Their success in this endeavor is a bulwark against possible abuses and injustice which, if left unchecked, might jeopardize the strength of our economic institutions."

17 CFR 200.55: "In administering the law, members of this Commission should vigorously enforce compliance with the law by all persons affected thereby. . . . In the exercise of their judicial functions, members shall . . . impartially determine the rights of all persons under the law.

17 CFR § 200.58: Maintenance of independence. "A member should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety; so also he should be above fear of unjust criticism by anyone."

17 CFR § 200.61: Impressions of influence. "A member should not, by his conduct, permit the impression to prevail that any person can improperly influence him,

or that any person unduly enjoys his favor or that he is affected in any way by the rank, position, prestige, or affluence of any person."

17 CFR § 200.64: Judicial review. "Members should recognize that their obligation to preserve the sanctity of the laws administered by them requires that they pursue and prosecute, vigorously and diligently but at the same time fairly and impartially and with dignity, all matters which they or others take to the courts for judicial review."

17 CFR § 200.69: Conduct toward parties and their counsel. "Members should be temperate, attentive, patient and impartial when hearing the arguments of parties or their counsel."

B. Commission Conduct Regulation

17 CFR § 200.735-2 Policy

(a) The Securities and Exchange Commission has been entrusted by Congress with the protection of the public interest in a highly significant area of our national economy. In view of the effect which Commission action frequently has on the general public, it is important that members, employees and special Government employees maintain unusually high standards of honesty, integrity, impartiality and conduct. They must be constantly aware of the need to avoid situations which might result either in actual or apparent misconduct or conflicts of interest and to conduct themselves in their official relationships in a manner which commands the respect and confidence of their fellow citizens.

(b) For these reasons, members, employees and special Government employees should at all times abide by the standards of conduct set forth in this subpart, the canons of ethics for members of the Securities and Exchange Commission (subpart C of this part 200) and, in the case of a professional person, the ethical standards applicable to the profession of such person.

IV. Statutes and Regulations Regarding Disclosure of Nonpublic Information

A. Standards of Ethical Conduct

Title 5, Part 2635 – Standards of Ethical Conduct for Employees of the Executive Branch

Subpart A - General Provisions:

Sec. 2635.101 Basic obligation of public service.

(b)(3) Employees shall not engage in financial transactions using nonpublic information or allow the improper use of such information to further any private interest.

Subpart G - Misuse of Position:

Sec. 2635.703 Use of nonpublic information.

(a) Prohibition. An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

(b) Definition of nonpublic information. For purposes of this section, nonpublic information is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:

(1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order or regulation;

(2) Is designated as confidential by an agency; or

(3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

B. The Securities Exchange Act of 1934

15 U.S.C. § 78x Public availability of information

(a) "Records" defined

For purpose of section 552 of title 5 the term "records" includes all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise obtained by the Commission pursuant to this chapter or otherwise.

(b) Disclosure or personal use

It shall be unlawful for any member, officer, or employee of the Commission to disclose to any person other than a member, officer, or employee of the Commission, or to use for personal benefit, any information contained in any application, statement, report, contract, correspondence, notice, or other document filed with or otherwise obtained by the Commission (1) in contravention of the rules and regulations of the Commission under section 552 of title 5, or (2) in circumstances where the Commission has determined pursuant to such rules to accord confidential treatment to such information.

(c) Confidential disclosures

The Commission may, in its discretion and upon a showing that such information is needed, provide all "records" (as defined in subsection (a) of this section) and other information in its possession to such persons, both domestic and foreign, as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate.

C. SEC Rules Relating to Investigations – 17 C.F.R. Part 203

17 CFR § 203.2 Information obtained in investigations and examinations.

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)[21] of this chapter concerning information obtained in individual investigations or examinations, including formal investigations conducted pursuant to Commission order.

17 CFR § 203.5 Non-public formal investigative proceedings.

Unless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public.

D. Commission Conduct Regulation -- 17 CFR § 200.735

17 CFR § 200.735-3

(b) A member of employee of the Commission shall not . . .

(7) (i) Divulge to any unauthorized person or release in advance of authorization for its release any nonpublic Commission document, or any information contained in any such document or any confidential information:

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[21] These persons identified in 17 CFR § 240.24c-1(b) are: (1) a federal, state, local or foreign government body or instrumentality; (2) a self-regulatory organization (SRO); (3) a foreign financial regulatory authority; (4) the Securities Investor Protection Corporation; (5) a trustee in bankruptcy; (6) a trustee, receiver, master or special counsel; (7) a bar association, state accountancy board or other federal, state, local or foreign licensing or oversight authority; and 8) a duly authorized agent, employee or representative of any of the above persons.

(A) in contravention of the rules and regulations of the Commission promulgated under 5 U.S.C. 552, 552a and 552b; or

(B) in circumstances where the Commission has determined to accord such information confidential treatment.

E. Securities and Exchange Commission Rule 19-1 Regarding Disclosure of Non-Public Information in Connection with Investigations, Examinations, or Grants of Access, Aug. 21, 1999

This regulation sets forth the Securities and Exchange Commission's (SEC) policy on disclosing non-public information developed in the course of its investigations, inspections and examinations (or otherwise) either to conduct those activities or to assist a person to whom disclosure may be made under Rule 24c-1 [17 CFR 240.24c-1]. This regulation is promulgated to assist in the effective and efficient discharge of the SEC's administrative, examination, enforcement, and oversight responsibilities, and is intended to facilitate the SEC's investigations and examinations and its cooperation with those persons to whom access may be granted, including State, Federal and Foreign Governmental authorities. It is not intended to benefit, nor does it confer any rights upon any individual or organization. This regulation is based on Section 24(c) of the Securities Exchange Act of 1934 [15 U.S.C. 78x(c)]; Rule 24c-1; Rule 2 of the SEC's Rules Relating to Investigations [17 CFR 203.2]; and the SEC's general rulemaking authority under the statutes it administers.

1. Policy.

a. Various SEC rules prohibit disclosure by its officers and employees of information and documents or other non-public records of the SEC obtained in the course of any examinations or investigations, unless the SEC authorizes or approves the disclosure of such information or documents. In certain cases, however, the SEC has authorized its staff to discuss, and grant access to, materials in its examination and enforcement files and other non-public records.

b. The prohibitions against use of non-public information or documents without specific authorization or approval by the SEC does not apply to the use of such materials as necessary or appropriate by members of the staff in pursuing SEC investigations or examinations, or in the discharge of other official responsibilities. For example, documents obtained from a registered entity during an examination or from a witness may be used in the examination of other witnesses or submitted for document analysis. Similarly, testimony of a witness may be used in examining other witnesses. That is, such information may be used to facilitate the development of SEC matters.

c. When the SEC authorizes the institution of actions, the staff is authorized to use such non-public material in the action. When the SEC refers matters to the Department of Justice, or when access is granted to non-public information or documents

to any person identified in Rule 24c-1, the staff also is authorized to render such assistance as may be required for the use of the information or documents by those to whom access is granted. When requests for non-public materials are made during litigation by respondents or defendants, or under other circumstances, and the staff is in doubt as to the propriety of disclosing such material, it may present such matters to the SEC for appropriate advice and authorization.

2. Responsibility and Authorization.

a. Officials in the Divisions of Enforcement, Corporation Finance, Market Regulations and Investment Management and the Offices of International Affairs and Compliance Inspections and Examinations at or above the level of Assistant Director; officials in Regional Offices at or above the level of Assistant Regional Director; and officials in District Offices at or above the level of Assistant District Administrator are authorized to act in matters covered in this regulation.

b. For the purpose of this regulation, the term "SEC officials" means those staff members designated in paragraph 2a.

3. Confidential Nature of Information.

If public disclosure of information given to a person under Rule 2 or Rule 24c-1 may interfere with enforcement or other activities of the SEC, the SEC official involved will inform the recipient that the information must be treated as confidential, and cannot be disclosed to the public without authorization by the SEC or by an appropriate SEC official. The SEC official will obtain appropriate representations of confidentiality.

Results of the Investigation

I. Background

A. Aguirre's Employment with the Commission

Complainant Gary Aguirre began working for the SEC's Enforcement Division on September 7, 2004, as a grade SK-14, step 24 staff attorney with an annual salary of $125,601, responsible for investigating potential violations of the federal securities laws. Letter dated August 6, 2004 from Jayne Seidman Associate Executive Director of SEC, to Gary Aguirre attached hereto as Appendix 91. Prior to obtaining this position, Aguirre applied unsuccessfully for 22 different attorney positions with the Commission in 2003 and 2004. U.S. Equal Employment Opportunity Commission (EEOC) decision, dated June 19, 2008, attached hereto as Appendix 92.[22]

[22] On June 24, 2004, Aguirre filed an Equal Employment Opportunity (EEO) complaint against the SEC, alleging that he was discriminated against on the basis of race (Caucasian), national origin (Hispanic), gender (male), and age when he was not selected for many of these positions. Equal Employment Opportunity Commission (EEOC) decision dated June 19, 2008 attached hereto as Appendix 92. Although

The SEC's Enforcement Division requested that Aguirre be offered a special higher salary rate based upon his level of experience. Memorandum dated July 15, 2004, from Stephen Cutler, Director, Division of Enforcement to Jayne Seidman, Associate Executive Director, Office of Administration and Personnel Management, attached hereto as Appendix 93. This memorandum authored by then-Director of the Enforcement Division, Stephen Cutler, provided that "Aguirre has much more litigation, securities and trial experience than the normal candidates we recruit." Id. The memorandum further stated that Aguirre had seven years of securities fraud litigation, including three class actions, and had obtained substantial recoveries in 95 consecutive complex cases totaling in excess of $200 million. Id. The memorandum concluded: "I am very impressed with Mr. Aguirre's legal experience, academic background, and his desire to join our staff." Id.

Upon joining the Commission in September 2004, Aguirre was initially supervised by Branch Chief Charles Cain (Cain) (SK-15),[23] who joined the Commission in December 1999 as a staff attorney and became a Branch Chief in 2004. Notes of OIG Investigator Interview of Charles Cain on July 31, 2006 (hereinafter, "C. Cain 7/31/2006 Interview Notes") at p. 1.

Cain was one of three Branch Chiefs who reported to former Assistant Director Richard Grime (Grime) (SK-17). Notes of OIG Interview with Richard Grime of August 1, 2006 (hereinafter, "Grime 8/1/2006 Interview Notes") at p. 1. Grime had been an Assistant Director since January 2003. Id. Grime explained that in general, the Branch Chiefs serve as immediate supervisors to the staff attorneys on day-to-day issues, and staff attorneys only come to him only with the larger issues. Id.

On January 5, 2005, Aguirre met with Grime's former supervisor, Associate Director Paul Berger (SO- 02), during which Aguirre requested that he be transferred from the group to which he had been assigned, working for Branch Chief Cain and Assistant Director Grime, "on the grounds of possible age discrimination." Gary Aguirre letter and memorandum dated April 6, 2006, to OSC examiner Barbara Wheeler in response to questions posed in Wheeler's e-mail of March 26, 2006 (hereinafter "Aguirre 4/6/2006 Response to Wheeler") at p. 1, excerpted portions of which attached hereto as Appendix 94. On January 10, 2005, Aguirre wrote to Berger formally requesting that he be transferred out of Grime's section. Letter dated January 10, 2005, from Aguirre to Berger, attached hereto as Appendix 95. In the letter, Aguirre stated that his only request was that his transfer not be into another situation where his age, and consequently his experience, is an obstacle that must be overcome every day. Id. Aguirre also stated in the letter that he understood there had been an opening in the section headed by Assistant Director Mark Kreitman (SK-17.) Id. Aguirre knew Kreitman prior to joining the Commission, having been a student in Kreitman's class in a Master's LLM program at

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Aguirre's complaint was initially dismissed on June 14, 2006; on June 19, 2008, the EEOC Office of Federal Operations vacated nearly all of the decision that dismissed his claims. Id.

[23]On October 14, 2007, Cain was promoted from an SK-15 Branch Chief to an SK-17 Assistant Director.

Georgetown University Law School. Transcript of Testimony of Mark Kreitman before Senate Committee on September 6, 2006 (hereinafter, "Tr. Kreitman Senate 9/6/2006 testimony") at p. 7.[24] Kreitman, and his wife also knew Aguirre and his wife socially prior to Aguirre joining the SEC. Id.

Berger responded to Aguirre's letter via e-mail on January 13, 2005, stating that Kreitman's Assistant Director section did not have an opening at that time. E-mail dated January 13, 2005, from Berger to Aguirre attached hereto as Appendix 96. Shortly thereafter, however, a position became available in Kreitman's section and, in early February 2005, Aguirre was transferred to Kreitman's section. Transcript of Testimony of Robert Hanson before Senate Committees on September 5, 2006 (hereinafter, "Tr. Hanson Senate 9/5/2006 testimony") at p. 8. After the transfer, Aguirre reported to Robert (Bob) Hanson (SK-15), a Branch Chief, who reported to Assistant Director Kreitman. Id. At that time, Hanson had been a Branch Chief for approximately three years. Id. at p. 5.

Associate Director Berger reported initially to Linda Thomsen (SO-03), who became Deputy Director of Enforcement in 2002. Transcript of Testimony of Linda Thomsen on September 8, 2006 before Senate Committee (hereinafter, "Tr. Thomsen Senate 9/8/2006 testimony") at p. 11. After then-Enforcement Director Stephen Cutler left the Commission, in May 2005, Thomsen became Director of Enforcement, a position she remains in today. Id. at p. 8. Associate Director Berger left the Commission and began employment as a partner at the law firm of Debevoise & Plimpton on June 1, 2006. Transcript of Testimony of Paul Berger before Senate Committee on November 2, 2006 (hereinafter, "Tr. Berger Senate 11/2/2006 testimony") at p. 6.

B. SEC Enforcement Investigation of Pequot Capital Management

In November 2003, the SEC's Enforcement Division began an informal inquiry into a number of potential Federal securities law violations by Pequot Capital Management (Pequot), a hedge fund. When Aguirre first joined the Commission in September 2004, the Pequot case was a Matter Under Inquiry (MUI). Although the matter had been opened since November 2003, significant investigatory work had not yet been done on the case. C. Cain 7/31/2006 Interview Notes at p. 1.

Shortly after joining the Commission, Aguirre was assigned the Pequot case by Branch Chief Charles Cain. Id. The Pequot case had been referred by the Enforcement Division's Market Surveillance Group headed by Joseph Cella (Cella) for investigation. Grime 8/1/2006 Interview Notes at p. 1. Cella had been Chief of the Office of Market Surveillance (OMS) in the Division of Enforcement, and held that position since approximately 1994. Notes of OIG Investigator Interview with Joseph Cella of August

[24] Kreitman noted that Aguirre "was the best student in his class," got an "A," and Kreitman supervised Aguirre's Master's thesis. Transcript of testimony of Mark Kreitman before Senate Committee on September 6, 2006 (hereinafter, Tr. Kreitman Senate 9/6/2006 testimony) at p. 7-10.

17, 2006 (hereinafter, "Cella 8/17/2006 Interview Notes") at p. 1. Cella assigned his subordinate in OMS, Branch Chief Eric Ribelin (Ribelin) (SK-15), to work with Aguirre on the Pequot matter.

In January 2005, the SEC issued a formal order of investigation in the Pequot matter, authorizing the Enforcement staff to issue subpoenas for documents and witness testimony. Pequot Capital Management Case closing report dated 11/30/2006 (hereinafter, "case closing report") attached hereto as Appendix 97 at p. 1.

The investigation arose out of several suspicious trading episodes that occurred prior to public announcements. Id. Initially, the SEC investigation of Pequot, for which Aguirre was the lead investigator, focused on a July 30, 2001 public announcement that General Electric (GE) had acquired Heller Financial (Heller), causing a sharp rise in Heller's stock price and a small decline in GE's stock price. Id. Pequot began accumulating Heller common stock on July 2, 2001, and started selling GE stock short on July 25, 2001. Id. By engaging in these transactions, Pequot realized a profit of nearly $17 million on the Heller stock and approximately $1.9 million on the GE stock. Id. Pequot closed out its GE short position approximately two weeks after the public announcement. Id. at p. 4. According to Aguirre, Pequot bought more Heller stock ($44 million worth) in total than any other individual or institution in the country during the four weeks before the acquisition announcement. Written Testimony of Gary Aguirre before U.S. Senate Committee on the Judiciary, Part I, dated December 5, 2006 at p. 4,7, excerpted portions attached hereto as Appendix 98.

According to Enforcement's case closing report, the Chairman and Chief Executive Officer of Pequot, Arthur Samberg (Samberg), who was the individual responsible for making the trading decisions in both Heller and GE stock, initially testified that he did not remember why he had decided to make the trades. Case closing report at p. 1. However, in subsequent testimony, he referred to information about Heller that was publicly available at the time he made the trades as the basis for placing the Heller trades. Id. Aguirre stated that he believed Samberg's testimony eliminated any legitimate source of information for his decisions to buy Heller stock. Written Testimony of Gary Aguirre before U.S. Senate Committee on the Judicial, Part I dated December 5, 2006 at p. 8, excerpted portions attached hereto as Appendix 98. According to Aguirre, Samberg said he spoke with no one regarding his decision to purchase Heller stock. Id. Nor did he recall seeing any newspaper articles about Heller. Id. The reasons identified by Samberg in his subsequent testimony for purchasing the stock, favorable credit climate, Heller's strong financial model, speculation, analysts' reports, and the relative performance of Heller's stock, were not credible according to Aguirre. E-mail dated June 27, 2005, from Gary Aguirre to Bob Hanson attached hereto as Appendix 99.

Documentary evidence demonstrated that Samberg communicated frequently with John Mack, the Chairman and Chief Executive Officer of Morgan Stanley, during the time period of Pequot's trading in Heller and GE stock and prior to the public announcement. Case closing report at p. 1. Mack also formerly served as Chairman of

Pequot. Id. There was evidence that Mack had a personal relationship with Samberg, and that his wife, and a foundation Mack controlled, made significant investments in a number of Pequot funds. Id. at p. 4. Mack also participated with Pequot in at least two private company investments in 2001. Id. at p. 1. Credit Suisse First Boston (CSFB), an investment banking firm and advisor to Heller in the transaction, hired Mack as its Chief Executive Officer on July 12, 2001, ten days after Pequot began to buy Heller stock. Id. According to Aguirre, John Mack was a logical source of a tip to Samberg for a variety of reasons. E-mail dated June 29, 2005, from Gary Aguirre to Mark Kreitman attached hereto as Appendix 100. Mack had access to the information by virtue of having worked for both Morgan Stanley, which represented GE, and CSFB which represented Heller. Id. Mack had communications with Samberg on at least two critical times during the trading, including a telephone call after the close of the markets on the Friday before the Monday Samberg began trading. Id.

Another aspect of the SEC's Pequot investigation arose out of the activities of David Zilkha, a Microsoft employee, who went to work as an analyst for Pequot. Case closing report at p. 2. Even before he officially started work at Pequot, Zilkha began providing Samberg with information about Microsoft via e-mail, including information attributed to Microsoft employees. Id. During the time he was receiving this information, Samberg started buying Microsoft options, which increased in price throughout this time period. Id. According to Aguirre, Pequot made a profit of $12 million from Microsoft trades. Written Testimony of Gary Aguirre before U.S. Senate Committee on the Judiciary, Part I dated December 5, 2006 at p. 4, excerpted portions attached hereto as Appendix 98.

In the Pequot investigation, Enforcement also investigated Pequot's trading in two drug companies, AstraZeneca and Par Pharmaceutical. Case closing report at p. 3. This part of the investigation arose out of a federal district court decision on October 11, 2002, that caused the price of shares of AstraZeneca's shares to increase by 12% and the price of Par Pharmaceutical's shares to decrease in price by 21%. Id. SEC Enforcement staff's initial inquiry indicated that shortly before the Court announced its decision, Pequot reversed its trading pattern in both stocks. Id.

Another aspect of the Pequot investigation concerned the public announcement of a Private Investments in Public Equities (PIPES). Such an announcement often causes an issuer's stock price to fall, making it advantageous to sell short the stock of companies who issue PIPE securities before the transactions are publicly announced. Id. Enforcement staff were examining Pequot's trading data to determine whether Pequot sold short prior to the public announcement of any PIPE it purchased. Id.

The final aspect of the Pequot investigation involved Pequot's selling shares it received in numerous initial public offerings (IPOs) and simultaneously purchasing the same number of shares soon after the shares began trading in the open market. Id. This trading suggested that Pequot may have engaged in a manipulative trading practice because it appeared as if the trades did not involve a change in beneficial ownership. Id.

These practices, known as "wash sales," occur when an entity both buys and sells the same security at the same price in a short period of time, generating commission costs, but involving no potential profit or loss, and are prohibited when such transactions are done for the purpose of creating a false or misleading appearance of active trading in a stock. Id. at pgs. 3, 4. The SEC investigated Pequot's execution of wash sales reported as an agency cross trade immediately after an IPO, those reported as an agency cross trade after a secondary offering, and those in which buy and short sale orders were executed against each other. Memorandum dated August 3, 2005 from Market Surveillance Specialist Tom Conroy to Pequot file attached hereto as Appendix 101.

II. Allegation of Improper Preferential Treatment Concerning the Taking of Mack's Testimony

A. Description of Aguirre's Allegations

In his testimony before the United States Senate, Aguirre stated that the SEC gave preferential treatment to Mack in connection with the Pequot investigation and blocked Aguirre's efforts to take Mack's testimony because of his "powerful political connections." Written Testimony of Gary J. Aguirre before U.S. Senate Committee on the Judiciary, Part I dated December 5, 2006 at p. 1, excerpted portions attached hereto as Appendix 98.

B. Chronological History of Communications Regarding Taking of Mack's Testimony

1. Aguirre's Initial Concerns about Narrowing the Pequot Investigation

Aguirre began working on the Pequot investigation shortly after he joined the SEC in September 2004. Written Testimony of Gary J. Aguirre before U.S. Senate Committee on the Judiciary, Part II dated December 5, 2006 at p. 6, excerpted portions attached hereto as Appendix 102. According to Aguirre, he made significant progress in the investigation. Id.

In the first several months of the investigation, Aguirre expressed some concerns about how the investigation was proceeding. According to Aguirre, less than a month after the staff obtained subpoena power and before any subpoenas were issued, Assistant Director Kreitman directed that the Pequot investigation be narrowed to two or three matters.[25] Letter from Aguirre to Senators Shelby and Sarbanes dated August 21, 2006 (hereinafter, "Aguirre 8/21/2006 letter to Shelby and Sarbanes") at p. 32. Aguirre said that previously, Kreitman had expressed his approval of the investigation being increased to include seventeen referrals. Id. Aguirre stated that Kreitman implied that the directive

[25] Branch Chief Eric Ribelin concurred that early in the investigation, "they [Berger and Kreitman] sought to whittle down dramatically the number of stocks that we look[ed] at, down to two or three, I think." Transcript of testimony of Eric Ribelin before Senate Committee on September 1, 2006 (hereinafter, Tr. Ribelin 9/1/2006 Senate testimony) at p. 21.

to narrow the scope of the investigation had come from Paul Berger, and that it came approximately two weeks after an influential attorney representing Pequot met with former Director of Enforcement Stephen Cutler.[26] Id. However, according to Aguirre, Kreitman later withdrew the directive to narrow the case. Id.

2. Issuance of Subpoenas in the Pequot Investigation

Aguirre stated that after the staff obtained subpoena power, he issued over ninety subpoenas in total in the Pequot investigation. Id. at p. 13. Aguirre said he served approximately 30 subpoenas on Pequot – five for records and the rest for testimony of officers, portfolio managers, traders and other staff. Id. The other 60 subpoenas were served, according to Aguirre, on third parties, mostly public companies and investment banks. Id. Aguirre stated that until he wanted to subpoena Mack, he merely informed his superiors whom he intended to subpoena and invited their feedback. Id. Aguirre stated that on February 18, 2005, he e-mailed Hanson and Kreitman about his intention to subpoena 27 individuals, 17 of whom were employed by Pequot. Id. He said that neither Hanson nor Kreitman asked why he decided to issue the subpoenas nor responded to his e-mail. Id. Aguirre stated that his supervisors approved the remaining 70 or so subpoenas in much the same way. Id.

3. Kreitman's Statement Early in Pequot Investigation of High Priority of Case

In a February 22, 2005 e-mail from Kreitman to Aguirre and several other individuals working on the Pequot investigation, Kreitman stated: "If we can interest the Southern District again [to look at the Pequot case from a criminal perspective], that should be a very high priority," which evidenced the initial favorable view by Aguirre's supervisors of the Pequot investigation. E-mail dated February 22, 2005 from Kreitman to Hilton Foster, with a copy to Aguirre, Eric Ribelin, and Hanson attached hereto as Appendix 105.

4. Aguirre's Concerns about Staffing of Pequot Investigation

Aguirre also expressed some concerns about the staffing on the Pequot investigation. By e-mail dated May 9, 2005, Aguirre requested that a contract paralegal be appointed to the Pequot investigation because of the 18 possible insider trading matters that were being investigated, and the large volume of electronic and hard copy

[26] Cutler acknowledged that he had a meeting with counsel for Pequot, Audrey Strauss of Fried Frank, at that time, but stated that he never discussed the Pequot investigation in that meeting. Notes of OIG Telephone Interview with Stephen Cutler of August 17, 2007 at p. 1, attached hereto as Appendix 103. Cutler also referred to a letter written by Audrey Strauss to Senators Baucus, Grassley and Specter, dated August 6, 2007, stating that she did not meet with Cutler about the Pequot investigation in early 2005, but that she "did meet with Mr. Cutler in early 2005 about another matter completely unrelated to Pequot that was being handled by the New York office of the SEC," and that "Pequot was not discussed" in this meeting. Letter dated August 6, 2007, from Audrey Strauss to Senators Baucus, Grassley and Specter, attached hereto as Appendix 104.

documents that were being produced by 21 parties in the investigation. E-mail dated May 9, 2005 from Aguirre to [redacted] with copies to Kreitman and Hanson attached hereto as Appendix 106. According to Aguirre, [redacted], who was the Enforcement staff person who evaluated requests for paralegals, indicated that Aguirre's request could be granted only if Associate Director Berger made the request, and Berger declined to do so. Responses by Gary Aguirre for the Hearing Record to Questions from Senator Grassley (hereinafter, "Aguirre Responses to Questions from Senator Grassley") at p. 41; e-mail dated May 23, 2005 from [redacted] to Aguirre attached hereto as Appendix 107.[27]

5. Aguirre's Efforts to Take Mack's Testimony

a. Initial Conversations

According to Aguirre, in early June, he began to inform his supervisors of evidence that Mack met the profile of the suspected tipper of information for Pequot's GE and Heller trades. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 15. In Aguirre's view, Mack had potential access to information that GE intended to acquire Heller; he had contacts with Samberg and Credit Suisse First Boston (CSFB); he had a number of motives to tip Samberg; and there was evidence that Mack and Samberg trusted each other. Id. at pgs.16-21. On June 3, 2005, Aguirre sent Hanson, Kreitman and several others an e-mail, which read, in part:

> John Mack, who came up on the radar screen as possible GE-Heller tipper, has just become chairman of Pequot capital, according to WSJ article below. . . . Is there something to this perverse logic: Mack is the only person in the world who would have as much to loose [sic] as Samberg if we could prove that he provided material-nonpublic info to Samberg. Who safer for Samberg to head Pequot and keep its secrets? E-mail from Aguirre to Ribelin, Foster, Eichner, Conroy, Glascoe, Miller, Hanson and Kreitman dated June 3, 2005 attached hereto as Appendix 108.

Hanson replied to Aguirre's June 3, 2005 e-mail, stating, "Mack is another bad guy (in my view)." E-mail from Hanson to Aguirre dated June 3, 2005 attached hereto as Appendix 109.

According to Aguirre, his supervisors authorized him to present the GE/Heller matter to the FBI and U.S. Attorney's office in connection with a possible criminal investigation of Pequot, including Mack and Samberg's roles as tipper and tippee on June 15, 2005. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 15.[28]

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[27] According to Kreitman, the Pequot investigation was more heavily staffed than other investigations in his group, and he arranged for the help of paralegals and interns, as well as two other attorneys on his staff, James Eichner and Liban Jama, to assist Aguirre. Tr. Kreitman Senate 9/6/2006 testimony at pgs. 22-23.

[28] A June 14, 2005 e-mail string between Kreitman, Hanson and Aguirre shows Aguirre performing a dry run of his planned presentation to the FBI and U.S. Attorney's Office for Kreitman and Hanson that day.

On June 20, 2005, Aguirre raised the issue of taking Mack's testimony in an e-mail to Hanson, saying "A tougher question is whether to take Mack'[sic] story now or wait till we get all info from CSFB." E-mail from Aguirre to Hanson, dated June 20, 2005, attached hereto as Appendix 111. Hanson replied to Aguirre, asking, "Are you suggesting that we take Mack's testimony now before we get the documents or that we ask for more documents from CSFB or both?" E-mail from Hanson to Aguirre dated June 20, 2005, attached hereto as Appendix 111. Aguirre replied, "Both." E-mail from Aguirre to Hanson dated June 20, 2005 attached hereto as Appendix 111. Hanson then responded to Aguirre that same day at 8:25 pm, saying "Okay Gary you've given me the bug. I'm starting to think about the case during my non work hours." E-mail dated June 20, 2005, from Hanson to Aguirre attached hereto as Appendix 111.

b. Allegations that Political Connections Were Raised as Justification for not Taking Mack's Testimony

Aguirre stated that on or about June 23, 2005, in a face-to-face meeting, Hanson told him that it would be difficult to obtain authorization for the issuance of a subpoena to Mack because Mack had powerful political connections and Kreitman would have to make the call. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 22. In his e-mail of July 27, 2005, to Kreitman and Berger, Aguirre said he had memorialized this conversation with Hanson in a June 28, 2005 e-mail to Kreitman. E-mail from Aguirre to Kreitman and Berger dated July 27, 2005, attached hereto as Appendix 112.

According to Aguirre, on June 24, 2005, Hanson met alone with Berger to discuss the Mack matter and specifically excluded both Aguirre and Ribelin from the meeting. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 23.[29] Aguirre believes that the following Monday, July 27, 2005, Hanson and Kreitman also met privately to discuss the proposed Mack subpoena. Id.

On June 27 and 28, 2005, Aguirre sent two e-mails to Kreitman explaining the evidence that Aguirre believed indicated Samberg had acted on material nonpublic information in directing the trades in GE and Heller stocks and why he thought subpoenas for Mack's testimony and related records were the most logical next steps in the investigation. Id. at p. 25; e-mails dated June 27 and 28, 2005 attached hereto as Appendices 113 and 114. Aguirre also sent Kreitman a spreadsheet summarizing Mack's ties to 15 hedge funds. Spreadsheet attached hereto as Appendix 115.

E-mails from Kreitman to Aguirre, Hanson to Kreitman, and Hanson to Kreitman dated June 14, 2005 attached hereto as Appendix 110.

[29] Ribelin also referenced the fact there was a meeting involving Berger and Hanson that Ribelin had the "impression that Gary was supposed to be in." Tr. Ribelin 9/1/2006 Senate Testimony at p. 70. According to Ribelin, Aguirre invited Ribelin to go with him to the meeting, and when they got there, the door was closed and "[Berger and Hanson] didn't want us to be there." Id.

According to Aguirre, on June 28 and 29, 2005, he spoke privately with Kreitman regarding the issuance of the subpoenas to Mack and Kreitman showed no interest in the facts summarized in the e-mails supporting Aguirre's belief that the Mack subpoenas should be issued. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 25. Aguirre said that Kreitman angrily refused to allow the subpoenas to be issued, but did not explain the reasons for his decision. Id.

By e-mail dated June 29, 2005, Aguirre memorialized his conversations with Kreitman, stating, in pertinent part, "Your refusal to permit this testimony, along with other limitations, has significantly affected this investigation." Id. at p. 26; e-mail dated June 29, 2005 from Aguirre to Kreitman dated June 29, 2005, attached hereto as Appendix 116.

According to Aguirre, Kreitman did not respond to his June 29, 2005 e-mail for almost four weeks, which was out of character for Kreitman, as it was his practice to reply promptly to e-mails from his subordinates. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 26. Aguirre also said Kreitman never replied to Aguirre's other lengthy e-mails of June 27 and June 28 describing why Mack's testimony should be taken. Id.

c. Aguirre's Tendering of and Withdrawing his Resignation

On June 30, 2005, Aguirre stated that he tendered his resignation, effective September 30, 2005, because he felt he could not carry out his duties as a Federal officer in the Pequot investigation and accept the decision of his supervisors to give Mack favored treatment. Id. at p. 27.

According to Aguirre, over the next four weeks, other SEC staff encouraged him to withdraw his resignation and he began to find more evidence suggesting that Mack was the tipper. Id. Aguirre said by late July, he decided to withdraw his resignation, and on July 20 or 21, 2005, he met with Berger and told him that Hanson had informed him the Mack subpoena had been blocked because of Mack's powerful political connections. Id.

d. Request by Aguirre's Supervisors for Further Justification for Taking Mack's Testimony and Aguirre's Responses

On July 25, 2005, Kreitman sent an e-mail to Aguirre with a copy to Hanson, stating, in pertinent part:

> I need greater specificity than the information provided [in Aguirre's June 29, 2005 e-mail] . . . . 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 contacts between Mack and Samberg, though potentially significant, are not, as I understand it, aberrational. The

> fact that we have not identified other potential tippers is of only marginal significance. Item 4 is of little material import since it hardly limits suspicion to Mack among all the people Samberg trusts. The evidence of motive you cite may have substance, but it's too vague as articulated to be meaningful. Specifics might strengthen it, if they show conduct inconsistent with pattern. . . . 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 in the sine qua non for focused investigation of Mack. E-mail from Kreitman to Aguirre dated July 25, 2005 attached hereto as Appendix 117.

According to Aguirre, Kreitman's e-mail ignored the "specificity" set forth in the e-mails and spreadsheets Aguirre sent him on June 27 and 28, 2005. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 29.

On July 27, 2005, Aguirre sent an e-mail to Berger and Kreitman, replying to Kreitman's July 25 e-mail, first inquiring why it would take four weeks to respond to Aguirre's emails, and suggesting that the timing of Kreitman's response was triggered by his conversation with Berger the previous week. E-mail dated July 27, 2005, from Aguirre to Berger and Kreitman, attached hereto as Appendix 118. Aguirre's July 27, 2005 e-mail included 15 attached exhibits, which were the e-mails and spreadsheets Aguirre had previously provided to Hanson or Kreitman. Id. Aguirre's July 27, 2005 e-mail responded to the statements made in Kreitman's e-mail, as follows:

> **[Original statements by Kreitman in bold]** [Aguirre's responses in regular text.]
>
> **I need greater specificity than the information provided here.** My June 28 e-mail was not intended to specify the factual support for the Mack testimony –CSFB subpoena course of action . . . The factual support for these two steps was discussed in the two lengthy e-mails and two spreadsheets I gave Mark on June 27 and June 28 . . .
>
> **Perhaps the CSFB documents will show when Mack obtained information about the GE/Heller deal.** [Not likely: all communications regarding Mack's position at CSFB during the critical period before July 2 were between Mack and Credit Suisse Group Chairman Lukas Muhlemann in Switzerland, except for two meetings with CSFB CFO and á CSFB attorney. . . . So far, despite my request, CSFB has not produced anything to or from its Swiss parent regarding Mack. . . . Until we talk to Mack, we don't know who he might have spoken with at CSFB before he was hired. . . .

The contacts between Mack and Samberg, though potentially significant, are not, as I understand it, aberrational. [We have four Mack-Samberg contacts during April through July 2001. One was on the Friday night before Samberg started trading his trading on the next Monday.]

The fact that we have not identified other potential tippers is only of marginal significance. [If we had just begun to look, I would agree. I have been through Samberg's personal calendar, what phone records we have, all his e-mails for the relevant period, searched through about the million Pequot e-mails for 2001. . . . There are no connects. . . The tipper must connect a lot of dots: access to info, motivation at the key time, trusting relationship with Samberg, communications at key time with Samberg. No one else connects these couple of dots: Mack connects all of them.]

Item 4 is of little material import since it hardly limits suspicion to Mack among all the people Samberg trusts. [It's not the trust factor in isolation as Mark suggests: it's one factor in a profile. . . . the tipper must meet the whole profile; have possible access to information, and spoke with Samberg at the key time, had a motive, and was trusted by Samberg. Mack . . . meets the whole profile.]

The evidence of motive you cite may have substance, but it's too vague as articulated to be meaningful. Specifics might strengthen it, if they show conduct inconsistent with pattern. [As discussed above, the June 28 e-mail, to which Mark responds, was not intended to specify the details regarding motive . . . In general, I do not believe that Mack's tips to Samberg would have been on transactions where they split a profit. That's too crude and created unnecessary risk. More likely, they did favors for each other like some of those discussed below:

a) *Mack got into Closed Pequot funds and special deals that Mack thought would have big returns to him during and after 2001.* . . . As a rough estimate, based on performance over 1999 and 2000, Mack could reasonably expect that his new investments in Pequot during 2001 alone would have returned something in the range of $5 million per year to Mack.

b) *Board seats.* As shown on one of the spreadsheets (attachment 12), Samberg was promoting Mack for board seats on both Baby C and Fresh-start.

c) *Office Space* Mack was using Pequot office space intermittently during the period from March 2001 through July, 2001, when he began work for CSFB.

d) *Stock tips* Samberg was giving Mack stock tips on public companies that Mack directly invested in, "That's where were putting our money.

e) *Friendship* Mack and Samberg were close friends. . . .

* * *

I have at no time "denied [your] my 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 in the sine qua non for focused investigation of Mack. [I'll be specific. I proposed in my 6/20 and 6/24 e-mails . . . to Bob that we serve a second subpoena on CSFB. When I did not get an answer, I asked Bob about it. He said it was Mark's decision. I therefore included my request to broaden the CSFB subpoena in my June 28 e-mail to Mark: ". . . 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." Mark said he had read the above memo before we spoke on June 28. He made clear to me that he disagreed with what I had proposed. I first learned that Mark had changed his mind after I told Bob I was resigning.] Id. at pgs. 1-4.

Aguirre's July 27, 2005 e-mail also mentioned what he viewed as "different and more troubling input why it was difficult to move ahead with the second CSFB subpoena and the Mack testimony." Id. at p. 4. He specifically referenced that Hanson told him "it would be an uphill battle because Mack had powerful political connections," and the fact that Hanson also mentioned this concern in a meeting with Kreitman and Aguirre. Id. Aguirre also pointed out that documents subpoenaed from Morgan Stanley were faxed by Mary Jo White directly to Linda Thomsen, and that Hanson and Kreitman did not invite him to a meeting to discuss Mack's possible testimony. Id. Aguirre concluded in the e-mail that "this combination of events suggest 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." Id.

On July 27, 2005, Aguirre also sent a separate e-mail to Berger, stating, "By this e-mail, I am rescinding my resignation of June 30, 2005." E-mail from Aguirre to Berger dated July 27, 2005, attached hereto as Appendix 119.

According to Aguirre, he had another face-to-face meeting with Hanson on August 3, 2005, during which he again questioned the decision to block the proposed

Mack subpoenas. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 30. Aguirre stated that at that meeting, Hanson again said it would be very difficult to take Mack's testimony because of his political influence. Id. Aguirre memorialized the conversation in two e-mails to Hanson the next morning. The first one, sent at 7:20 a.m., referenced Ferdinand Pecora,[30] who warned about the "riotous speculative excesses of the 'wild bull market'" without regulatory oversight, and stated as follows:

> When the SEC declines to question "industry captains," when an investigation suggests it is the next logical step, we are granting them a pass to play the trading game by their own rules. We do so when we set artificially high barriers to question them that do not exist for others, e.g., don't question them about going over the wall until we proved they have already made the trip. . . . Mack had multiple motives, Samberg's trust, contact with Samberg at the key moment, and two possible sources for the tip. He should be asked the obvious questions. E-mail from Aguirre to Hanson, dated August 4, 2005 attached hereto at Appendix 120.

Aguirre's second e-mail on August 4, 2005, sent at 9:48 am, stated, in pertinent part:

> 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. . . . 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 Mary Jo White could contact a number of powerful individuals, any of whom could call Linda about the examination. E-mail from Aguirre to Hanson, dated August 4, 2005, attached hereto as Appendix 120.

Hanson replied to Aguirre's August 4, 2005 e-mails at 10:16 am, stating, in relevant part:

> We seem to be miscommunicating and I'm not sure why. We both have the same objectives. I learned through the grapevine, rather than directly, that you were not leaving but staying and wanted to know what your plans are. . . .
>
> I think we should prepare a memo discussing why it is appropriate to take Mack's testimony at this point. I said I would do it at one point and I thought you said you would do it shortly thereafter. We've discussed this several times thereafter and Paul mentioned recently that he was still looking for a memo. We may have different recollections, but at bottom I

[30] Pecora was Chief Counsel of a commission established by the Senate Committee on Banking, Housing & Urban Affairs in 1932 to investigate the Wall Street crash of 1929.

> still believe one should be prepared. I'm happy to do the memo, though it will have to wait now until after my vacation.
>
> I believe that Mark feels it is premature to take Mack's testimony. I don't disagree. I thought and think it makes sense to write a memo to make sure everyone has a chance to understand the facts we have and whether it makes sense to take the testimony at this juncture. Paul had wanted to talk about taking the testimony at one point. I think the memo should precede the discussion. As a general matter I try to alert folks 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 and possibly Linda 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 may reach out to Paul and Linda (and possibly others). Hope this clarifies things somewhat. E-mail from Hanson to Aguirre, dated August 4, 2005, attached hereto as Appendix 120.

That same day, Aguirre sent an e-mail to Linda Thomsen, referencing a comment that former Enforcement attorney Hilton Foster had made to her at Foster's going away party about the Pequot case being the most important case he had handled at the Commission in 30 years, stating, as follows:

> Do you have an open door policy?
>
> If so, do you recall Hilton Foster's comment to you about the most important case he handled in his 30 years at the Commission? He wanted me to talk to you about it. It was nearly killed 5 months ago and is now moving in circles.
>
> It could change the financial markets – make them a little more hospitable for investors, small, or big, who do their home work rather than buy information with favors. E-mail from Aguirre to Thomsen dated August 4, 2005, attached hereto as Appendix 121.

Thomsen responded to Aguirre's e-mail, saying, "I would be happy to meet with the team working on the matter." E-mail from Thomsen to Aguirre dated August 4, 2005 attached hereto as Appendix 122.

Later that day, at 6:34 pm, Aguirre sent an e-mail to Hanson, stating:

> Bob: You have asked that I do a memo why I believe the Mack testimony should be taken as the next logical step in the Pequot investigation. I believe there are three reasons. First, a profile of the tipper was developed

> in this case that has multiple elements. The possibility that Mack acted as the tipper satisfies almost every element and is inconsistent with none. Second, whether or not he is the tipper, his testimony will advance the investigation. If he is the tipper, his testimony will likely suggest some avenues to be pursued and others to be dropped. It will pin him down to a story which we can begin to disprove. If he is not the tipper, his testimony is the likely first step to eliminating him from consideration. This would allow our limited resources to be focused on starting a new screening process to find another possible tipper. E-mail from Aguirre to Hanson, dated August 4, 2005, attached hereto as Appendix 123.

This e-mail further described how "Mack meets each element of the profile," including "the timing of the trading with Mack's access to possible information," "Mack had the motive to tip Samberg," "Samberg had a relationship of trust deep friendship with Mack," and "Samberg's need for a big favor from an old friend." Id. The e-mail concluded that "there do not appear to be other leads in the Samberg e-mails." Id.

Hanson responded to Aguirre's e-mail the next morning, saying "Gary, I forwarded this to Paul and Mark to review. I think we should meet after some of the facts in the memo are nailed down to discuss whether it makes sense to go forward. See you in a couple of weeks." E-mail from Hanson to Aguirre dated August 5, 2005 attached hereto as Appendix 124. Aguirre regarded Hanson's e-mail (sent by Hanson before he left on vacation) as evidence of a more flexible position on the Mack subpoenas, and according to Aguirre, based on this new flexibility, he postponed the meeting he had attempted to schedule with Linda Thomsen, and sent her an e-mail stating "Linda: The day following my e-mail to you, my Branch Chief said he would like to discuss in September, when all are back from vacation, the specific concern that prompted my e-mail to you. I therefore believe it makes more sense to delay discussing the matter with you until September to see if it works itself out. Thanks for you reply, Gary." E-mail from Aguirre to Thomsen, dated August 10, 2005, attached hereto as Appendix 125.

In response to Hanson's August 5, 2005 e-mail, which forwarded Aguirre's August 4, 2005 e-mail explaining the reasons for taking Mack's testimony, Kreitman made three points in an August 15, 2005 e-mail to Hanson and Berger, as follows:

> **[Original statements by Aguirre in bold]** [Kreitman's responses in regular text.]
>
> 1 **"First, Mack could deny that he ever knew that GE would make the offer until the public announcement. The investigation would then focus on whether this was true."** Since it's quite likely Mack will say this if we take his testimony, it makes sense to me to focus on whether it was true before doing so.

2 **"Mack also was getting into Pequot funds when they appear to be closed."** Gary repeatedly represented that Mack was admitted to Pequot funds that were closed. Which is it.

3 Much of this memo is speculation, not evidence. We need more of the latter. E-mail from Kreitman to Hanson and Berger, dated August 15, 2005, attached hereto as Appendix 126.

According to Aguirre, Kreitman had "created a new requirement" for the issuance of the subpoena, i.e., that he must prove that Mack "was brought over the wall" before he could be subpoenaed. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 33. On August 17, 2005, Kreitman sent an e-mail to Aguirre, Liban Jama and James Eichner stating, "Where are we on determining the date Mack was brought over the wall re the GE-Heller deal – the necessary prerequisite to subpoena to Mack?" E-mail from Kreitman to Aguirre, Jama and Eichner, dated August 17, 2005, attached hereto as Appendix 127.

Aguirre responded to Kreitman's e-mail stating, "As I understand the term "over the wall," I do not think it applies here in its usual sense: someone within a securities firm going over the 'wall' restricting access to non-public, material information. The tip to Samberg, assuming it took place, must have occurred before Mack started with CSFB. There will be no evidence in the classic sense that he went over the wall, as there was no wall at that time." E-mail from Aguirre to Kreitman, dated August 17, 2005, attached hereto as Appendix 128.

Upon returning from vacation, on August 22, 2005, Hanson responded to Kreitman's August 15th e-mail, which made three points about taking Mack's testimony, with a one word response: "Yup." E-mail from Hanson to Kreitman, dated August 22, 2005, attached hereto as Appendix 129.

Aguirre then went on his scheduled vacation on or about August 22, 2005, although he continued to be involved in deliberations via e-mail. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 33. Aguirre sent Hanson an e-mail on August 24, 2005, stating, "While you were on vacation, Mark informed me that I would have to establish that Mack 'went over the wall' before I could take Mack's testimony and ask him whether he went over the wall. This makes no sense to me." E-mail from Aguirre to Hanson, dated August 24, 2005, attached hereto as Appendix 130. Aguirre further stated in this e-mail that Berger had asked him to send his assessment as to why it was necessary to take Mack's testimony. Id. Aguirre explained that he had delayed it in the hopes the assessment would be reviewed objectively, but since Kreitman had already made up his mind, he saw no point in further delaying the analysis that Berger had requested. Id.

That same day, August 24, 2005, Hanson responded to Aguirre's e-mail about Kreitman's requirement of establishing that Mack "went over the wall," stating:

> Mark [Kreitman]'s idea makes complete sense to me. Normally we start questioning those who had the insider information. It's been my experience that Mark [Kreitman] views issues very objectively and closely and Paul [Berger] does also. I attempt to as well. I believe Mark [Kreitman] has thought long and hard about the best way to proceed on GE/Heller and continues to think about it. You may disagree with his determinations (and mine as well) and that, of course, is your right. My suggestion a while ago was to write a memo so that we could vet the issue with Paul [Berger]. From your e-mail directly below it seems that Paul [Berger] had the same idea. E-mail from Hanson to Aguirre, dated August 24, 2005, attached hereto as Appendix 131.

Also on that same day, Aguirre sent an e-mail to Berger stating "You had requested my analysis why John Mack's testimony should be taken. I had delayed sending it to you in hopes that Mark would be open to this possibility. However, Mark recently told me again that I would have to establish that Mack went over the wall before I could take his testimony. This does not make sense to me or to other staff. I am therefore submitting my analysis directly to you." E-mail from Aguirre to Berger dated August 24, 2005 attached hereto as Appendix 132.

Later that day at 1:53 pm, Aguirre responded to Hanson's e-mail that "Mark [Kreitman]'s idea makes complete sense to me, [etc.]" stating, in pertinent part:

> **[Hanson original statement bolded]**
>
> 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. E-mail from Aguirre to Hanson, dated August 24, 2005, attached hereto as Appendix 133.

A little over an hour later at 3:05 p.m., Hanson responded to Aguirre's e-mail stating, in relevant part:

> I read your "over the wall" e-mail when you sent it by cc to me. I assumed that Mark used the phrase to mean whether Mack had the information, not in the technical sense of the phrase (I doubt the technical sense would have any relevance in this case). I still recommend that we try and figure out whether Mack had the information before approaching him.
>
> 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 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. E-mail from Hanson to Aguirre, dated August 24, 2005, attached hereto as Appendix 134.

Less than an hour later, at 3:53 p.m., Aguirre responded to Hanson, stating, in pertinent part:

> I believe the bar has been set at 9' to take Mack's testimony and done so retroactively. First, Mark wanted proof of motive. When I documented that, Mark wanted proof that Mack went over the wall. That would just about take a confession from the CSFB CEO, who says he is innocent of any wrongdoing, the CD CEO, whose testimony we cannot take, or Mack, whose testimony we cannot take.
>
> [In response to Hanson's statements about the political clout was just having 'all your ducks in a row']: Bob, this is spin. You told me it would be tough to take Mack's testimony because he has political clout. An artificially high barrier has been set for this exam. I do not think this is proper. Doing so clashes with the SEC's mission. It also stops me from doing my job as a federal officer. E-mail from Aguirre to Hanson, dated August 24, 2005, attached hereto as Appendix 135.

Approximately a half an hour later, at 4:31 p.m., Hanson responded as follows:

> We seem to have different recollections of what I said.
>
> Moreover, I get the sense that you feel there is some hidden motivation for not wanting to take Mack's testimony now that I don't quite understand. I'm not sure what you think this is about (using your words), but, as I've mentioned before, and will mention again, we should try to figure out a number of things about Mack before scheduling him up. You can disagree with that course of action, which is perfectly fine by me, but you need to convince me and others that your course is the more appropriate one. One

> way to do that, which I suggested, was to write a clear and concise memo laying out all of the facts as to why to take Mack's testimony at this point (I believe that everyone feels we will take Mack's testimony at some point -- the question is when). I think you've prepared that memo and I've forwarded it on to Paul and Mark to digest. If there is other information beyond that memo and the other e-mails you sent to me and Mark in June, please let me know. E-mail from Hanson to Aguirre, dated August 24, 2005, attached hereto as Appendix 136.[31]

At 5:34 p.m., Aguirre responded by saying, "This will have to wait till I get back so I have access to e-mails, documents, etc. Also, I do need some time off." E-mail from Aguirre to Hanson dated August 24, 2005, attached hereto as Appendix 138.

Two days later, on August 26, 2005, Aguirre e-mailed Hanson asking if a decision had been made on the CSFB subpoena and stating, "If we are to have any chance in getting over what I see as a 9' bar, these docs are critical." E-mail from Aguirre to Hanson, dated August 26, 2005, attached hereto as Appendix 139. That same day, Hanson replied to Aguirre's e-mail, stating, "I've reviewed it twice and Leban [sic] is working on revising it now I believe. There were a number of typos and corrections to the first draft but the second one was in better shape. I also expanded the scope in some ways and reduced it in others. I talked through the revisions with Leban [sic], Mark and Jim. I am happy to go through them with you if you want. Just let me know." Later that same day, Aguirre e-mailed Kreitman, Hanson, Eichner, Ribelin, and Jama, expressing concerns about examination scheduling, the fact that "the five year Statute of Limitation for 10b will begin to expire in eight months and will fully expire in nine," and noting that "we have miles to go before we could file a 10b action against Samberg. . . ." E-mail from Aguirre to Kreitman, Hanson, Eichner, Ribelin, and Jama, dated August 26, 2005, attached hereto as Appendix 140.

According to Aguirre, on August 29, 2005, he contacted the Disclosure Unit of the OSC to discuss the filing of a complaint arising out of the Pequot investigation. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 35.

On September 1, 2005, Aguirre was terminated. Termination notice from Linda Thomsen to Gary Aguirre dated September 1, 2005 attached hereto as Appendix 141.

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[31] There is documentary evidence that, initially, Hanson drafted a response as follows: "Gary, My recollection is different about a couple of things. Most importantly I have not said that the problem is Mack's political clout," but never sent that language and sent the e-mail described above instead. Draft e-mail from Hanson to Aguirre attached hereto as Appendix 137.

e. Aguirre's Claims that Mack Testimony was Treated Differently Because of his Prominence

i. Abrupt Change in Approach to the Case

Aguirre claims the reaction by his superiors to the Pequot investigation, and particularly the case against John Mack, changed "night and day" after inquiries were made by Mary Jo White and Eric Dinallo on behalf of Morgan Stanley to his supervisors.[32] Transcript of Testimony of Gary Aguirre before SEC IG on April 29, 2008 (hereinafter, "Tr. Aguirre 4/29/2008 testimony") at p. 81. Aguirre stated that on June 14, 2005, he was in Kreitman's office making the case, at the request of Hanson and Kreitman, of what he would be presenting to the FBI and U.S. Attorney's Office the next day. Id. at pgs. 81-82. Aguirre said that "ecstatic" is the best description he could give for Hanson's and Kreitman's reaction to his presentation and the case in general. Id. According to Aguirre, nine days later, the communications took place with Dinallo and "instead of exuberance about what's going on, there is a resistance to even discuss the facts." Id. Aguirre said after the communications with Dinallo, the new little pieces of information he would pass on to Hanson that would in the past have excited him were "either not responded to, ignored, or treated with hostility." Id. at p. 83.

Aguirre referenced a statement made by Linda Thomsen to counsel for the Morgan Stanley Board of Directors when Morgan Stanley sought information from Enforcement to assist in its decision on whether to hire John Mack as their new Chief Executive Officer and Chairman that "There's smoke, not fire," and noted that "from the moment Linda Thomsen said [that statement], the decision was made that there was not going to be any fire." Id. at p. 91.

ii. Classic Strategy of Taking Testimony "Sooner Rather Than Later" Used in Insider Trading Cases Was Not Applied to Mack's Testimony

(a). Aguirre's Contentions on "Sooner Rather Than Later" Strategy

Aguirre stated that Hanson's "ducks in line" theory conflicts with the classic strategy for conducting an insider trading investigation: to pin down the tipper and tippee to a story as early as possible. Aguirre Responses to Questions from Senator Grassley at p. 18.

Aguirre noted that he reminded his supervisors on at least two occasions that this classic principle required that Mack's testimony be taken early. Id. According to Aguirre, the theory that one should complete the investigation before asking the tipper

[32] The specifics of the events surrounding the conversations between Eric Dinallo and Mary Jo White and SEC Enforcement officials are described in detail in section III of this Report.

questions "defies common sense." Id. at p. 19. Aguirre noted that "evidence obtained from the tipper may complement or explain evidence obtained from the tippee." Id.

Aguirre claims that Hilton Foster, who trained new investigators at the SEC and worked closely with Aguirre for the first several months of the Pequot investigation, taught Aguirre how to conduct an insider trading investigation and advocated, the "sooner rather than later principle." Id. Aguirre also noted that this principle was repeatedly emphasized by both Hanson and Kreitman during the Pequot investigation, and stated that "it was applied to all suspected tippers and tippees, except Mack." Id. at p. 20. Aguirre stated that he had never heard the "ducks in line" strategy in relation to an insider trading investigation from anyone at the SEC until Hanson used the phrase to defend the decision blocking the Mack subpoena eight days before Aguirre was fired. Id. He further said he knew of no other insider trading cases where the approach was not to lock in the testimony first, and noted that in the Martha Stewart case, the questioning took place immediately after the investigation commenced. Tr. Aguirre 4/29/2008 testimony at p. 68. Accordingly, Aguirre concluded that the "ducks in line" theory was just "an ad hoc rationalization to justify his supervisors' decision to give Mack favored treatment." Aguirre Responses to Questions from Senator Grassley at p. 20.

(b). Evidence from Other SEC Employees on "Sooner Rather Than Later" Strategy

Several attorneys who worked in the Enforcement Division stated that the strategy most often employed by both Kreitman and Hanson in insider trading investigations was to take the testimony of critical witnesses early to lock in their testimony. For example, [redacted], a former Senior Counsel in the Enforcement Division who worked for Hanson and Kreitman from 2003 through 2005, stated that when she worked on insider trading cases for them, the approach was to "take the testimony immediately and nail down a story." Tr. [redacted] 4/18/2008 Testimony at p. 17. She noted that in one insider trading case, "they had the CEO of the company on the phone the same day they received the unusual trading activity." Id. [redacted] stated that Hanson and Kreitman generally instructed her to take the testimony of witnesses early to nail down their story. Id. [redacted] said in every case she worked on with Kreitman and Hanson, "the minute it was referred to them, the only wait would be a day or two, in order to get the trading records and the minute they got them, they got the person on the phone and nailed down their initial story." Id. at p. 18. [redacted] said that, in her view, the idea that in an insider trading case, one could not take the testimony of a target until you determined they were over the wall or aware of certain information, goes against a lot of Enforcement's training in terms of insider trading cases, where staff is told to nail down the story at the very, very beginning within hours or a day. Id. at p. 65.

Another former Enforcement attorney who was supervised by Hanson and Kreitman also said the approach that Hanson generally took was to lock in a person's testimony early in an insider trading case. Transcript of Testimony of Witness 3 before SEC IG in April 2008 (hereinafter, "Tr. Witness 3 4/2008 testimony") at p. 15. He

further stated that this was "absolutely the approach that Kreitman generally took," and he was not aware of any other situations where that approach was not taken. Id.

Similarly, a former Enforcement staff attorney who worked for both Hanson and Kreitman between 2005 and 2007, stated that in her experience in insider trading cases, the approach favored by Kreitman and Hanson was to "lock in [the target's] story" and she cited an example of an instance when, in fact, she wanted more information to kind of "line her ducks up" in a particular insider trading investigation, and was concerned about what to ask the individuals who were suggested to come in for testimony. Transcript of Testimony of Witness 9 before SEC IG in April 2008 (hereinafter, "Tr. Witness 9 4/2008 testimony") at p. 28. According to this witness, Kreitman and Hanson told her not to delay, and that "we need to get them in here quick and lock in their story." Id.

Another former senior-level official in the Enforcement Division concurred that the approach favored by Kreitman was to take testimony early. This official stated that he once heard Kreitman berate a staff attorney for being too slow in taking testimony and, although the staff attorney responded, "I'm not ready yet," the witness "heard Kreitman several times adamantly express the counterview on that subject [i.e., that the testimony needed to be taken right away]." Transcript of Testimony of Witness 6 before SEC IG in April 2008 (hereinafter, "Tr. Witness 6 4/2008 testimony") at p. 103.

(c). Unprecedented Request to Prepare Written Memoranda Justifying Taking of Mack's Testimony

Aguirre also claims that further evidence that the Mack situation was dealt with differently from other cases was the fact that he was asked by his supervisors to prepare several memoranda explaining why Mack's testimony should be taken, noting that there were no other potential witnesses in the Pequot case for which he had to draft a separate justification document other than Mack. Tr. Aguirre 4/29/2008 testimony at p. 68. Aguirre also stated that he was not aware of anyone else in Enforcement who had been asked to draft such a document. Id. Kreitman himself acknowledged that he was not aware of any other cases where he required a memo to be written about someone prior to taking testimony. Tr. Kreitman Senate 9/6/2006 testimony at p 138.

Additionally, eleven other current or former attorneys in the Enforcement Division noted that they were unaware of any case in which they were asked to prepare a memorandum justifying the decision to take a particular individual's testimony. Transcript of Testimony of Margaret Cain by Senate Committee on October 13, 2006 (hereinafter, "Tr. M. Cain 10/13/2006 Senate testimony") at p. 47; Transcript of Testimony of [redacted] before SEC IG on April 18, 2008 (hereinafter, "Tr. [redacted] 4/18/2008 testimony") at p. 55; Transcript of Testimony of Liban Jama before SEC IG in April 24, 2008 (hereinafter, "Tr. Jama 4/24/2008 testimony") at p. 54; Tr. Witness 9 4/2008 testimony at p. 30; Transcript of Testimony of Witness 1 before SEC IG in April 2008 (hereinafter, "Tr. Witness 1 4/2008 testimony") at pgs. 40-41; Transcript of Testimony of Witness 2 before SEC IG in April 2008 (hereinafter, "Tr.

Witness 2 4/2008 testimony") at p. 17; Tr. Witness 3 4/2008 testimony at p. 61; Tr. Witness 6 4/2008 testimony at p. 99; Transcript of Testimony of Witness 7 before SEC IG in April 2008 (hereinafter, "Tr. Witness 7 4/2008 testimony") at p. 44; Transcript of Testimony of Witness 8 before SEC IG in April 2008 (hereinafter, "Tr. Witness 8 4/2008 testimony" at p. 45; transcript of Testimony of Witness 5 before SEC IG in April 2008 (hereinafter, "Tr. Witness 5 4/2008 testimony") at p. 25.

F. Evidence of Those Who Worked on the Pequot Matter on When to Take Mack's Testimony

Hilton Foster, who worked closely with Aguirre for several months on the Pequot investigation, stated that Mack was in a position to know and as an investigator, you would want to lock people in as soon as possible. Transcript of Testimony of Hilton Foster before Senate Committee on September 15, 2006 (hereinafter, "Tr. Foster 9/15/2006 Senate testimony") at p. 56. However, Foster acknowledged that the "decision about exactly when to take Mack's testimony was something that reasonable people could differ on." Id. at pgs. 115-116.

Eric Ribelin, who also worked closely with Aguirre on the Pequot investigation for nearly a year, was asked if he agreed with Aguirre that Mack's testimony should be taken, and replied he thought it was reasonable to take Mack's testimony. Notes of OIG Interview with Eric Ribelin of August 3, 2006 (hereinafter, "Ribelin 8/3/2006 Interview Notes") at p. 9. Ribelin said based upon his 18 years of experience at the SEC, the evidence would lead one reasonably to believe that Mack's testimony should be taken. Transcript of Testimony of Eric Ribelin before Senate Committee on September 1, 2006 (hereinafter, "Tr. Ribelin 9/1/2006 Senate testimony") at p. 44. However, Ribelin also said he did not necessarily think that it needed to be taken right then. Ribelin 8/3/2006 Interview Notes at p. 9. Ribelin explained that he personally thinks that one should have as much information as you can before you take testimony. Id. For example, Ribelin noted that one should get all the relevant e-mails and phone records, and that he did not think they had any phone records for Mack. Id. Ribelin said that, while it was reasonable to take Mack's testimony when Aguirre wanted to, it was also reasonable to get more information before taking his testimony. Id. Ribelin stated that a "decision to take the testimony later rather than when Aguirre wanted to could simply have been because they didn't have enough information, or they wanted to further analyze what information they had." Id. at p. 11. Ribelin further acknowledged that there could be a reason to delay taking Mack's testimony other than that Mack was connected. Id.[33]

On the other hand, Ribelin did express frustration about some of Enforcement's statements and decisions regarding the taking of Mack's testimony. Ribelin said at one

[33] In his November 9, 2007 testimony, Ribelin noted that it was a "very common" investigative technique in the Commission to "lock someone into a story," and "then if that story changes, if you get evidence that suggests later on that story is not holding water, then that . . . causes the initial story to come under suspicion." Transcript of Testimony Eric Ribelin before OIG Investigators on November 9, 2007 (hereinafter, "Tr. Ribelin 11/9/2007 Testimony") at p. 58.

point, Kreitman told him, "well, we have to determine whether or not Mack is over the wall [referring to Chinese wall between a firm's investment banking division and trading division]." Id. at p. 38. But Ribelin said it was a moot point because Mack was not employed at an investment bank. Id. at p. 39. When asked if he ever heard anyone else talk about the need to establish whether a subject of an investigation had gone over wall, Ribelin said he had not. Id. at p. 40. Ribelin said that at another point in time, Kreitman wanted to determine how much Mack gained individually from Pequot's trades in Heller and GE, and Ribelin felt that it did not make sense, and that often a tipper will not significantly financially benefit from the trades that the tippee makes. Id. at pgs. 84-85.

There is a record of an e-mail that Ribelin sent to Hanson on August 4, 2005, in which he stated, in pertinent part, as follows:

> In fact, I have been troubled by a number of oddities about decisions made on both sides (insider trading and stock manipulation) of this investigation. In the end I felt I needed to make a strong plee [sic] that we stick with the original plan (and to your credit you agreed), but the continued twists and turns that seem to be always be put in the road . . . if anything is effecting major decisions that I'm not made aware of, then it will obviously leave me wondering what is really happening. I ask you therefore, to apprise me of ANY behind the scenes discussions and/or considerations. I DON'T want to play politics, but I do want to do my job in a straightforward manner and absent intrigue. E-mail dated August 4, 2005 from Ribelin to Hanson attached hereto as Appendix 142.

Hanson replied to Ribelin's e-mail, in relevant part, as follows:

> I sensed that you were unhappy in the meeting today and I'm not sure exactly why. If you think there are issues we should address (including the oddities you mention) I'm happy to talk about them with you or anyone else. I'm very concerned that you feel there are considerations or discussions going on behind the scenes. Do you know something I don't?
>
> Eric, I look forward to continuing to work with your team on this exciting project. Again you may need to be a little patient with us until we get a better handle on the facts and I apologize for that in advance. In the meantime, I'm always open to suggestions and ideas on ways to do my job better, and move the investigation along while keeping everyone motivated and happy.
>
> E-mail dated August 4, 2005 from Hanson to Ribelin attached hereto as Appendix 143.

Later, after Aguirre was terminated, on September 9, 2005, Ribelin sent Hanson another e-mail, saying:

> Bob, I have serious misgivings about many decisions made in this investigation. I don't know what all has driven the decisions. Something smells rotten, though. (I'm accusing you of nothing.) You seem like a good guy and you're certainly a good soldier, but I'm nonplussed by issues big and small about the course of events going back to January. I really do need to contemplate my investment going forward. E-mail dated September 9, 2005 from Ribelin to Hanson attached hereto as Appendix 144.

Hanson replied to Ribelin's e-mail, stating, "Sorry you feel this way. I know you have put a great deal of productive time and energy into the case." E-mail dated September 8, 2005 from Hanson to Ribelin attached hereto as Appendix 145. Ribelin then responded, stating: "Let's try to work this thing out. I'm hopeful that we all want to do what's right." E-mail dated September 9, 2005 from Ribelin to Hanson attached hereto as Appendix 146.

Joseph Cella, former chief of Enforcement's Office of Market Surveillance (OMS), who was involved in the Pequot investigation as the supervisor of Ribelin and others who worked on the matter, stated that he thought there was a valid reason for bringing Mack in for testimony. Notes of OIG Interview with Joseph Cella of August 17, 2006 (hereinafter, "Cella 8/17/2006 Interview Notes") at p. 4. Cella said he expressed that position to Kreitman, who said they wanted to wait until they could put Mack in a position of having inside information. Id. Cella said he talked to Kreitman and Hanson, who said, at that point in time, they were unable to obtain the necessary information relating to Mack, and had nothing to confront Mack with other than the fact that he had a personal and business relationship with Samberg. Transcript of Testimony of Joseph Cella before Senate Committee on September 7, 2006 (hereinafter, "Tr. Cella Senate 9/7/2006 testimony") at p. 29. Cella reported that Kreitman and Hanson said bringing Mack in was a distinct possibility but it was not the right thing to do tactically at that time. Id. Cella said he understood that. Id. Cella said he believed Kreitman and Hanson's position was a "reasonable position to take," although he also felt there was no down side to bringing in Mack. Id. at p. 30.

James Eichner, who worked on the Pequot matter with Aguirre for a couple of months before he was terminated, and who took over the investigation after Aguirre left, stated he did not really have a view on whether Mack's testimony should be taken right away. Transcript of Testimony of Jim Eichner by Senate Committee on September 1, 2006 (hereinafter, "Tr. Eichner 9/1/2006 testimony") at p. 86. However, Eichner said he could understand Kreitman's position that until it could be shown that Mack had the information, they were not going to take Mack's testimony. Id. Eichner said he did not think this position articulated by Kreitman was an "unreasonable" one. Id.

Liban Jama, who worked with Aguirre on the Pequot investigation for several weeks, concurred that Kreitman was always aggressive in terms of wanting to take the testimony of someone in an insider trading case as quickly as possible once they had the information. Tr. Jama 4/24/2008 testimony at p. 18. However, Jama noted that "right away is a loose term that requires documentation and information," and he did not really sense that Pequot was handled in a different way than other insider trading cases. Id. at p. 19.

G. Response from Aguirre's Supervisors about Taking Mack's Testimony

1. Branch Chief Hanson's Response

Hanson acknowledged that he had conversations with Aguirre about Mack being a person of prestige or his counsel's "juice." Tr. Hanson Senate 9/5/2006 testimony at p. 95. He explained that when he said that counsel would have "juice," he meant that "they would be well respected people who could call anybody up and because of their status, stature, that people might pick up their phone calls." Id. at pgs. 95-96. He further described "juice" as "a combination of things," including "confidence and the ability to reach out and get someone's ear" and that "there's a competence element to it." Id. at p. 160. Hanson also acknowledged that he would have said that Mack was "an industry captain," but did not think he would have used the phrase "that he had powerful contacts." Id. at p. 145.

In his Senate testimony, Hanson admitted using the term "political clout" in an e-mail response to Aguirre, although he indicated that he was "responding to [Aguirre's] use of that term." Id. at p. 184; e-mail from Hanson to Aguirre, dated August 24, 2005 attached hereto as Appendix 134.[34] Hanson acknowledged that Aguirre talked to him about Aguirre's concern that the political juice was a factor in whether or not he could take Mack's testimony. Id. at p. 101. Hanson said he was "trying to clarify to [Aguirre] that [he] wanted to get his I's dotted, and T's crossed" so that they could be fully prepared. Id. at pgs 101-102. Also, he "wanted the front office, meaning Paul Berger primarily, to know that Mack was somebody whose testimony he was going to be taking or not taking." Id. at p. 102. Hanson said, "If we were going to take his testimony, I wanted to run that up the flagpole with Paul." Id. Hanson explained that he "thought it was appropriate to let people know that this event about Mack was occurring." Transcript of Testimony of Robert Hanson before SEC IG on July 15, 2008 (hereinafter, "Tr. Hanson 7/15/2008 testimony") at p. 88, excerpted pages attached hereto as Appendix 147. Hanson noted his "rule was would your superiors want to know that information about the investigation [i.e., taking Mack's testimony] and that was one of those things I thought they would want to know." Id.

[34] With regard to whether he used the term "political clout" in a conversation with Aguirre, Hanson responded that he did not recall using that term, although he admitted, "It's possible I used it, but it just doesn't seem like something I would say." Tr. Hanson Senate 9/5/2006 testimony at pgs. 181-182.

At the Judiciary Committee hearing, Hanson stated: "I explained this practice [of informing his supervisors about significant events like Mack's testimony] 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." Written Testimony of Robert Hanson for December 5, 2006 Hearing before the Senate Committee on the Judiciary at p. 4, excerpted pages attached hereto as Appendix 148.

Hanson said Aguirre first proposed taking Mack's testimony in late June 2005, and he received a "whole slew of e-mails" from Aguirre on the subject. Tr. Hanson Senate 95/2006 testimony at pgs. 102-103. Hanson said Aguirre "was writing sort of the same email over and over again," and "he did have questions with respect to" Aguirre's e-mails. Id. at p. 103. Hanson said he tried to get Aguirre to write a coherent memorandum related to Mack. Tr. Hanson 7/15/2008 testimony at p. 64. Hanson also said he was getting a lot of information from Aguirre, some of which was he felt was inaccurate and some of which was hyperbole, and he thought it made sense to have a memorandum prepared. Id. at p. 72.

Hanson said at some point, he punted the decision about taking Mack's testimony to Kreitman because he "thought it was an important enough decision that [Kreitman] should be involved in it." Tr. Hanson Senate 9/5/2006 testimony at p. 104. Hanson said he never made a decision about Mack's testimony, and that it was "really [Kreitman's] call." Id. Hanson said Kreitman felt that Aguirre wanted to "get this guy because he was the biggest fish" out there, and "it wasn't so much that there was evidence, it was just Mack had to be involved." Id. at p. 105.

When asked about why they did not adopt the approach to try to lock in Mack's testimony early on, Hanson replied that there was no rule that "you follow blindly in every situation." Tr. Hanson 7/15/2008 testimony at p. 68. Hanson said with a sophisticated potential defendant like Mack, "you're not going to be able to call him up and just casually ask him questions." Id. at p. 70.[35]

Hanson noted that he wrote in an e-mail to Aguirre, "I believe that everyone feels we will take Mack's testimony at some point -- the question is when," and stated that this e-mail reflected what he was thinking at that time. Transcript of Testimony of Robert Hanson before Senate Committee on November 9, 2006 (hereinafter, "Tr. Hanson Senate 11/9/2006 testimony") at p. 54; e-mail from Hanson to Aguirre dated August 24, 2005 attached hereto as Appendix 136. Hanson stated that his view was that they would eventually take Mack's testimony, but that they first needed something to confront him with. Tr. Hanson 7/15/2008 testimony at p. 114. Hanson noted that it would have been very short testimony without something to ask Mack about. Id. In Hanson's view, if

[35] Ribelin countered that in Enforcement, they "call[ed] people all the time on the phone," even potential tippers of inside information. Transcript of Testimony Eric Ribelin before OIG Investigators on November 9, 2007 (hereinafter, "Tr. Ribelin 11/9/2007 testimony") at p. 91.

they were going to take Mack's testimony, you would first take the testimony of the CSFB officials who would be the most likely to have tipped Mack. Id. However, Hanson stated that after they went through documents, and took the testimony of CS First Boston officials, it was less likely that Mack was the tipper and, eventually, Kreitman did not want to take Mack's testimony at all. Id. at pgs. 113; 115.

In response to Aguirre's claim that in mid-June 2005, only a short time before Enforcement's expressed reluctance to take Mack's testimony, Aguirre had been authorized to present the GE/Heller matter, including Mack's role as a tipper, to the FBI and U.S. Attorney's Office, Hanson stated that he thought the preparation session for this presentation mainly focused on issues related to Microsoft, and he did not remember if it included information on Mack. Tr. Hanson 7/15/2008 testimony at p. 62. David Anders, the Assistant U.S. Attorney to whom Aguirre made the presentation stated that Aguirre's presentation related to two matters: (1) the merger of GE and Heller; and (2) the Microsoft issue, involving David Zilkha. Notes of OIG Interview with David Anders of March 6, 2007 (hereinafter, "Anders 3/6/2007 Interview Notes") at p. 4. Anders said that, during the meeting, they talked equally about both of these two main aspects of the case. Id. However, Anders stated that the focus of the GE/Heller part of the discussion was not on Mack. Id. Kreitman also recollected that the "prep session" with Aguirre prior to his presentation to the U.S. Attorney's Office and the FBI "did not focus on Mack." Transcript of Testimony of Mark Kreitman before SEC IG on July 17, 2008 (hereinafter, "Tr. Kreitman 7/17/2008 testimony") at p. 54, excerpted pages attached hereto as Appendix 149.[36]

2. Assistant Director Kreitman's Response

Kreitman said, "In some [insider trading] cases, there is an advantage to nailing somebody's testimony down" in those instances where "[y]ou immediately want to get that person's story, because you want to find out what it is they say motivate[d the] trade so that you can challenge that, and establish a chronology." Tr. Kreitman Senate 9/6/2006 testimony at pgs. 107-108. He then said, "When you try these cases, you try them on the basis of chronology, [as the] tipper has access to the information, the tipper has communication with the tippee, . . . [but that] it is different in [the Mack] case because [they] were investigating in 2005 conduct that occurred in 2001." Id. at p. 108. Kreitman also said that in most cases, "there is a rather small universe of people who are potential tippers [and] the evidence points to one." Id. However, according to Kreitman, in this case, Aguirre's bases for believing that Mack was the tipper were insufficient. Id.

[36] Aguirre maintained that he did speak at length about Mack in both his practice presentation before his supervisors and the discussion with the FBI and AUSA, and noted that he thought he talked more about John Mack with the AUSA and FBI than he did in the session with his supervisors. Tr. Aguirre 8/26/2008 testimony at pgs. 106-113; 114. He also referenced the fact that he had prepared an outline of the topics for the presentations, which included a reference to "5) John Mack possible tipper." Id at p. 105; Document entitled "Index" attached hereto as Appendix 150.

Kreitman further said Hanson and Berger and he repeatedly asked Aguirre to draft a memorandum setting forth the bases upon which he thought he should take Mack's testimony. Id at p. 109. According to Kreitman, the document prepared by Aguirre "had inaccuracies," some "rank speculation," and evidence that Kreitman "considered not really of significance." Id. Kreitman said Aguirre was insistent on taking Mack's testimony and he was resistant to it, so he asked Aguirre to draft a justification for taking Mack's testimony to be sure he was not making a mistake. Tr. Kreitman 7/17/2008 testimony at p. 44. Kreitman also said the case required the additional evidence to show that Mack had access to nonpublic information about the deal before calling him to testify under criminal penalties. Tr. Kreitman Senate 9/6/2006 testimony at p. 111.

Kreitman said from his point of view, the debate about taking Mack's testimony was a disagreement with a "probationary employee who had no investigative experience." Id. at p. 106. Kreitman said Aguirre was never told he could not take Mack's testimony, but that "the prerequisite" to Kreitman's allowing Aguirre to bring in Mack was evidence that he "had access to the inside information," and that "he had to get that information before bringing in Mr. Mack to take his testimony when [Aguirre] had nothing to confront him with." Id. Even though Kreitman considered obtaining the information that Mack had access to be a prerequisite for taking testimony, Kreitman said they could have developed evidence from another witness that would have made the prerequisite of Mack's access unnecessary. Id. at pgs. 135-136. For example, Kreitman stated they could have developed evidence that pointed directly toward Mack as the tipper, or obtained evidence from another witness that they were present during a conversation between Samberg and Mack that led the witness to believe a tip had been communicated. Id. at pgs. 135-136.

Kreitman said he felt that "if we called in Mack and we had no information about where he might have had access to the information, that he would just say, 'No. Wasn't me. I had nothing to do with it; the answer is no' . . . [and] we would be showing our hand prematurely." Tr. Kreitman 7/17/2008 testimony at p. 45. Kreitman felt that Mack would also say, "I don't know anything about this, and if you have some documents to show me that indicate that I may have . . . done something wrong, I'll be glad to look at them and explain them," and they did not have any such documents. Id. at pgs. 48-49.

When asked about Aguirre's justification for taking Mack's testimony, Kreitman said there "were all kinds of logical jumps" and, although Kreitman admitted that Aguirre had some facts in the justification that did suggest that Mack could have been the tipper, he said it was "a little bit of circular reasoning," noting that Aguirre created the idea of a profile of the tipper around Mack, and then concluded that "nobody else fits the profile." Id. at pgs. 46-47. Regarding Aguirre's discussion in his justification about Mack having a motive, Kreitman noted that "everybody has a motive for insider trading" and arguably, Mack "may have had less of a motive because he was a very wealthy man." Id. at p. 49.

When asked why in this case, he did not advocate locking down Mack's testimony early as he often encouraged in insider trading cases, Kreitman stated that this

approach is sort of "in the nature of an ambush" where, if you have the evidence that somebody engaged in aberrational trading that was profitable, "you want to find everything that they can tell you about the reason they traded, what research they did, who they spoke to, what blogs they looked at . . . and then go and see whether any of it turns out to be true." Id. at p. 50. Kreitman stated that "Mack was not somebody who was going to be ambushed" because he was "a very sophisticated individual," the trading was not very recent, he was a big trader, and they did not have evidence that he had access to the inside information. Id. Kreitman further asserted that since Mack had high-powered lawyers, "you would have to be better prepared" for his testimony because "he would be very well prepared." Id. at pgs. 50-51.

3. Associate Director Berger's Response

Berger stated that Aguirre came into his office and said Kreitman was afraid to take the testimony of John Mack because he is a powerful guy. Tr. Berger Senate 11/2/2006 testimony at p. 133. Berger said he explained to him that no one in Enforcement is afraid of taking an individual's testimony because he or she is powerful. Id. at p. 134. Berger said he explained to Aguirre the reasons for not taking Mack's testimony at that point in time, and told him this was a judgment made by Kreitman, Hanson and Berger himself, who had a lot of experience doing these investigations. Id. Berger said then Aguirre retorted that he thought they were afraid to take Mack's testimony, and Berger replied that he could give him a laundry list of the people they have put on the record or interviewed, and described people who were much more powerful, much more influential, and much better known than Mack. Id. at p. 134. Berger said Aguirre calmed down in the conversation and seemed to understand that the decision was simply to take Mack's testimony at the end when they had all their ducks in a row and had all the evidence they needed to compile. Id. at p. 135. Berger said he did not recall Aguirre telling him anything specifically about Hanson having indicated it would be difficult to take Mack's testimony because of his political clout or influence. Transcript of Testimony of Paul Berger before Senate Committee on November 7, 2006 (hereinafter, "Tr. Berger Senate 11/7/2006 testimony") at pgs. 69-70.

Berger further stated that in his view, they had a basis to take Mack's testimony based on theories, but not a lot of hard evidence. Id. at p. 56. He said everyone recognized that Mack was a sophisticated individual in the securities markets, who was not going to come in and admit something on the record. Id. He noted that they were not going to pin him down or place him in a position where he did not know what to say and, therefore, they were not going to get any real usable information on the record at that time. Id. at pgs. 56-57. Thus, Berger concluded that the "best thing to do was to get all of the documentation, review the documentation, and then be prepared to go in and have a conversation with Mr. Mack." Id. at p. 57.

Berger said his view was that they were going to take Mack's testimony, and he believed that all the supervisors, including Hanson and Kreitman, "were in agreement that [they] were going to end up doing that." Id. at p. 59. Berger stated that he did not

believe it was a "necessary prerequisite to establish that Mr. Mack had foreknowledge of the merger," but said "it was important to be able to establish" this fact. Id. He stated he believed that it was "always a question of timing," and that no one was afraid to take Mack's testimony. Id. at p. 60.

4. Director Thomsen's Response

Thomsen said she never has seen the Enforcement Division not take the testimony of someone based on political clout and that this has never happened. Tr. Thomsen 9/8/2006 Senate testimony at p. 48. Thomsen said she believed it was largely Kreitman's decision, backed up by Berger, not to take Mack's testimony when Aguirre wanted to. Id. at p. 62. Thomsen said she agreed with this decision. Id. at p. 63. In fact, Thomsen said she was not aware of anyone other than Aguirre who disagreed with the approach adopted by Hanson, Kreitman, Berger, and that the summer of 2005 was not the right time to take Mack's testimony. Id. at p. 58.

Thomsen said they knew that Mack knew Samberg and communicated with him; however, they had nothing to show that Mack had the material, nonpublic information, and they concluded that the Mack testimony "would go something along the lines of, do you know Mr. Samberg, yes; do you talk to him, yes; did you know about this transaction, no; did you tell him about it; no. And that we had nothing else." Id. at pgs. 63-64. She said she did not know if there necessarily would be harm in taking his testimony, "but it was everyone's view that there was the potential to have better information, more information and that we should wait to have that." Id. at p. 64. Thomsen said she did not think it was reasonable to take Mack's testimony in the summer of 2005. Id. at p. 65. She said that if she called in Mack, she would expect him to tell her something that was consistent with the facts that were known or knowable. Id. at p. 68. Thomsen stated that "her understanding was [it] was a question of when not whether," and that there were additional investigative steps that were being taken before taking Mack's testimony. Id. at p. 58. Thomsen noted that at the time, they felt that there were places to go to look for evidence, although she did not know what they were going to find, and she acknowledged that she did not know if she necessarily thought through the question of whether they would still take Mack's testimony if they did not uncover any additional information. Transcript of Testimony of Linda Thomsen before SEC IG taken on April 28, 2008 (hereinafter, "Tr. Thomsen 4/28/2008 testimony") at p. 37.

H. Evidence on Whether Political Matters Influence Enforcement Decisions in the Pequot and Other Investigations

There are many within the SEC who do not believe that Enforcement makes substantive decisions regarding its investigations for political reasons. Even excluding the opinions of Aguirre's supervisors, i.e., Cane, Grime, Hanson, Kreitman, Berger and Thomsen, numerous individuals have expressed the view that political considerations are

not used to make Enforcement decisions.[37] Moreover, several individuals particularly identified Kreitman[38] and Berger as having the reputation of being very aggressive.

1. Evidence from Senior-level Enforcement Officials

Long-time and high-level Enforcement officials stated that they had never seen any cases affected by political decisions. For example, Stephen Cutler, who served as Acting Director of the SEC's Division of Enforcement for three months and then as Enforcement Director from October 2001 through May 2005, stated he had no knowledge of any Commission investigations that were ever halted or slowed because of political pressure or because the individual was prominent or had prominent counsel. Notes of OIG Investigator Interview with Stephen Cutler of August 23, 2007 (hereinafter, "Cutler 8/23/2007 Interview Notes") at p. 4.

Cutler stated that Enforcement officials were not reluctant to take the testimony of a prominent individual, and noted that they have taken the testimony of senior political officials in the past. Id. He stated that Enforcement might be reluctant to take the most senior person's testimony first, not because the person is important, but for strategy reasons. Id.

Cutler also stated that Kreitman is known throughout the building and outside the building "as being extraordinarily aggressive" and, at times, Kreitman could be seen as "overly aggressive." Id. He stated that he believed if Kreitman thought he could make a case against John Mack he would do so, and that Kreitman would not back away from anyone for anything. Id.[39]

Peter Bresnan, who served in several positions in Enforcement, including both Associate Director and Deputy Director of Enforcement, stated that in his twelve years at the Commission, he has never seen anyone do anything for political reasons or favor anyone because of his or her political connections. Notes of OIG Investigator Interview with Peter Bresnan of August 22, 2007 (hereinafter, "Bresnan 8/22/2007 Interview Notes") at p. 5.

In fact, Bresnan stated that the allegation that favorable treatment was given due to political connections or prominence was totally contrary to his experience at the SEC and made no sense to him. Id. Bresnan felt that anyone on the staff would love to bring

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[37] However, at least one individual who worked with Aguirre on the Pequot investigation, Eric Ribelin, felt there was pressure to slow down or stop the investigation.

[38] Concerning Kreitman, even Aguirre stated that "the handling of the Mack controversy was out of character for him, e.g., giving Mack favored treatment, directing him to seek a criminal investigation and then blocking the issuance of an administrative subpoena, refusing to review his emails," noting that in his view, "[i]t was obvious [that Kreitman] was under pressure from above." Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 26.

[39] Hanson concurred in this opinion, stating that Kreitman "is fearless and he likes to mix it up with whoever will mix it up and he would, I think, to the extent [it] involved a prominent person, he would probably enjoy it." Tr. Hanson 7/15/2008 testimony at p. 84.

this type of high-profile case and it would be several feathers in their cap and that "people here live for that."[40] Id. He said the idea that the staff would not bring a good strong case made absolutely no sense. Id.

Bresnan added that the allegation really made no sense to him because of the people involved. Id. He stated "that Paul Berger and Mark Kreitman are the last people on the face of the earth who would be less than 100% aggressive." Id. He said they have the reputation of being as "tough as nails," and the defense bar thinks they are too tough. Id. Bresnan said the idea that Berger and Kreitman would throw an investigation because of political connections or because of someone's prominence is laughable to those who know them. Id.

Walter Ricciardi, who joined the Commission in April 2004 and served as Deputy Director of Enforcement from October 2005 until June 2008, added that, based upon the reputations Kreitman and Berger have in the building, they are about the least likely Enforcement staff members to not go after someone in a high position. Notes of OIG Investigator Interview with Walter Ricciardi of July 11, 2006 (hereinafter, "Ricciardi 7/11/2006 Interview Notes") at p. 2. Ricciardi described Berger as being "very aggressive"[41] and noted that Enforcement staff "are always excited when they find evidence of insider trading by a high-level official, as opposed to someone at a lower level, like a paralegal." Id. at pgs. 2-3.

Christopher Conte, Enforcement Associate Director, who joined the Commission in 1992 and replaced Paul Berger as Associate Director, stated that he has never known of any Enforcement case being slowed or stopped because of political connections or clout; nor has he ever heard allegations to that effect. Notes of OIG Investigator Interview with Christopher Conte of October 30, 2006 (hereinafter, "Conte 10/30/2006 Interview Notes") at p. 2.

2. Evidence from Aguirre's Colleagues Who Worked on the Pequot Investigation

Branch Chief Eric Ribelin, who worked extensively on the Pequot matter with Aguirre, expressed concern about how the Pequot investigation and other high-profile cases have been handled by Enforcement. Ribelin stated that there was "palpable pressure" going back to January 2005 to slow down or stop the entire Pequot investigation, but said he did not know where this pressure was coming from. Ribelin 8/3/2006 Interview Notes at p. 4. Ribelin's impression was that Paul Berger "seemed dismissive of investigative ideas. He seemed disinterested in the idea of moving

[40] Kreitman noted that, in his opinion, the fact that Mack was a prominent person "makes him a more attractive target" for an investigation, saying "that's how careers are made." Tr. Kreitman 7/17/2008 testimony at pgs. 65, 66.

[41] Kreitman said he thought "Berger brought more of and more significant cases while he was here than any other associate" in the history of the commission and Berger's reputation was that he was "the toughest guy on the street." Tr. Kreitman 7/17/2008 testimony at p. 66.

aggressively and assertively." Tr. Ribelin 9/1/2006 Senate testimony at p. 21. Ribelin also said he thought "some of that was communicated to us by Kreitman." Id.

Ribelin further stated that at one point, Hanson said they had to be careful about taking Mack's testimony because, previously, some famous person (perhaps Warren Buffet or Bill Gates) gave testimony and the press found out. Ribelin 8/3/2006 Interview Notes at p. 11. Ribelin felt that the whole situation involving taking Mack's testimony was being treated "gingerly." Id. at p. 11. He also recollected a conversation in which Hanson said "something similar to that, that he – 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." Tr. Ribelin 9/1/2006 Senate testimony at p. 37.

In contrast to Ribelin's view, several colleagues of Aguirre who worked on the Pequot investigation expressed the view that political clout does not affect Enforcement decisions.

James Eichner stated that he was not aware of any case being stopped or slowed for political considerations. Notes of OIG Interview with James Eichner of September 27, 2006 (hereinafter, "Eichner 9/27/2006 Interview Notes") at p. 10. He also stated that he did not "have reason to think that Mack's political clout influenced the SEC's decision not to take his deposition prior to September 2005." Tr. Eichner 9/1/2006 testimony at p. 105.

Liban Jama, who worked with Aguirre on the Pequot investigation for a few weeks before Aguirre was terminated and then with Jim Eichner after Aguirre was terminated, stated that he thought the conclusions that Mack's testimony was not taken because of his prominence were wrong. Tr. Jama 4/24/2008 testimony at pgs. 55-56. Specifically, Jama felt that based upon Paul Berger's reputation internally, there was "no way he would bend over a little bit backward for any outside counsel and was a tenacious prosecutor." Id.

Stephen Glascoe, a Market Surveillance Specialist in Enforcement, who worked with Aguirre on the Pequot case, stated that he had no knowledge of any SEC investigation being stopped or slowed because of political pressures. Notes of OIG Investigator Interview with Stephen Glascoe of November 15, 2006 (hereinafter, "Glascoe 11/15/2006 Interview Notes") at p. 9.

Joseph Cella also stated that he did not believe that Kreitman, Hanson or Berger would let political influence slow down the pace of an investigation. Cella 8/17/2006 Interview Notes at p. 2. Cella said that he worked closely with Hanson on one case and has the highest regard for him and, although he indicated that had had not worked as closely with Kreitman, Cella stated that he has the highest regard for Kreitman as well. Id. at p. 3. Cella said he did not think Kreitman, Hanson or Berger would be subject to political influence and noted that the agency has had prominent people, including a

former President of the United States, come in for testimony in a number of investigations. Id.

Kevin O'Rourke, Assistant Chief Litigation Counsel in Enforcement, who worked on the Pequot investigation, stated that in his 19 years at the Commission, he has never seen any case influenced in any way by political factors. Notes of OIG Investigator Interview with Kevin O'Rourke of September 18, 2006 (hereinafter, "O'Rourke 9/18/2006 Interview Notes") at p. 5. He stated that the thought that an Enforcement official would not take someone's testimony for political reasons is, if anything, contrary to his experience. Id. According to O'Rourke, all the "youngsters" would want to take the testimony of a political big shot. Id. He further stated that he did not believe political factors were even a consideration in the decision whether to take Mack's testimony. Id.

O'Rourke added that the idea that Kreitman would not take someone's testimony for political reasons is a joke. Id. He also noted that he had no reason to believe that Hanson, Berger or Thomsen would not take someone's testimony for political reasons. Id.

Craig Miller, a Senior Market Surveillance Specialist in Enforcement, who also worked on the Pequot investigation, noted that he has been involved in other high profile cases such as WorldCom, and although Enforcement may move cautiously if it is going against someone who can mount a big legal defense to have "its ducks in a row," he has never heard of an investigation being slowed or stopped for political reasons. Notes of OIG Investigator Interview with Craig Miller of November 20, 2006 (hereinafter, "C. Miller 11/20/2006 Interview Notes") at p. 2. Miller stated that he never had the impression that something was not pursued if it needed to be. Id. However, when specifically asked if he was aware of any other Enforcement cases being stopped or slowed because of political reasons, "Miller replied that he is not at a high enough level to know if this ever happens." Id. at 5.

3. Evidence from Other Enforcement Division Officials

Other Enforcement officials, even some who were very critical of the management styles of Hanson and Kreitman, did not share Aguirre's view that prominent individuals were given improper preferential treatment.

Richard Simpson, Chief Litigation Counsel in Enforcement, stated that he does not know of, and has he never heard of, any Enforcement case being slowed or stopped because of political considerations. Notes of OIG Investigator Interview with Richard Simpson of October 25, 2006 (hereinafter, "Simpson 10/25/2006 Interview Notes") at p. 2.

Fiona Philip, a partner with the law firm of Howrey & Simon and former SEC attorney in both the Enforcement Division and the Chairman's Office, who represented Morgan Stanley in the Pequot matter, described Berger as a "straight shooter," who was

aggressive in pursuing cases. Notes of OIG Investigator Interview with Fiona Philip of March 12, 2007 (hereinafter, "Philip 3/12/2007 Interview Notes") at p. 2. Philip further stated that she did not believe Berger would likely give someone in an investigation favorable treatment because of that person's political connections or prominence because the bigger, higher profile cases were better for the Commission and the markets. Id.

Robert Bayless, a former Associate Chief Accountant in Enforcement said he remembered the charges being made that testimony was not taken because of a person's prominence, and that he had never seen that in his six years in Enforcement. Transcript of Testimony of Robert Bayless before SEC IG taken on April 24, 2008 (hereinafter, "Tr. Bayless 4/24/2008 testimony") at p.15. In fact, Bayless noted that he had seen Enforcement staff take testimony of people who were high up in the organization and he wondered why they were reaching that tall. Id.

Even those who were critical of Aguirre's supervisors for other reasons did not indicate that they were subjected to political pressures. [redacted] a Senior Counsel who worked for Hanson and Kreitman for approximately two years, said there was a very strong interest and it was often repeated in that it was important to be in the group "to get the headline," and there was an incredible emphasis on stats. [redacted] 4/18/2008 testimony at p. 51.[42] Witness 9, who worked as an Enforcement attorney for Hanson and Kreitman for approximately two years, stated that she was unaware of a case where there was hesitation on the part of Enforcement to take testimony of a prominent person, and actually cited an example of Hanson wanting her to take a more aggressive position than she was comfortable with. Tr. Witness 9 4/2008 testimony at pgs. 29-30. A lawyer who worked for the SEC for over 30 years and in Enforcement for over 20 years, stated that he not aware of any cases of a larger magnitude that were not brought. Tr. Witness 1 4/2008 testimony at p 32. In fact, he mentioned an example of one case against a defendant who, in his opinion, tried to do the right thing, but did not do it fast enough, and Witness 1felt the case should have been dropped. Id. at p. 31. Witness 3, who worked in Enforcement for eight years and worked for both Hanson and Kreitman, stated that his reaction to the Senate report was, "what people are they talking about" and "that political pressure does not have any influence on decisions in Enforcement." Tr. Witness 3 4/2008 testimony at p. 49. He noted that one has to be extra careful because you don't want a high profile lawyer "to call behind you," he has never worried about anyone influencing a case. Id. at p. 49.

[42] Aguirre said he did not recall anyone in Kreitman's group talk about headlines, but did acknowledge that the SEC, and particularly Enforcement, "tried to make statistics," but they were often "incredibly small cases." Tr. Aguirre 8/26/2008 testimony at pgs 244, 246.

I. Claims that Another High Profile Witness and Counsel Received Improper Preferential Treatment

Witness Smith,[43] a staff attorney in the Division of Enforcement, stated that he became aware of a sensitivity on the part of Enforcement with respect to taking the testimony of certain high ranking officials. Notes of OIG Interview with Witness Smith of October 3, 2006 (hereinafter, "Witness Smith 10/3/2006 Interview Notes") at p. 4.

Smith stated that he took the testimony of a high-ranking official named Mario Gabelli three times. Id. He said that when he took Gabelli's testimony the third time, Kreitman asked why they were taking Gabelli's testimony three times and said they usually only take the testimony of these types of people once. Id. Smith further said that Kreitman had previously indicated that he had a pretty good relationship with Gabelli's counsel, Vince DiBlasi. Notes of OIG Interview with Witness Smith of March 26, 2007 (hereinafter, "Witness Smith 3/26/2007 Interview Notes") at p. 2. Smith said that Kreitman also went to a fellow Enforcement attorney, Charles Davis, and questioned why they had taken the second testimony in D.C. Id. Smith explained that Kreitman thought they had agreed all the testimony would be taken in New York, "so any lies that took place would all have occurred in the same venue." Id. at pgs. 2-3.

Smith noted that his former Branch Chief, J. David Fielder, showed him an article that said Mario Gabelli had given $24,000 to Elliot Spitzer's gubernatorial campaign during the pendency of the New York Attorney General's investigation of Gabelli, which was being conducted simultaneously with the SEC's investigation. Id. at p. 1. When asked about an e-mail he had sent to Fielder and Charles Davis, stating that his "sense is Vince DiBlasi [Gabelli's counsel] – because Mario Gabelli is mad he has to answer questions – called Linda with some misrepresentations, which went to Paul and then to Linda," Smith said "he was purely speculating and does not know if DiBlasi ever called Thomsen or Berger." Id. at p. 2; redacted e-mail from Smith to Fielder and Davis, dated July 21, 2005, attached hereto as Appendix 151. Smith also referenced an e-mail he sent to Aguirre on July 20, 2005, stating "[Kreitman] pulled on me today on [sic] of the things he pulled on you," but stated that he may have been referring to the fact that Kreitman was in a "rage" outside Smith's door. Redacted e-mail from Smith to Aguirre, dated July 20, 2005, attached hereto as Appendix 152; Notes of OIG Interview with Witness Smith of October 16, 2006 (hereinafter, "Witness Smith 10/16/2006 Interview Notes") at p. 6.

Smith said he believed the Enforcement Division limits itself in taking testimony or asking hard questions because of someone's position, although he stated he did not think there were "political forces" at work, but "something more subtle than that." Witness Smith 10/3/2006 Interview Notes at p. 5.

However, former Branch Chief Fielder stated that he did not think the Gabelli case was not brought because of a phone call from Gabelli's lawyer to Linda Thomsen;

[43] This Enforcement staff attorney has requested confidentiality and specifically asked that his name not appear in the report.

rather, he thought "it wasn't brought because there really wasn't that much evidence against Gabelli personally, even though Smith wanted there to be and was almost obsessed with finding a claim against Gabelli, coupled with his decision that too much time had been wasted on the case and Mark [Kreitman]'s [negative] opinion of [Smith]." Transcript of Testimony of J. David Fielder before SEC IG taken on April 14, 2008 (hereinafter, "Tr. Fielder 4/14/2008 testimony") at pgs. 62-64.

Staff Attorney Charles Davis said he recalled Smith complaining about Kreitman's intrusions into the Gabelli case, but said that while Kreitman did not want to push the case as hard as Smith did, Davis felt that could have been simply that Kreitman was not favorably disposed to Smith. Transcript of Testimony of Charles Davis before SEC IG taken on April 15, 2008 (hereinafter, "Tr. Davis 4/15/2008 testimony") at p. 23. excerpted pages attached hereto as Appendix 153. Davis stated that he did not know that Kreitman was more reluctant to push a case when it came to folks represented by high profile counsel. Id. at p. 44.

Further, Smith acknowledged that Kreitman had not questioned the taking of any previous testimony of Gabelli in the investigation, and Smith said he learned later that Kreitman expressed his concerns about taking Gabelli's testimony the day after Smith went to Paul Berger to complain about Kreitman. Redacted e-mail from Smith to David Kotz dated July 31, 2008 attached hereto as Appendix 154.

J. Conclusion as to Improper Preferential Treatment Regarding Taking of Mack's Testimony

The evidence does show that Aguirre's supervisors were very resistant to his requests to take Mack's testimony in the Pequot investigation in the summer of 2005. There is also significant evidence that the views and opinions of Aguirre's supervisors regarding the Pequot case, changed from the spring and early summer of 2005, when Aguirre first discussed Mack being the possible tipper, and late summer of 2005, when they refused to approve Aguirre's request to subpoena Mack.

The record shows that Hanson initially reacted favorably to Aguirre's raising the possibility of Mack being the tipper, both in a June 3, 2005 e-mail in which Hanson stated "Mack is another bad guy (in my view), and in a June 20, 2005 e-mail in which Hanson responded to e-mails from Aguirre about taking Mack's testimony by saying, "Okay Gary you've given me the bug. I'm starting to think about the case during my non-work hours." In addition, there is evidence that on June 15, 2005 Aguirre was authorized to present the details of possible criminal violations in connection with the Pequot investigation, including information about Mack, to the FBI and U.S. Attorney's Office.

The record further demonstrates that after a June 23, 2005 conversation with Hanson in which the subject of Mack's political clout arose, Aguirre undertook numerous efforts to convince his supervisors of the evidence against Mack, and the importance of taking his testimony. Initially, after a series of e-mails sent by Aguirre to Kreitman in

late June 2005, explaining why he believed it was necessary to take Mack's testimony, Kreitman did not respond to Aguirre's e-mails for several weeks. In late July 2005, Kreitman asked Aguirre for more specificity about the potential case against Mack, which then resulted in numerous back and forth e-mail exchanges between Aguirre and Kreitman about the strength of the evidence against Mack.

In early August 2005, Aguirre and Hanson once again discussed the effect of Mack's political clout on taking his testimony. On August 4, 2005, Hanson requested that Aguirre prepare a memorandum discussing why it was appropriate to take Mack's testimony at that time. Aguirre then set forth in e-mails the bases for his belief that Mack met every element of the profile of the tipper, to which Kreitman replied that much of Aguirre's memorandum was speculation, not evidence, and expressed the concern that Mack could simply deny the allegations against him in testimony.

In mid-August 2005, Kreitman indicated via e-mail to Aguirre that he felt a necessary prerequisite to bringing in Mack for testimony was determining that "Mack was brought over the wall" regarding the GE/Heller transaction. Hanson explained to Aguirre in an e-mail sent on August 24, 2005, that Kreitman used the phrase "over the wall" to mean that Mack had the requisite inside information and recommended they try to figure out whether Mack had this information before bringing him in for testimony. Aguirre responded that the bar for taking Mack's testimony had been set artificially high and claimed that political influences were the real reasons he was not being allowed to take Mack's testimony. Approximately a week later, on September 1, 2005, Gary Aguirre was terminated.

Aguirre claims that in confronting his supervisors in late July 2005 with Hanson's comments about Mack's political connections, and the communications between Morgan Stanley officials and Aguirre's supervisors during that same time period triggered the change in the reaction of his supervisors to the prospect of taking Mack's testimony. Aguirre contends that the record of Hanson's comments about Mack's political clout is undeniable proof that political factors were involved in his supervisors' decision not to take Mack's testimony.

Indeed, the conversations between Hanson and Aguirre about Mack's political clout are very troubling. Hanson acknowledged using the term "political clout" in an e-mail to Aguirre and that he had conversations with Aguirre about Mack being a person of prestige who would have counsel with "juice." Hanson also admitted that he would have used the term "industry captain" to refer to Mack in a discussion about the prospect of taking his testimony.

Hanson, however, explained these conversations, stating that what he meant was that Mack and his counsel had the ability to easily pick up the phone and call his supervisors about the Pequot case. He further explained that he simply wanted to let his supervisors know that they were considering taking Mack's testimony and to be fully aware of the facts before receiving any phone calls from outside counsel. Hanson denied

that Mack's political clout was a factor in the decision of whether to take Mack's testimony. He also noted that he indicated to Aguirre in late August 2005, that he felt that they would eventually take Mack's testimony.

In fact, there are contemporaneous e-mails from Hanson that are consistent with his explanation. These include: an August 4, 2005 e-mail, in which he stated "Mack's counsel will have juice as I described last night – meaning they may reach out to Paul [Berger] and Linda [Thomsen] and (possibly others)," and an August 24, 2005 e-mail, in which Hanson stated, "the political clout I mentioned to you was a reason to keep Paul [Berger] and possibly Linda [Thomsen] in the loop on the testimony".

In addition, several e-mail communications support Hanson's claim that it was a question of when, not if, Mack's testimony should be taken. For example, Hanson expressed the view that the issue was "why it is appropriate to take Mack's testimony at this point" (August 4, 2005 e-mail at Appendix 120), that "we should try to figure out a number of things about Mack before scheduling him up" (August 24, 2005 e-mail at Appendix 134) and finally, that "I believe that everyone feels we will take Mack's testimony at some point -- the question is when." (August 24, 2005 e-mail at Appendix 136).

However, there is evidence that the Mack situation was dealt with differently from others in that Aguirre had to prepare several memoranda explaining why Mack's testimony should be taken, although no such requests were made prior to Aguirre issuing other subpoenas or taking testimony of other persons in the Pequot investigation. In fact, Kreitman himself acknowledged that he was not aware of any other situations where he required a memorandum to be written to take someone's testimony. Further, eleven other current or former Enforcement attorneys noted that they were unaware of any case where they were asked to prepare a memorandum justifying the decision to take a particular individual's testimony.

In addition, there is evidence that the approach adopted by Hanson and Kreitman in connection with taking Mack's testimony was different from the approach Kreitman and Hanson, as well as others within Enforcement, commonly utilized in investigating insider trading cases. The evidence suggests that the classic strategy for conducting an insider trading investigation was to pin down the tipper and tippee to a story as early as possible. In fact, this "sooner rather than later principle" was how Hilton Foster trained new investigators at the SEC. In addition, the evidence shows that this was also the strategy most often employed by both Kreitman and Hanson themselves in insider trading investigations. A staff attorney who worked for Kreitman noted that in one case where he protested that he did not feel ready to take the testimony of a particular witness at the beginning of the investigation, Kreitman was adamant that the testimony needed to be taken right away. Tr. Witness 6 4/2008 testimony at p. 103.

On the other hand, Aguirre's supervisors' explanation of why they felt it appropriate to wait to take Mack's testimony is a plausible one. Hanson noted that that

there was no rule that one follows blindly in every case and that, without something to confront Mack with, the testimony could have been pretty short. Kreitman concurred, saying that if they called Mack in for testimony without evidence that he had access to the inside information, Mack could have simply denied the allegations, and they would have shown their hand prematurely. Kreitman also noted that unlike many cases, in the Pequot matter, the trading was not very recent, and the approach of locking in a witness early was in the nature of an ambush immediately after the trading occurred. Also, in Kreitman's view, Mack was not somebody who could be ambushed easily. Berger stated that everyone recognized that Mack was a sophisticated individual in the securities markets, who was not going to come in and admit something on the record. He noted they were not going to pin him down or place him in a position where he did not know what to say. Therefore, Berger believed they were not going to get any real usable information on the record at that time. Thus, Berger logically concluded that the best thing to do was to obtain and review all possible documentation before bringing in Mack for testimony.

In addition, while several other individuals who worked with Aguirre on the Pequot investigation concurred with Aguirre's request to take Mack's testimony in July or August of 2005, they also generally indicated that it was not *per se* improper to wait to obtain more information before bringing in Mack. Hilton Foster acknowledged that the decision about exactly when to take Mack's testimony was something about which reasonable people could differ. Similarly, Eric Ribelin said he did not necessarily think Mack's testimony needed to be taken right then, noting that he personally thought that you should have as much information as you can before you take testimony. Joseph Cella, who suggested to Kreitman that Mack's testimony should be taken, admitted that Kreitman and Hanson's position to wait to take the testimony was a still reasonable position, even if he disagreed with it.

Further, as investigators with substantially more experience than Aguirre in these types of investigations, and as the supervisors, Hanson, Kreitman and Berger certainly had the prerogative to come to a different conclusion about the appropriate strategy to be utilized in a particular investigation.

Moreover, there is substantial evidence that Enforcement cases are generally not affected by political decisions or the prominence of the defendants. Nearly every individual interviewed about this issue stated, without hesitation, that they had never seen any cases halted or slowed by political pressure. Past and present senior-level Enforcement officials (even excluding Aguirre's supervisors) stated that they were not aware of anyone being favored for his or her political connections and that, in fact, bringing in high-profile defendants would serve to elevate the reputation of Enforcement lawyers. Aguirre's colleagues on the Pequot investigation, with the exception of Eric Ribelin, also concurred that they have never heard of a case being slowed or stopped for political reasons, and even Ribelin acknowledged that there could be a reason to delay taking Mack's testimony other than that Mack was connected.

Moreover, the specific individuals involved in the decision not to take Mack's testimony during July and August of 2005, most notably Kreitman and Berger, were considered particularly aggressive and the least likely to back down in the face of political pressure. In fact, even several long-time Enforcement lawyers who were very critical of Hanson and Kreitman's management style did not believe that these individuals would hesitate to take the testimony of a prominent person.

Accordingly, the OIG investigation did not find sufficient evidence to establish that Mack was given improper preferential treatment regarding the taking of his testimony. While there was evidence that the approach taken with respect to Mack's testimony was different than in other cases, Enforcement's explanation of why they felt it appropriate to wait to take Mack's testimony is a reasonable one and based on years of investigative experience. The OIG investigation did not find that it was improper *per se* to factor in Mack's level of sophistication in deciding to wait to take his testimony until Enforcement had specific evidence with which to confront him. Moreover, although there are certainly some very troubling aspects of the communications between Aguirre and his direct supervisor, and the somewhat abrupt change in Aguirre's supervisors' views regarding the Pequot case, the investigation finds that this evidence alone is insufficient to establish that there was a direct connection between Mack's prominence or political connections and the decision not to take Mack's testimony in the summer of 2005.

III. Communications Between Representatives of Morgan Stanley and SEC Enforcement Officials in June 2005

A. Communications with Eric Dinallo, Managing Director for Regulatory Affairs at Morgan Stanley

1. Initial Phone Call from Dinallo

On or about June 23, 2005, Aguirre received a phone call from Eric Dinallo, then Managing Director for Regulatory Affairs at Morgan Stanley, in which Dinallo indicated that the Morgan Stanley Board was going to make a decision about whether to choose John Mack as Morgan Stanley's new CEO, and that he was seeking information about the SEC's insider trading investigation of Mack. Tr. Aguirre 4/29/2008 testimony at p. 70. According to Dinallo, he was trying to obtain "information to determine whether Mack was a target [of the SEC's investigation] and if so, how serious the claims were against him or how much evidence the SEC thought they had against him." Transcript of Testimony of Eric Dinallo before SEC IG taken on May 9, 2008 (hereinafter, "Tr. Dinallo 5/9/2008 testimony") at p. 7. Dinallo stated that it was important to determine if Mack was a target of the investigation, or merely a witness, which would not have presented a problem for the Board. Notes of OIG Investigator Interview with Dinallo of January 31, 2007 (hereinafter, "OIG Dinallo 1/31/2007 Interview Notes") at p. 3, attached hereto as Appendix 155. He indicated that he did not remember worrying about whether the SEC was going to call in Mack for testimony, but was more concerned about

whether he "was a mere possessor of possible evidence," or a "possible target." Tr. Dinallo 5/9/2008 testimony at p. 6.

According to Aguirre, Dinallo told him that he needed some "comfort that this guy is not going to walk into Morgan Stanley and have an insider trading case filed against him 6 months from now." Tr. Aguirre 4/29/2008 testimony at p. 71. Dinallo concurred that he indicated to Aguirre in the initial phone call that "the Board would obviously have a problem if Mack is a target of an insider trading investigation." Tr. Dinallo 5/9/2008 testimony at p. 7. Dinallo noted that he was worried that Morgan Stanley, "which had just gone through a crisis of management," might hire a CEO who was targeted, which would make for "quite an unhappy company." Id. at p. 6. Dinallo explained that for the Morgan Stanley Board's purpose, it would not matter if Mack was accused civilly or criminally of a Section 10(b)(5) violation, since it would be the same problem if he were a target of either type of investigation. Notes of OIG Investigator Interview with Dinallo of February 16, 2007 (hereinafter, "OIG Dinallo 2/16/2007 Interview Notes") at p. 3. Dinallo understood the Board wished to make a final decision and announce Mack as the CEO on July 1, 2005. OIG Dinallo 1/31/07 Interview Notes at p. 1.

According to both Aguirre's and Dinallo's accounts, Aguirre refused to provide any information to Dinallo. Aguirre testified that when asked if the SEC planned to file an insider trading case against Mack, he responded "I can't tell you that." Tr. Aguirre 4/29/2008 testimony at p. 71. According to Dinallo, "Aguirre's response to his call was the typical SEC response to not really commit to anything and to say the SEC was considering lots of options." OIG Dinallo notes at p. 4. Dinallo stated that Aguirre did not indicate whether Mack was a target or merely a witness. Id.

2. Kreitman's Return Phone Call with Dinallo and Aguirre's Supervisors' Discussions about How to Proceed

By all accounts, Aguirre then relayed his conversation with Dinallo to Hanson and Kreitman. According to Hanson, Aguirre came into his office and reported that Dinallo had called and wanted to know what was going on with Mack. Tr. Hanson Senate 9/5/2006 testimony at p. 112. Hanson said he brought the issue up with Kreitman, who called Dinallo back with Aguirre and Hanson on a speaker phone. Id. Aguirre concurred that Kreitman called Dinallo back on the speaker phone, with Aguirre, Hanson, and another Morgan Stanley representative also present on the call. Transcript of June 28, 2006 Hearing before the Senate Comm. on the Judiciary, S. HRG. 109-696 (hereinafter, "Tr. 6/28/2006 Senate Hearing") at pgs. 34-35, excerpted pages attached hereto as Appendix 156.

According to Hanson, Kreitman's view was "that [the call from Dinallo] was a pretty significant event and it would be weird if they had hired him and then we announced that we going to take his testimony," and he "wanted to signal to Dinallo or to tell Dinallo that something was going on with Mack." Tr. Hanson Senate 9/5/2006

testimony at pgs. 112-113. Kreitman did not dispute this account, stating that "he had some concern that if Mack became head of Morgan Stanley and then they did proceed against him, that could be disruptive to the markets or potentially injurious to investors." Tr. Kreitman Senate 9/6/2006 testimony at p. 77. Kreitman further stated that from "his point of view," Dinallo's call "asking if Mack is being investigated for insider trading was a reasonable inquiry." Id. at p. 150. Hanson's contemporaneous notes of the conversation with Dinallo also corroborate Kreitman's account. These notes state next to the initials "MK" the words, "Eric, perfectly reasonable request, we don't have targets, investigations in early stages – don't know what will," and references that Kreitman indicated that they would call Dinallo back. Hanson's notes bate-stamped as SEC 0000892 attached as Appendix 157.

Dinallo indicated that in the call with Kreitman, he felt more comfortable with Kreitman than he did on the call with Aguirre and pushed Kreitman more for an answer. OIG Dinallo 2/16/2007 Interview Notes at p. 5. Dinallo thought he said something like, "Come on, Mark, we go way back and we need to know, and it is not right not to tell us," referring to Morgan Stanley. Id. Dinallo said he also told Kreitman that although Dinallo had only seen a "narrow world of evidence," specifically about six months of e-mails, he did not see anything that was an issue for Mack. Id. Dinallo then said to Kreitman something like, "If you know something I am urging you to tell me because it is not right for the company to not know." Id. Dinallo described the call as a dialogue with Kreitman with Aguirre present, and indicated that Aguirre did not speak much. Id. Dinallo stated that he thought that Kreitman was kinder than Aguirre had been, and that the position in which Morgan Stanley found itself resonated more with Kreitman more than it did with Aguirre. Id. Dinallo also indicated that he thought that Kreitman was going to try to get an answer and get back to him. Id.

Kreitman stated that he knew the Pequot matter "was an open investigation and by statute nonpublic and he couldn't say anything to Dinallo because of the statutory prohibition and so he called Berger [and] asked for advice." Tr. Kreitman Senate 9/6/2006 testimony at p. 77. A documentary record evidences Kreitman's attempts to contact Paul Berger on June 24, 2005, to seek advice on responding to Dinallo. In a June 24, 2005 e-mail from Kreitman to Berger at 12:09 pm, Kreitman wrote as follows:

> Paul – I have a call from Eric Dinallo at Morgan Stanley. Before responding, I'd like your advice. It's a matter of some urgency and delicacy. Can you please give me a call? Thanks. Mark. E-mail dated June 24, 2005 from Kreitman to Berger attached as Appendix 158.

Berger responded to Kreitman's e-mail at 12:11 pm, saying, "I'm out of the office for about 2 and half hours. Can it wait till I get back." E-mail dated June 24, 2005 from Berger to Kreitman attached hereto as Appendix 159. Kreitman responded in less than a minute saying, "A quick call to confirm the propriety of my plan would help, if it's not too inconvenient." E-mail dated June 24, 2005 from Kreitman to Berger attached hereto as Appendix 160. Berger responded two minutes later that "I'm not in a place where I

can call right now. Give me 15 minutes and I'll call." E-mail dated June 24, 2005, from Berger to Kreitman, attached hereto as Appendix 161.

Berger stated that he was at a doctor's appointment when he received Kreitman's e-mail, and he left the doctor's office, "got out on the street and called Mark back." Tr. Berger Senate 11/2/2006 testimony at p. 102. When asked about the urgency conveyed in the e-mail exchange with Berger, Kreitman stated he considered it urgent because Dinallo said it was urgent, and he felt he had put Dinallo off and wanted to get him a response. Transcript of Testimony of Mark Kreitman before Senate Committee on November 15, 2006 (hereinafter, "Tr. Kreitman Senate 11/15/2006 Senate testimony") at p. 11.

Shortly after the e-mail exchange, Kreitman discussed Dinallo's question with Berger by speaker phone with Aguirre present. Transcript of Testimony of Gary Aguirre before SEC IG on June 18, 2008 (hereinafter, "Tr. Aguirre 6/18/2008 testimony") at p. 11 attached hereto as Appendix 162. According to Aguirre's recollection of this phone call, Kreitman 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." Tr. 6/28/2006 Senate Hearing at p. 35. According to Aguirre, Berger cut Kreitman off in mid-sentence and said, "I don't think we are [going to file against Mack], and we shouldn't say anything" or words to that effect.[44] Id. Aguirre stated that he was concerned about Berger's response and particularly the fact that Berger "knew very, very little about the investigation [Aguirre] had conducted." Id. Aguirre noted that Berger did say "something that slightly discounted the strength of" his statement, acknowledging that he did not really know that much about the case. Tr. Aguirre 8/26/2008 at pgs. 103-104.

Berger disputed Aguirre's recollection of the conversation and said that Kreitman had suggested they should tell Morgan Stanley that Mack had a problem, and Berger said he replied "we can't do that, we're not at the Wells stage and we don't know whether we're going to sue Mack or not," denying that he indicated in that conversation Enforcement had decided not to file against Mack. Tr. Berger Senate 11/2/2006 testimony at pgs. 103-104. Berger also said he told Kreitman that he would call Dinallo back. Id. Berger further stated that he then went to Kreitman and said, "you realize that your suggestion was contrary to Commission policy, that they could not tell a party, particularly someone who was not even a party to the investigation, any of the confidential information about the investigation, nor could they express an opinion one way or the other about Mack." Id. at p. 106. Berger said he further explained to Kreitman that "if the Commission staff were to say to someone who was trying to make a hiring decision, this man has a problem they may decide not to hire him based on staff opinion, and the reverse of that is that he said he has no problem and then the Commission decides to sue him, they'd come back and say you guys essentially involved

[44] In later testimony, Aguirre described Berger's comment as follows: "Berger, cutting in: I don't think we're going to file. Nothing should be said to Morgan Stanley." Tr. Aguirre 6/18/2008 testimony at p. 11.

yourselves in a business decision." Id. Berger said Kreitman replied, "you are absolutely right, we can't say anything to people." Id. at p. 107. Berger said when he asked Kreitman at that time, "do we have enough yet to take [Mack's] testimony," Kreitman "replied no, not yet, but you know we're moving along." Tr. Berger 11/07/2006 Senate testimony at p. 28.

Kreitman stated that at the time of Dinallo's call, he was concerned about the situation, but "he didn't know whether they would ultimately proceed against Mack." Kreitman 9/6/2006 Senate testimony at p. 77. Kreitman stated that Berger said in the conversation about how to respond to Dinallo's call, that "you can't say anything, it is an open investigation," and that he would call Dinallo. Id. at p. 78. Kreitman said that "he knew he could not answer the question but didn't know if the SEC as an institution could say anything." Id. at p.151. Kreitman also stated that Berger did not say during that call, "no we're not filing on Mr. Mack," or "no, we're not taking Mr. Mack's testimony." Id. at p. 152.

Hanson said that he, Kreitman and Aguirre "called Berger and Berger was adamant in saying absolutely not [to say anything to Dinallo] and instructed Mark [Kreitman] not to do that." Tr. Hanson 9/5/2006 Senate testimony at p. 114. Hanson said he concurred in Berger telling Kreitman not to tell Dinallo anything at all. Id. at p. 151. Aguirre also acknowledged that after Kreitman went back to Berger to ask what to do, Berger gave an instruction to "tell them nothing." Tr. Aguirre 4/29/2008 testimony at p. 77.

3. Berger's Phone Call with Dinallo

Berger then stated that he "called Dinallo and said Eric you know I can't tell you anything, we're in the middle of an investigation and it's premature to say." Tr. Berger 11/2/2006 Senate testimony at p. 104. Berger said Dinallo replied, "I knew you were going to say that but I needed to ask anyway." Id. Berger said he further said, "I appreciate the fact you are interested and have a decision to make, but we can't be part of the decision." Id. at pgs 104-105. According to Berger, Dinallo then asked "where are you in the investigation," and Berger replied "the middle," whereupon Dinallo asked, "is there any way to speed it up," and Berger said, "not that he was aware of, but if there was, they'll be in touch with him if they can be of help." Id. at 105. Berger said Dinallo had asked if they thought "they would be done in a week or two," and Berger replied "that's not going to happen, we're in the middle of this investigation." Id. at 105. Berger further stated that he said to Dinallo something to the effect of, "like any other insider trading investigation, we don't know where it's going to go until we've finished it." Tr. Berger 11/7/2006 Senate testimony at p. 25. Berger said "the point of [his] phone call was to adhere to the Commission policy by not disclosing any information about an investigation . . . ." Id. at p. 31. Berger was asked if he implied that the SEC did not presently have evidence of any wrongdoing by Mack, and replied "no," and that he "was specifically trying to stay away from conveying anything that would suggest that they take from the conversation that they can make a business decision based on what the SEC is doing." Id. at p. 32.

Although Berger indicated that that he provided little, if any, information to Dinallo in this phone conversation, the contemporaneous notes of Mary Jo White, an attorney conducting due diligence for Morgan Stanley, and Dinallo's testimony detail Berger imparting a great deal more information to Dinallo. Mary Jo White, former United States Attorney for the Southern District of New York and partner at the law firm of Debevoise & Plimpton, was retained by the Morgan Stanley Board of Directors to conduct due diligence on Mack and, in particular, his possible involvement in the Pequot insider trading matter. Transcript of Testimony of Mary Jo White before OIG Investigators on February 16, 2007 (hereinafter, "Tr. White 2/16/2007 testimony") at pgs. 11-12. Notes that White prepared for a presentation before a Morgan Stanley Board Meeting on June 30, 2005, contain the following reference to Dinallo reporting back to White his conversation with Berger as follows:

> 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. Mary Jo White Redacted Notes for Morgan Stanley Board Meeting – June 30, 2005 (hereinafter, "White notes") at pgs. 7-8 attached as Appendix 163.

Dinallo's testimony corroborates the statements in White's notes that some relevant information about the Pequot investigation was provided to him. Dinallo said he made a "longer, more lucid plea" to Berger about his predicament with Mack and the Board since he had more time to refine his pitch. OIG Dinallo 2/16/2007 Interview Notes at p. 5. Dinallo remembered saying that it was really important to the company shareholders, and, with the headlines about [former CEO Phillip] Purcell[45] leaving Morgan Stanley, "the worst of all worlds would be to bring on John Mack as the CEO only to learn that he had to leave because he was the target of an insider trading investigation." Id. at pgs. 5-6. Dinallo also said he told Berger "he was concerned the SEC could not get its act together fast enough to get an answer for the Board, that time mattered, and that he saw no evidence Mack could not be the CEO." Id. at p. 6. Dinallo also recalled making comments to Berger about the SEC's obligation to shareholders and the market to give Morgan Stanley an answer. Id.

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[45] On June 13, 2005, Morgan Stanley CEO Phillip J. Purcell indicated he would step down as CEO of Morgan Stanley, stating in a letter released by Morgan Stanley: "It has become clear that in light of the continuing personal attacks on me, and the unprecedented level of negative attention our Firm -- and each of you -- has had to endure, that this is the best thing I can do for you, our clients and our shareholders." *Market Watch,* June 13, 2005 "Morgan Stanley CEO Stepping Down," attached hereto as Appendix 164.

Dinallo was read the language described above in Mary Jo White's notes and responded as follows: "The language you just read to me [from White's notes] is an accurate rendition of my conversations with her or at least a portion of my conversations with her. I think that's exactly what my conversation with Paul Berger was about." Tr. Dinallo 5/9/2008 testimony at p. 10. Dinallo explained that from what he saw, he could not see anything that would rise to the level of anything that was insider trading but did not have exposure to the rest of the world of evidence and was trying to appeal to the SEC if see if they had a difference of opinion on this point (i.e., the amount of evidence against Mack.) Id. Dinallo said he was trying to determine whether the SEC had anything else that should be communicated to the Board so it could make a determination whether Mack would be a good choice or not. Id. Based on his conversations with Berger or through Mary Jo White, "the implicit impression was that there was no current evidence [against Mack]." Id. at p. 13. Dinallo said he thought he inferred, based on his conversation with Berger that the SEC did not seem to have any significant evidence other that what Dinallo was looking at. Id. at pgs. 13-14. Dinallo further stated that it was a fair statement that after his conversation with Berger he got some comfort that while the SEC did not tell him anything definitively, it did not seem that SEC had any significant evidence at that moment against Mack. Id. at p. 14. Overall, Dinallo felt like he got some comfort. Id. at p. 15.

Linda Thomsen stated that while she did not know if Berger told Dinallo that they did not presently have evidence of any wrongdoing by Mack, the statement in Mary Jo White's notes reflecting the conversation between Dinallo and Berger was consistent with the conclusion Berger reached as it was described to Thomsen. Tr. Thomsen 4/28/2008 testimony at p. 30.

Berger was asked how his words could have given Dinallo the impression that the SEC did not have any evidence of wrongdoing by Mack, Berger responded, "I can't tell you what Mr. Dinallo was thinking or not thinking." Tr. Berger 11/7/2006 Senate testimony at p. 33. Berger also noted that his saying to Dinallo that "this is an investigation like any insider trading investigation . . . cuts both ways," and "one could take that as something good or something bad." Id. Berger also added, "hopefully I didn't convey that to him." Id.

B. Communications between Linda Thomsen and Mary Jo White, Attorney for the Morgan Stanley Board of Directors

1. Telephone Call between White and Thomsen

There were also communications during late June 2005 between Mary Jo White, the attorney retained by the Morgan Stanley Board of Directors to conduct due diligence on Mack and, in particular, his possible involvement in the Pequot insider trading matter. and Enforcement Director Linda Thomsen regarding the status of the Pequot investigation as it related to John Mack.

White said on June 24, 2005, she met with Dinallo, who reported to her on a phone call he had with Paul Berger, in which he called Berger to ask "given that [Morgan Stanley] had received these subpoenas from Mr. Mack's e-mails, what the SEC could say about any involvement of Mr. Mack and the insider trading issue." Tr. White 2/16/2007 testimony at p. 16.

White said that in the context of her other due diligence, which involved speaking to lawyers for Pequot and Credit Suisse First Boston,[46] she "also determined that I would call the SEC to find out what, if anything, I could about the SEC's view at that time as to whether Mr. Mack had any exposure in that insider trading investigation. So that's essentially what we did." Id. at p. 21.

White said she contacted Linda Thomsen on June 27, 2005, "as one of the potential sources of information" in order "to determine what, if anything, the SEC [could] say at this juncture about any possible exposure of Mr. Mack and any insider trading investigation." Id. at p. 37. White stated:

> I told [Thomsen] that what my assignment was [and] who I was representing. I also told her that I had the consent of both Morgan Stanley and Mr. Mack and his counsel to be making this call, and I told her that the board was on the verge of -- was certainly considering appointing him as the chairman and CEO. The subpoenas had come in, and needless to say, the board didn't want to step into this if he had a problem. And that I was calling to see what, if anything, the SEC could say about whether indeed the judgment was that he had exposure in the insider trading investigation. Id. at p. 38.

White said she asked Thomsen "if we could accelerate the production of those e-mails [which were responsive to an SEC subpoena issued in the Pequot case] did she think the SEC might be in a position to say something more about Mr. Mack's exposure or not." Id. at p. 39. White said that she also "asked whether [the SEC] would be willing to at least look at the e-mails that we had identified as potentially of interest and [Thomsen] said send them on down." Id. White said she wanted to accelerate the production of the e-mails and, "if it were possible, the SEC staff could look at them and then decide whether or not they could tell us anything more about the possible exposure of Mr. Mack and the insider trading matter." Id. at p. 40. White said Thomsen responded to her saying send the e-mails down to her and she would see what they could do, and see what if anything she could say. Id. at p. 15. White said she then arranged for the production of e-mails to be accelerated and delivered within the next 24 hours. Id.

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[46] Credit Suisse First Boston (CSFB) is an investment banking firm and advisor to Heller in the GE-Heller transaction that hired Mack as its Chief Executive Officer on July 12, 2001, ten days after Pequot began to buy Heller stock.

Thomsen's account of the telephone call is similar to White's account. Thomsen said she received a phone call from White, who said she was representing the Morgan Stanley Board and had been employed to vet candidates for the job of Morgan Stanley CEO. Tr. Thomsen 9/8/2006 testimony at p. 85. Thomsen said White stated that she did not want to influence the investigation, but that she had done her own investigation and concluded that Mack had not engaged in any improper behavior and wanted to know if Thomsen had any information to the contrary. Id. at pgs. 85-86.

2. Thomsen's Deliberations on How to Proceed

Thomsen said that what was running through her mind was "how am I going to handle this if we have something negative on Mr. Mack." Id. at p. 86. Thomsen said she had a concern that "a corporation who's trying very hard to do the right thing, hire somebody pristine to run their organization," and if "I was sitting on information that we were confident that we had, whether there was any way to communicate that to them so they didn't do something that they would be sorry about it later." Id. at p. 87. Thomsen said she was concerned that "the effect on the markets could be quite dramatic particularly for an institution like Morgan Stanley," if the SEC was confident that they had a case against Mack and could not find some way to communicate it. Id. at p. 88. Thomsen explained that "if Morgan Stanley were to hire as its CEO someone who engaged in insider trading shortly after he became CEO that could be potentially quite disruptive" to the capital markets. Id. at p. 149. She said "it could have ripple effects that makes the markets go haywire." . at p. 150. Thomsen added that since Morgan Stanley is a financial institution, the Commission's failure to provide information about Mack's exposure, could be disruptive and she was worried about the SEC "contribut[ing] to that in some way that could have been avoided." Id. at pgs. 150-151. Thomsen said the disruption could affect, in addition to Morgan Stanley, "other companies ability to raise capital," noting that Morgan Stanley's previous CEO had just left, she thought their General Counsel may have just left or was about to leave, and they had several lawsuits with the SEC. Id. at pgs. 151-2. Thomsen said "on the other side, I similarly was worried that the fact that we had an investigation that [Morgan Stanley] obviously knew about . . . might cause the Board to act so cautiously" that "[Morgan Stanley] would not hire a candidate they deemed to be qualified because somehow, by our communication, we had signaled that he was in violation of federal securities laws." Tr. Thomsen 4/28/2008 testimony at p. 33.

Thomsen opined that in Morgan Stanley's position, it was perfectly reasonable and sensible to reach out to her, and in Thomsen's view, there was nothing untoward about it, and Morgan Stanley would fully expect that the answer back would be, "I can't tell you anything." Tr. Thomsen 9/8/2006 Senate testimony at p. 90. Thomsen said she told White that she did not know if she could tell her anything, that she did not know enough even to know if there was anything she could tell her, and that she would get back to her. Id. at p. 86. Thomsen said she then talked to Berger who told her they did not have enough information one way or another and were not likely to be at a stage where they would know information about the extent of the evidence against Mack any time

soon. Id. She also said she talked with Berger about taking Mack's testimony, and Berger said they could not rule it out, and while they expected to take Mack's testimony at some point, it was not soon. Id. at p. 90.

3. Initial Documents Sent by White to Thomsen

On June 27, 2005 at 12:02 pm, White sent a facsimile to Thomsen through her administrative assistant, [redacted], stating as follows:

> We are now faxing to your office and to your attention, certain documents from Morgan Stanley's production today in response to the recent SEC subpoena we discussed this morning. All documents responsive to that subpoena, including these, are being produced by CD today by Fiona Phillip of Howrey, LLP. Please let me know if you need further information. Thank you very much. June 27, 2005 e-mail from [redacted] to Linda Thomsen (referencing facsimile) attached as Appendix 165.

That same day, Mary Jo White sent 26 pages of e-mails via facsimile to Linda Thomsen with a cover letter, stating, in pertinent part, "attached are the documents referenced in my earlier e-mail." June 27, 2005 letter from Mary Jo White to Linda Thomsen with attachments attached as Appendix 166.

Aguirre stated that 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. Neither I nor other staff had had heard of this happening before. Indeed, the subpoena explicitly stated that the documents were to be delivered to me." Transcript of December 5, 2006 Hearing before the Senate Comm. on the Judiciary, S. HRG. 109-898 (hereinafter, "Tr. 12/5/2006 Senate Hearing") at p. 534, excerpted pages attached hereto at Appendix 167.

4. Second Telephone Call between White and Thomsen

According to White, she had a second telephone call with Thomsen on June 28, 2005, after Thomsen had an opportunity to review the e-mails White sent to her. Tr. White Senate 9/25/2006 testimony at p. 10. White said, in the second call, Thomsen said "that in terms of . . . the e-mails, . . . you could say, there's smoke, meaning raising potential, you know, questions, just as I had, you know, put the question to her, certainly not fire, looking at the face of the e-mails . . . ." Id. at p. 27. This testimony is consistent with the notes White prepared for her presentation before the Morgan Stanley Board Meeting on June 30, 2005, which stated as follows:

> 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." White notes at p. 8, attached hereto as Appendix 163.

White also noted that Thomsen did state in both telephone calls that it was premature to say anything about Mack's potential exposure, and stated that she did not feel Thomsen had said anything to her that made her feel more assured that the Board should move ahead in hiring Mack. Tr. White 9/25/2006 Senate testimony at p. 28; Tr. White 2/16/2007 testimony at p. 41. White's notes also reflect these statements by Thomsen, stating, "The SEC, through Linda Thomsen, the Chief of Enforcement, has told me that it is too early for them to conclude whether Mr. Mack had any involvement in any allegedly unlawful insider trading by Pequot," and that "it does seem clear that the SEC will continue to pursue the Pequot investigation aggressively, including making sure that there is no misconduct by Mr. Mack." White notes at pgs. 1-2; 9. White's notes conclude "it also seems likely that Mr. Mack will be asked to testify in the SEC's investigation at some point." Id. at p. 9.

In her testimony, Thomsen acknowledged that the section in White's notes about her saying, "there is smoke there but that there was surely not fire," was "accurate," although she could not recall if that was exactly what she said, but stated that she "was trying to convey to Ms. White the notion that we have information that puts Mr. Mack as an actor in the events we're looking at, but we don't have anything at this point that says we're going to sue him tomorrow." Tr. Thomsen 4/28/2008 testimony at p. 29. She also said White got the point she was trying to convey that they did not know one way or the other, and there was nothing she could provide to help her weigh the balance. Id.

5. Additional Documents Arranged by White to be Sent to Thomsen

White continued to "accelerate [the process] of getting that information to the SEC [for its review]" and arranged for Fiona Philip, a former associate (now partner) with the law firm of Howrey & Simon who represented Morgan Stanley on the Pequot matter, to send a compact disk (CD) to the SEC with the rest of the document production. Tr. White 2/16/2007 testimony at pgs. 51-52; 54-55.

On June 29, 2005, Fiona Philip called Aguirre, and told him she had a document production on a CD for him. Notes of OIG Investigator Interview with Fiona Philip of March 12, 2007 (hereinafter, "OIG Philip 3/12/07 Interview Notes") at p. 5. According to Philip, Aguirre told her to deliver it tomorrow, and she said, "No," that she was going to deliver it today. Id. Philip stated that Aguirre told her twice to deliver it tomorrow and she said, "No, it is coming to you today." Id. Philip recollected that she probably indicated that someone at the SEC was expecting the CD and remembered that Aguirre met someone in the lobby to pick up the CD. Id. Philip stated that she had been instructed by the client (Morgan Stanley) to get the CD over to the SEC. Id. She noted

that the documents she had for delivery on June 29th related to the June 13th subpoena from the SEC for e-mails to and from John Mack and believed that all of the documents on the CD related to the subpoena for Mack's e-mails. Id.

6. Aguirre's Role in and Concerns about the Communications from Morgan Stanley

On June 29, 2005 at 2:13 pm, Aguirre sent an e-mail to Kreitman, stating as follows:

> I have been informed by Fiona Phillip, who represents Morgan Stanley, that a CD is expected here this afternoon. When I told them it could be delivered tomorrow, since the mailroom would be closed, she insisted that it be delivered today because "someone here was expecting it." That person is not me. I also understand that other documents from Morgan Stanley were sent directly to Linda Thompson [sic] and that there have been discussions between senior staff and counsel for Morgan Stanley. . . . E-mail from Aguirre to Kreitman dated June 29, 2005 attached as Appendix 168.

Aguirre stated that he had numerous contacts with other Morgan Stanley counsel, but never with White. Aguirre 8/21/2006 letter to Shelby and Sarbanes at p. 23 attached as Appendix 11. He stated that he issued over 90 subpoenas in the course of the Pequot investigation and defense counsel always sent the responsive documents to him in accordance with explicit instructions, except for the delivery of those documents to Thomsen. Id. at p. 26.

To Aguirre, it appeared that White had been retained by Morgan Stanley to deal directly with Director Thomsen about the Mack investigation. Id. at p. 23. According to Aguirre, it is usual protocol for a defense counsel to deal with the staff attorney first and then go further up the chain of command if he or she is dissatisfied with a decision by the staff attorney. Id. Aguirre stated, "White simply started at the top." Id.

Thomsen acknowledged that she would not typically receive documents that were subpoenaed in an investigation and, although she stated it was not unusual for her to be called about an investigation by someone outside the SEC, she said those outside the SEC generally do not ask her about the status of an investigation. Tr. Thomsen 9/8/2006 Senate testimony at pgs. 89, 96.

Kreitman concurred that having documents Enforcement requested via subpoena delivered directly to Thomsen's office was "abnormal" because ordinarily, when Enforcement requested documents, they would come to him. Tr. Kreitman 9/6/2006 testimony at p. 143. In fact, Kreitman stated that this was the only time he had "ever heard of this happening." Id.

Furthermore, according to Aguirre, the e-mails that White had delivered to Thomsen were not particularly relevant to the exposure of Mack in the insider trading investigation. Aguirre stated as follows:

> The emails that White had delivered to Thomsen were only one of the two classes of emails I had subpoenaed from Morgan Stanley: email exchanges between Samberg and Mack before Mack left Morgan Stanley in March 2001. These exchanges took place before Morgan Stanley became GE's consultant in May 2001 on the Heller acquisition. Accordingly, no one expected these emails to have even the subtle clues regarding the possible tip from Mack to Samberg. Rather, this class of emails was sought to provide background information on the Mack-Samberg relationship, e.g., how often they exchanged trading tips, and to conform whether [Pequot Capital Management] PCM had produced all Mack-Samberg email exchanges for this time period, which we doubted.
>
> The other class of emails sought, Mack's communications with Morgan Stanley staff after he left, had more relevance to the possible flow of information. Again, no one expected to find a smoking gun in these emails. . . . Rather, these emails might identify Morgan Stanley employees with whom Mack was still communicating *after* he left Morgan Stanley. The lead could open a new path to investigate, e.g., whether the employee was on the acquisition team, had a friend on the team, or had any other reason to know about the acquisition. White produced no emails of this class, at least none that Thomsen turned over to me. Aguirre 8/21/2006 letter to Shelby and Sarbanes at pgs. 23-24.

Aguirre further stated that when he picked up the e-mails from Thomsen, she walked out of her office, handed them to him, and made the comment, "they say what they say." Id. at p. 24. After reviewing the e-mails, Aguirre concluded that they "merely provided background on the Samberg-Mack relationship." Id. Aguirre found Thomsen's comment troubling, in that he felt that the "emails said very little" and was concerned about the communications between Thomsen and White and whether Thomsen thought that he was relying upon these e-mails to prove Mack had tipped Samberg. Id.

Thomsen stated that the only communication that she had between the first and second telephone call with Mary Jo White was with Paul Berger, who told her that they did not have enough information one way or the other with respect to Mack, and that they expected to take Mack's testimony "at some point," but "it wouldn't be soon." Tr. Thomsen 9/8/2006 Senate testimony at p. 90.

Thomsen stated that when she received the e-mails, she "may have taken it [sic] directly to Mr. Aguirre" but did not know if she took them to Berger, Hanson or Kreitman. Id. at p. 95. She further said that she did not recall reviewing the emails

herself, "so much as getting a package from Ms. White and essentially opening up the package, seeing that it included documents and nothing else, and taking it to the investigative team." Tr. Thomsen 4/28/2008 testimony at p. 28.

When Berger was asked about his knowledge of the investigation around the time of the communications with Morgan Stanley representatives, he stated that he "knew the theories that [they] were proceeding on, general theories . . . and a little bit about the GE/Heller financial transaction. . . ." Tr. Berger Senate 11/7/2006 testimony at pgs. 29-30. He said, by that point, he also may have looked at some documents, but did not recall specifically which documents, although he did indicate that, at some point; he read excerpts from the testimony of Pequot's Chairman and CEO Arthur Samberg. Id. at p. 30.

7. The Conclusion of White's Investigation

White said her investigation on behalf of the Morgan Stanley Board lasted six days, from June 24 – 30, 2005, and she concluded that she "had seen no evidence of any involvement by Mr. Mack in insider trading or other wrongdoing." Tr. White 2/16/2007 testimony at p. 32. On June 30, 2005, White gave the Board an hour-long oral presentation of her findings. Id. at pgs. 32-33. For this presentation, she used the notes that contained the references to both Berger's and Thomsen's comments as talking points for her presentation. Id. at p. 69;White notes at pgs. 7-8 attached as Appendix 163. After White's presentation, the Board called Mack into the room and questioned him in her presence. Id. at p. 34. White said the announcement that Morgan Stanley hired Mack was made on that same day, June 30, 2005. Tr. White 9/25/2006 Senate testimony at p. 27.

C. Aguirre's Contentions Regarding Berger's and Thomsen's Communications with Morgan Stanley Representatives

Aguirre claimed that Thomsen's comment telling White that there is smoke, but surely not fire, violated Berger's instruction and inappropriately provided information in an adversarial proceeding contrary to SEC rules and guidelines. Tr. Aguirre 4/29/2008 testimony at pgs. 77-78. Aguirre stated, "you're contemplating the possibility of filing a case against them . . . and so their lack of knowledge of what you have is a powerful tool for you." Id. at p. 78. He noted that if a party being investigated was holding a "smoking gun," and the SEC tells them that the SEC does not have any "smoking guns," the investigated party can "deep-six" the evidence. Id. He also stated that even if one were to consider breaking the rule, you might be inclined to tell a party if the SEC knows it has a case and may be going forward with that case, so significant funds will not be potentially lost downstream. Id. at p. 80. However, in this scenario, the only person or entities who would be protected in this case would be John Mack and Morgan Stanley. Id. Aguirre also maintained that Thomsen "was clearly providing non-public information to someone outside the SEC." Supplement C to Aguirre 4/29/2008 testimony at p. 1, attached hereto as Appendix 169.

Aguirre also claimed that both the Thomsen comment and the information Berger provided to Eric Dinallo would violate Aguirre's understanding that Enforcement was to treat all people exactly the same, whether they were the head of Morgan Stanley or a just a "Joe Company." Tr. Aguirre 4/29/2008 testimony at p. 81.

Eric Dinallo himself acknowledged that, in his experience it would benefit a lawyer to know how much evidence the SEC might have against a client, or how strongly the SEC felt their evidence was against his client. Tr. Dinallo 5/9/2008 testimony at p. 16. Specifically, he noted if a lawyer was to going to negotiate something, it would obviously be important to know how much evidence the SEC had. Id.

A former senior Enforcement official also stated that if any questions were asked about an investigation, his understanding of SEC procedure was to provide "a boiler plate response . . . that we're in the midst of an investigation and we don't disclose anything." Tr. Witness 6 4/2008 testimony at pgs. 107-108. He further stated that a statement, "there is smoke but not fire," would be against Commission policy, at least the way the staff perceives it. Id. at pgs. 108-109.

Aguirre also raised concerns about "Thomsen's willingness to rely upon records given to her by White," which he characterized as going "way [beyond] mere negligence," to "somewhere between recklessness and intent." Supplement C to Aguirre 4/29/2008 testimony at p. 1, attached hereto as Appendix 169. Aguirre stated that Thomsen "took a position on a case in which thousands of hours had been spent by more than 20 staff members." Id. He noted that it would have been easy for her to ask him to read through the e-mails and tell her if they contained anything against Mack, but she did not do so. Id. He stated that he knew of "no briefing" that Thomsen received before she made the "smoke, not fire" statement to White. Id. at p. 2. Aguirre concluded that Thomsen's "way of handling this issue goes far beyond naiveté and her actions in accepting White's statement that she was delivering all the emails as well as that these emails were the critical evidence Enforcement staff was relying upon" were "potentially criminal." Id.

Moreover, as discussed in further detail in section II above, Aguirre claimed the reaction by his superiors to the Pequot investigation, and particularly the case against John Mack, changed "night and day" after inquiries were made by Mary Jo White and Eric Dinallo on behalf of Morgan Stanley to his supervisors. Tr. Aguirre 4/29/2008 testimony at p. 81. Aguirre also stated that "from the moment Linda Thomsen said, 'There's smoke, but not fire,' the decision was made that there was not going to be any fire." Id. at p. 91.

D. Morgan Stanley's Access to the Top Levels of Management in Enforcement

Aguirre also maintained that the mere fact that Morgan Stanley's counsel was allowed to bypass the normal chain of command and contact Linda Thomsen directly was sufficient evidence to suggest that the decision to take Mack's testimony was not handled like other investigations. Aguirre Complaint to Office of Special Counsel at Attachment A to Part 2, p. 1, attached at Appendix 6. He stated that White "bypassed the normal protocol of dealing directly with the staff attorney" and, "instead, she dealt directly with Ms. Thomsen by correspondence and phone." Id. According to Aguirre, "of hundreds of contacts with defense counsel, this [was] the first time any defense counsel began discussions at the top of the chain of command."

However, other Enforcement officials have noted that this practice is not actually that uncommon. Robert Anderson, a former Enforcement Senior Counsel who worked at the SEC for 37 years, and in Enforcement for approximately 25 years, stated that, in his experience, it was "fairly common" for lawyers to contact the Director of Enforcement or others above the head of the line attorney. Transcript of Testimony of Robert Anderson before SEC IG on April 17, 2008 (hereinafter, "Tr. Anderson 4/17/2008 testimony") at p. 36. Former Enforcement Division Branch Chief David Fielder also stated that it is "fairly routine" for prominent counsel to call the Director or Deputy Director, noting that, in his opinion, "there was nothing unique" about White's call to Thomsen. Tr. Fielder 4/14/2008 testimony at p. 71. Hilton Foster stated that "he is sure there were many calls made above him that he did not know about," although he noted that usually the opposing counsel would let the investigator know first that they are going to go over his head. Notes of OIG Investigator Interview with Hilton Foster of August 1, 2006 (hereinafter, "Foster 8/1/2006 Interview Notes") at p. 4. Kreitman also acknowledged that these calls occur, noting that "it is "not uncommon" when he is investigating a case for a prominent alum is on the other side to go above his head. Tr. Kreitman Senate 9/6/2006 testimony at p. 146.

In fact, White, in speaking about the practice of contacting someone above a line attorney, stated that the SEC has "really made it known to the securities bar," including stating as much publicly at panels, that "if you've got an issue and you do not think you are getting a fair hearing on something . . . [from] some assistant . . . pick up the phone, you know, we have an open-door policy." Tr. White 9/25/2006 Senate testimony at pgs. 83-84. White said that "what the Director of Enforcement and some of the other supervisor enforcement people say is, look, if its happening, we want to know about it." Id. at p. 85.

While several witnesses noted the frequency of the practice describe above, they also expressed concerns about allowing outside counsel to contact those above the line attorney on behalf of their clients. Anderson opined that the result of allowing this practice is to "undercut" the staff attorney. Tr. Anderson 4/17/2008 testimony at p. 37. He also noted that an outside counsel who was more prominent would have easier access

to someone above the staff attorney level than a less prominent attorney. Id. at pgs. 38-39. Fielder said that when White makes a call directly to Linda Thomsen, she has some access that a regular lawyer representing somebody would not necessarily have. Tr. Fielder 4/14/2008 testimony at p. 73. Foster called this practice a "cheap trick" that irks investigators. Foster 8/1/2006 Interview Notes at p. 4.

Mark Kreitman also expressed some concern about the practice, saying:

> My view of the appropriate role of government is that we treat everybody exactly the same, . . . And so that, -- while every defense lawyer certainly has real common access to staff attorney, branch chief, assistant director, associate director . . . I can't really say this from personal knowledge, my sense is that . . . the lawyer in Minneapolis may not have the director's ear, whereas a prominent Washington lawyer may. And to the extent that that's the case, I'm uncomfortable about it. Tr. Kreitman 7/17/2008 testimony at pgs. 81-82.

Even White, who said from her perspective in the defense bar that this practice was a "good thing," noted that this was not the practice of the U.S. Attorney's Office that she headed, and acknowledged that when she got calls from defense attorneys, "very often you'd say absolutely nothing" and you would not even want to "confirm you're investigating someone." Tr. White 9/25/2006 Senate testimony at pgs. 84-85; 88-89.

E. Conclusion Regarding Contacts Between Morgan Stanley Representatives and SEC Enforcement Officials

The foregoing evidence demonstrates that relevant information was imparted to representatives of Morgan Stanley by both Berger and Thomsen regarding the nature of the evidence that the Enforcement Division had against Mack in connection with the Pequot investigation.

The investigation found that although Berger admonished Kreitman and Hanson that providing any information about the evidence against Mack would be contrary to Commission policy, and that they were prohibited from telling particularly someone who was not even a party to the investigation any confidential information about the investigation, and could not express an opinion one way or the other about Mack, Berger failed to follow his own advice. The record demonstrates that Berger himself gave Eric Dinallo, the Managing Director for Regulatory Affairs at Morgan Stanley, the impression that Enforcement did not presently have evidence of any wrongdoing by Mack in its ongoing investigation. This disclosure, on Berger's part, gave Dinallo "comfort" that the Commission did not have any significant evidence against Mack at that moment.

Further, although Linda Thomsen stated that Morgan Stanley would fully expect the answer to its inquiries about the evidence against Mack to be, "I can't tell you anything," Thomsen, in fact, imparted relevant information about the nature of the

Commission's evidence against Mack to Morgan Stanley's counsel, Mary Jo White, by indicating that with respect to pertinent e-mails there was "smoke" but "surely not fire."

The evidence also shows that the information provided by both Berger and Thomsen to Morgan Stanley was used in its determination to go forward with hiring Mack as Chairman and CEO of Morgan Stanley.

The investigation also found evidence that although Berger and Thomsen made representations to Morgan Stanley representatives about the nature of the evidence against Mack, they did not confer with the attorney, Gary Aguirre, who had been handling the investigative matter, and who had much greater knowledge than they did about the evidence against Mack.

The Commission's Conduct Regulation prohibits divulging confidential and nonpublic information in circumstances where the Commission has determined to accord such information confidential treatment. 17 CFR § 200.735-3(b)(7)(i). Information obtained by the Commission in the course of any investigation, unless made a matter of public record, is specifically deemed to be considered "non-public." 17 CFR § 203.2.

Commission policy further provides the prohibitions against use of nonpublic information without specific authorization or approval by the SEC does not apply to the use of such materials as necessary or appropriate by members of the staff in pursuing SEC investigations, or in the discharge of other official responsibilities. SECR 19-1, Disclosure of Non-Public Information in Connection with Investigations, Examinations, or Grants of Access, Aug. 21, 1999.

Although Thomsen maintained that her disclosures were appropriate, given the potentially disruptive effects on the markets of information concerning the potential CEO of a large institution like Morgan Stanley, in this case, the information she and Berger imparted (i.e., the lack of evidence against Mack) only served the interests of John Mack personally and Morgan Stanley. This was not a situation where Morgan Stanley and the larger financial markets would have been adversely affected by Enforcement not advising Morgan Stanley that they were poised to bring an Enforcement action against the person chosen to be their new CEO. In fact, the only danger in Enforcement not sharing with Morgan Stanley that Enforcement did not have substantial evidence against Mack while Morgan Stanley was considering Mack for the CEO position was that Mack may not have not obtained the position, and Morgan Stanley would have to find another candidate.

Thus, although Commission regulations do not define specifically in what circumstances this type of non-public information may be disclosed, and Thomsen may have legitimately believed that the information she provided was necessary in the discharge of her responsibilities, there are serious questions about the appropriateness of the information provided to Morgan Stanley. First, there is clearly a disconnect in the Enforcement Division about the procedures regarding the release of nonpublic information, as the decision to provide information about Mack to Morgan Stanley

contradicted Berger's admonition to Kreitman and Hanson not to say anything, and Enforcement lawyers indicated that Thomsen's comment would be considered against the policy of the Commission, at least the way the staff perceives it. Second, the fact that both Berger and Thomsen provided information without conferring with the attorney who had primary responsibility for the investigation could lead to a situation where the information provided was inaccurate. Enforcement might then be more reluctant to bring an action against an individual like Mack after having provided assurances about the lack of evidence. It also created an appearance that Enforcement was providing Mack preferential treatment. Third, as Dinallo himself acknowledged, learning the extent of the information that the Commission had against a potential target (i.e., that there was no "smoking gun" evidence in the hands of Enforcement), could prove very useful in preparing a defense. Fourth and perhaps of most concern, since the information was provided specifically because Mack was being considered for a high-level position in a large investment bank, such information would not be available to another potential target of lesser means or reputation.

In addition, there are some questions about the appropriateness of the current common practice in Enforcement that allow (and even encourage) outside counsel the opportunity to contact those above the line attorney level on behalf of their clients when they have issues or disagreements with the line attorneys. Although the evidence does not show, as Aguirre maintained, that this practice was unique to the Pequot matter, the fact that it is "fairly routine" may present an issue of greater concern. Even Kreitman acknowledged that this practice would allow certain lawyers (of prominence or note) to have greater access to the decisionmakers in Enforcement than other less prominent lawyers would have, and could create real inequities. This practice could also result in greater access by former Commission lawyers who had established relationships with high-level Enforcement officials prior to going into private practice. Greater access could lead to better results, or at least the appearance thereof.

Finally, although the evidence does suggest that after both Berger and Thomsen were contacted by Morgan Stanley officials about the investigation of Mack, Aguirre's supervisors were even more resistant to Aguirre's efforts to take Mack's testimony, creating an appearance of preferential treatment, for the reasons described in section II of this report, (e.g., the countervailing reasons that Aguirre's supervisors decided to wait to take Mack's testimony), the evidence is insufficient to establish a direct connection between the communications between Berger and Thomsen and Morgan Stanley officials and the decision not to take Mack's testimony in the summer of 2005.

IV. Conduct of the Pequot Investigation After Aguirre Was Terminated

A. Eichner and Jama Taking Over the Pequot Investigation

After Aguirre was terminated, the Pequot investigation was headed by James Eichner, who joined the SEC in April 2005, after working for the Department of Justice, first in the Environmental Division for nearly three years, and then in the Civil Rights

Division for approximately five years. Tr. Eichner 9/1/2006 testimony at p. 7. While Eichner was new to the SEC, he was generally well regarded both inside and outside the Commission. J. David Fielder, a former Branch Chief who worked extensively with Eichner, stated that Eichner "was arguably the best attorney in the group," calling him "stellar" and "above the level." Tr. Fielder 4/14/2008 testimony at pgs. 85-86. David Makol, an FBI agent who worked on the Pequot investigation, and a former SEC compliance examiner, stated that he "is a big fan of Eichner, who he found to be a bright and talented individual." Notes of OIG Investigator Interview with David Makol of June 22, 2007 (hereinafter, "Makol 6/22/2007 Interview Notes") at p. 4. Makol mentioned that another prosecutor with whom Eichner worked had recommended him to Makol. Id. Even Aguirre referred to Eichner as a "smart lawyer," although he felt that Eichner did not bring the kind of experience and background to the case that was needed and criticized him for his work hours. Tr. Aguirre 4/29/08 testimony at pgs. 121-122.

Liban Jama, who joined the SEC at the end of May 2005, after working as an associate at the law firm of Arnold & Porter in the corporate and securities practice for nearly five years, and worked with Aguirre on the case for several weeks before Aguirre was terminated, continued to work with Eichner on the Pequot case. Notes of OIG Investigator Interview with Liban Jama of October 12, 2006 (hereinafter, "Jama 10/12/2006 Interview Notes") at p. 6.

B. Initial "Triage" Efforts

Eichner said he spent the first four to six weeks after Aguirre left cleaning up and doing "triage" on the case. Eichner 9/27/2006 Interview Notes at p. 6. In Eichner's opinion, at the time Aguirre left, the Pequot case was a "total mess and disaster." Id. Eichner said this was partly because of the nature of the case, but mostly because of Aguirre. Id. at p. 5. Jama also noted that it was a huge transition after Aguirre left because "Gary was the case." Jama 10/12/2006 Interview Notes at p. 8. Jama stated that Eichner and he took the macro approach and decided how to triage the case and determine what had likely been looked at. Id. According to a chronology of events prepared by Eichner and Jama, immediately after Aguirre's departure, the staff "spent significant time trying to organize and take inventory of what had already been done on the insider trading portion of the case." Document entitled Pequot Investigative Chronology Since Mid-September 2005 (hereinafter, "Pequot Investigative Chronology") at p. 1, attached hereto as Appendix 170. The chronology further provided that the staff's organizational efforts were "complicated by the large number of subpoenas that had been issued in the case and the lack of basic file and document management." Id.

C. Investigative Efforts Concerning the GE/Heller Trades and Mack

Eichner stated that he led the examination of all the testimonies taken in the Pequot case after Aguirre was terminated. Tr. Eichner 9/1/2006 testimony at p. 23. Eichner stated that he took the testimony of a number of individuals, several of whom

were alleged to have provided Pequot with information about reports before they were publicly released. Id.

Eichner stated that he received a couple of hundred pages in response to a subpoena sent out on July 24, 2006, to Mack for his personal documents, including his calendar, phone records and documents relating to Samberg or Pequot. Id. at p. 36. Eichner acknowledged that the subpoena was for Mack's personal phone records, rather than for records from a service provider. Id at p. 37. Eichner said the timeline for the phone records request was a pretty narrow band from June to September 2001, and they never found a record of a June 29, 2001 phone call from Mack to Samberg. Id. at p. 38.[47]

Eichner also stated that on September 1, 2005, they issued a subpoena to Credit Suisse First Boston (CSFB) designed to find information about whether Mack knew about the GE/Heller transaction. Id. at p. 41. According to Eichner, they found when the subpoena came back that there was nothing in the production that showed Mack had the information. Id. According to the written chronology, in the fall of 2005, there was a shift on the insider trading portion of the Pequot investigation from GE/Heller to the Microsoft trades. Pequot Investigative Chronology at p. 2. The chronology stated as follows:

> While we found connections between many people with information and the merger between GE and Heller and people at Pequot, we could not find any specific information suggesting that any one of these individuals was the tipper. In particular, we were unable to find evidence establishing that John Mack knew about the GE/Heller transaction before Pequot began trading in Heller and were unable to develop sufficient evidence that would be useful to confront John Mack with in testimony regarding the transaction. Id.

Eichner acknowledged that after the CSFB subpoena was complied with, they took no other steps to determine whether or not Mack knew about the merger prior to the trading. Transcript of Testimony of Jim Eichner by Senate Committee on November 14, 2006 (hereinafter, "Tr. Eichner 11/14/2006 testimony") at p. 41. Eichner further admitted this subpoena only focused on information Mack could have gotten from two individuals from CSFB. Id. at p. 42. When asked about a trip that Mack took to Switzerland in the two days prior to June 29, 2001 (the time period in which Samberg may have obtained inside information), Eichner stated that, in his view, it seemed unlikely that Mack could have learned about the GE/Heller deal on his trip. Id. at p. 44. On the other hand, Eichner said he and others in the Commission felt the Microsoft aspect of the case was promising. Id. at p. 48. Jama concurred that the determination was made that the Microsoft portion was more promising than the GE/Heller one, which was why the focus

[47] In his justification to take Mack's testimony, Aguirre cited the fact that Mack met with CSFB's Chief Financial Officer on June 28, or June 29, 2001, and that Samberg's trading pattern suggested he obtained inside information just before July 2, 2001. E-mail from Aguirre to Hanson dated August 4, 2005 attached hereto as Appendix 123.

of the investigation shifted. Transcript of Testimony of Liban Jama by Senate Committee on October 11, 2006 (hereinafter, "Tr. Jama 10/11/2006 Senate testimony") at pgs. 100-101.

There is also evidence that Hanson and Eichner met with Assistant U.S. Attorney (AUSA) Benjamin Lawsky in the fall of 2005, and Lawsky said that Hanson and Eichner were "anxious to move the case along." Notes of OIG Interview with Benjamin Lawsky on April 27, 2007 (hereinafter, "Lawsky 4/27/2007 Interview Notes") at p. 2. Lawsky mentioned that they discussed both the GE/Heller and Microsoft aspects of the Pequot case in "a strategy session about pushing the case forward." Id.

D. Other Steps Taken to Pursue Aspects of the Pequot Investigation

According to the chronology prepared by Eichner and Jama, during the period from the middle of September 2005 through June 16, 2006, they reviewed thousands of documents produced by Pequot and others, and analyzed hundreds of trades entered into by the firm. Pequot Investigative Chronology at p. 1. The chronology further provides that during this period, they have "also interviewed or taken testimony of a number of witnesses." Id. Specifically, some of the activities undertaken during this period as described in the chronology, included:

- October/November 2005 – Issuance of subpoena seeking the identities of all employees Pequot hired around the time of the transaction in Heller and GE stock. Evaluation of response to subpoena and further analysis.

- December 14, 2005 – Participation in a joint proffer with the U.S. Attorney's Office for the Southern District of New York for a former Microsoft and Pequot employee (David Zilkha) who appeared to be the source of the non-public information that Pequot received in April 2001.

- January 23, 2006 – Took testimony of Arthur Samberg who received information from the former Microsoft and Pequot employee (David Zilkha) at the same time that he was trading in Microsoft.

- February 10, 2006 – Conducted an additional proffer with the former Microsoft and Pequot employee (David Zilkha.)

- February 2006 – Phone interview with a Microsoft employee that may have provided the former Microsoft and Pequot employee (David Zilkha) the inside information after he left the company.

- March 16, 2006 – Phone interviews with three additional Microsoft employees that might have provided the same former Microsoft and Pequot employee (David Zilkha) with the inside information.

- March 2006 – Obtained four month tolling agreements from Pequot, Samberg and the former Microsoft and Pequot employee (David Zilkha), expiring August 1, 2006.

- March 2006 – Examined Pequot's trading activity of approximately 100 Private Investment in Public Equity (PIPE) transactions for four years beginning in 2001.

- April 3, 2006 – Met with attorneys for Samberg and Pequot and were presented with additional information regarding the Microsoft and GE/Heller transactions.

- May 2006 – Review of all of Pequot's trading history in issuers who announced PIPES during the years 2004, 2003 and 2002.

- June 1, 2006 – Took testimony of two Goldman Sachs employees. Id. at pgs. 2-7.

E. Decision to Take Mack's Testimony in the Summer of 2006

There is evidence that, as of June 15, 2006, Enforcement had not planned to take the testimony of John Mack. A memorandum drafted by Walter Ricciardi, former Deputy Director, Enforcement, on June 15, 2006 (in response to Congressional inquiries about the Pequot investigation and the termination of Aguirre) stated as follows:

> 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 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. Samberg. 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." Memorandum from Walter G. Ricciardi, Deputy Director, Division of

Enforcement to Files dated June 15, 2006 attached hereto as Appendix 171.

Kreitman stated that it was true that there was no further evidence pointing to Mack as a possible source of information for Samberg as of June 15, 2006, and, accordingly, there was no intention to take Mack's testimony at that point. Tr. Kreitman Senate 11/15/06 testimony at pgs. 63-64.

Subsequent to Ricciardi's June 15, 2006 memorandum, Enforcement changed its position and decided to take Mack's testimony.[48] Jama stated that in late June 2006, Hanson, Kreitman, Eichner and he met with Enforcement Deputy Directors Walter Ricciardi and Peter Bresnan to discuss whether Mack's testimony should be taken. Jama 10/12/2006 Interview Notes at p. 6. At that meeting, according to Jama, he provided the status of the PIPES and market manipulation parts of the case, and Eichner gave an update about the insider trading part of the case. Id. According to Jama, Kreitman and Hanson said there was no basis on which to take Mack's testimony, and Ricciardi and Bresnan took the position, "why not take it?" Id. Jama described the meeting as lasting about five minutes and said, at the end of it, no decision was made; they agreed they would talk about the issue later. Id. Jama stated that Ricciardi was in favor of taking Mack's testimony because of public opinion and mentioned that Mack would want to have the testimony taken given the press coverage. Tr. Jama 4/24/2008 testimony at p. 27. According to Jama, Kreitman and Hanson said there was not enough evidence to take Mack's testimony and they did not think his testimony should be taken until there was sufficient evidence. Id.

Eichner recalled that his view was that taking Mack's testimony was not going to help them in the case and so, on the merits, there was no reason to do it. Tr. Eichner 11/14/2006 testimony at p. 117.

Deputy Director Ricciardi stated that that he was initially the one who felt Enforcement should take Mack's testimony. Notes of OIG Investigator Interview with Walter Ricciardi of June 20, 2007 (hereinafter, "Ricciardi 6/20/2007 Interview Notes") at p. 3. Ricciardi explained that he had looked at some of Aguirre's e-mails and, based on his reading of those e-mails, he thought it would be hard to defend not taking Mack's testimony. Id. Ricciardi said the team disagreed with his view that Mack's testimony should be taken because they felt doing so would suggest Aguirre had been right all along. Id. According to Ricciardi, Kreitman's view was that Enforcement should not do things just to make itself look better and should not let anyone (i.e., Congress and the press) improperly influence its decisions. Id. Ricciardi also said Kreitman did not think it was right to bother Mack. Id. Notwithstanding the team's concerns, Ricciardi stated that he felt it made sense to take Mack's testimony for the good of the Enforcement

[48] It is worth noting that around the time the decision was made whether to take Mack's testimony, on June 23, 2006, the New York Times published a front page article on the Pequot investigation and Aguirre's termination. S.E.C. is Reported to be Examining a Big Hedge Fund, *New York Times*, June 23, 2006 section A1, attached hereto as Appendix 172.

program. Id. Ricciardi stated that in light of all the facts and circumstances (including Congressional interest and press leaks), he felt they should not close the case without taking Mack's testimony. Id. Ricciardi said he also felt Enforcement would be doing Mack a favor by taking his testimony, given the cloud that was hanging over his head. Id.

Ricciardi said he received some pushback from the team, who argued that Enforcement would normally not take someone's testimony under these circumstances. Id. Ricciardi said he thought the Congressional and press interest in the matter was a perfectly legitimate consideration in deciding whether to take Mack's testimony, as he felt it was important to maintain public confidence in the integrity of the SEC Enforcement program. Id. at p. 4. At the same time, Ricciardi stated that he felt that there was a minimal chance that taking Mack's testimony would result in Enforcement bringing a case. Id. at p. 3. According to Ricciardi, there was no evidence Mack had the secret information, and he did not find Aguirre's arguments as to why Mack was the tipper very persuasive. Id. at p. 3-4.

According to Deputy Director Bresnan, Ricciardi and he jointly decided, in consultation with the staff, to take Mack's testimony. Notes of OIG Investigator interview with Peter Bresnan of August 22, 2007 (hereinafter, "Bresnan 8/22/2007 Interview Notes") at p. 6 Bresnan stated that the staff was willing to go either way on the issue, although he noted that Kreitman did not think taking Mack's testimony was necessary and reiterated his view that there was insufficient evidence of insider trading to justify taking Mack's testimony. Id. Bresnan pointed out that he did not disagree with Kreitman's view that taking Mack's testimony was unnecessary. Id. Bresnan said that Kreitman's view made sense, as there was no compelling evidence that Mack had tipped Samberg, and he did not necessarily agree with the view that the staff should always take the testimony of a potential tipper. Id. Nonetheless, Bresnan stated that he felt it was prudent and a good idea to take the testimony. Id.

F. Preparation for Taking Mack's Testimony

Jama stated that Eichner came by his office after the decision was made to take Mack's testimony and told him that Kreitman and Hanson needed to see him. Jama 10/12/2006 Interview Notes at p. 1. According to Jama, Kreitman asked him to take the testimony of several senior-level CSFB individuals and John Mack, relating to the insider trading portion of the case. Tr. Jama 4/24/2008 testimony at pgs. 22-23. Jama said that he was a bit surprised since he had not been involved in that portion of the case since September 2005. Jama 10/12/2006 Interview Notes at p. 7. Jama noted that after Aguirre was terminated, he was not working on the insider trading part of the case in a primary role. Tr. Jama 10/11/2006 Senate testimony at p. 26. Jama said he was told on a Monday that he was going to take the testimony on Thursday. Tr. Jama 4/24/2008 testimony on p. 24. Jama stated that he told Kreitman he would need more time since he did not have the relevant files and did not have enough "prep time" to take the testimony. Jama 10/12/2006 Interview Notes at p. 9; Tr. Jama 10/11/2006 Senate testimony at pgs. 78-79.

Jama stated that Kreitman responded, "it's no big deal, you don't need much time to prep." Tr. Jama 4/24/2008 testimony at p. 25. Jama also said he understood that there was some particular reason that the testimony had to be taken on Thursday because, ordinarily, it was not unusual to reschedule testimony. Id. Jama said he viewed Kreitman's response "as strange." Tr. Jama 10/11/2006 Senate testimony at p. 93.

Jama said he told Kreitman he would have to think about taking the testimony, and Kreitman said to let him know by that afternoon. Jama 10/12/2006 Interview Notes at p. 9. Jama said he told Kreitman he was happy to do it, but that he needed more time. Id. According to Jama, Kreitman responded that the testimony had to be on Thursday when it was scheduled. Id. Jama said he later went to Kreitman's and Hanson's offices, but they were not there. Id. He then sent them an e-mail saying he was sorry, but he did not feel comfortable doing the testimony given the time constraints. Id. This e-mail sent by Jama to Kreitman on July 24, 2006, with copies to Hanson and Eichner, read as follows:

> 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 [sic] 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 had 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 [sic] complete and thorough job any matter. Please let me know how you would like me to proceed. Thanks. E-mail from Jama to Kreitman dated July 24, 2006 attached hereto as Appendix 173.

Jama said it crossed his mind that his supervisors told him he did not need much time to prepare because the testimony was not necessary anyway. Tr. Jama 4/24/2008 testimony at p. 27. Jama said he felt extremely uncomfortable about taking the testimony, and would not have an attorney who was not the lead counsel take the testimony. Id. at p. 28. He said it would be highly unusual given his role in the case for him to take the testimony of the CSFB senior officials. Id. at p. 29. Jama said that Eichner ended up taking the testimony, and that Eichner had had a conflict which he rescheduled. Jama 10/12/2006 Interview Notes at p. 10

Eichner stated that he had been in New York while the decisions were being made about who would be taking the testimony and, when he returned, the testimony of two CSFB senior officials, in addition to that of Mack, had been scheduled, and Eichner had intended to take all of the testimony, but the testimony of the CSFB officials conflicted with his previously-scheduled testimony. Tr. Eichner 11/14/2006 testimony at pgs. 94-95. Eichner stated that Kreitman suggested Jama take the testimony of the two CSFB officials. Id. Eichner said Jama then sent an e-mail saying he was not comfortable with taking the testimony, and Kreitman said "there was sort of nothing to this testimony," and suggested the preparation was not very involved as there were only a few documents. Id. at p. 94; 97. Eichner said, in the end, he took the testimony of the CSFB officials, in addition to the Mack testimony. Id. at p. 98. He noted that he had a week to ten days to prepare for Mack's testimony, which he thought was sufficient preparation time. Id. Hanson recollected that it was the testimony of the two CSFB officials, and not Mack's testimony, that Jama was asked to take. Transcript of Testimony of Bob Hanson by Senate Committee on November 9, 2006 (hereinafter, "Tr. Hanson 11/9/2006 Senate testimony") at pgs. 48-49.

When Jama was asked specifically if he understood whose testimony he was being asked to take, he replied that he was told that there was a variety of senior-level officials whose testimony had to be taken, including Mack, and he was asked, "Could you take those testimonies?" Tr. Jama 4/24/2008 testimony at p. 24. Two other witnesses confirmed that, at the time, Jama expressed concern to them about being asked to take Mack's testimony without being sufficiently aware of the facts or having appropriate time to prepare. Tr. Witness 3 4/2008 testimony at p. 46; Tr. Witness 6 4/2008 testimony at p. 90.

G. Taking Mack's Testimony and the Expiration of the Statute of Limitations

Eichner eventually took Mack's testimony on August 1, 2006, with former Deputy Director Peter Bresnan and Hanson in attendance. Eichner 9/27/2006 Interview Notes at p. 8. According to Eichner, Mack's testimony started at 9 a.m. and went until 1:30 or 2:30 p.m. (with no lunch break). Id. Eichner said the testimony took some time because they wanted to explore Mack's motives and connection to Pequot to refute some things Aguirre had said publicly. Id. According to Eichner, during the testimony, Mack denied having any involvement in insider trading regarding GE and Heller. Id. Eichner stated that Mack also denied having any knowledge of the deal until after he started at CSFB and there was no evidence to the contrary. Id.

Eichner acknowledged, however, that although CSFB provided the SEC with the names of people who had access to its list of pending deals, he never asked Mack about each of the contacts on that list to determine if Mack could have obtained information from them in his testimony. Tr. Eichner 11/14/2006 testimony at pgs. 144-145. Eichner stated he did not believe these individuals of the list had the relevant information. Id. at p. 145. Eichner stated the only actions he took to determine if Mack had contacts with

any of those people on the list CSFB provided was to review of Mack's phone records. Id. at pgs. 145-146.

Because the GE/Heller announcement occurred on July 30, 2001, it was understood that the statute of limitations for criminal and civil penalties expired on July 30, 2006. Tr. Eichner 9/1/2006 testimony at pgs. 136-138.[49] Because of the impending expiration of the statute of limitations, on April 1, 2006, the SEC obtained tolling agreements for four months with Pequot, the entity, Arthur Samberg as an individual, and David Zilkha[50] as an individual. Id at p. 138. According to Eichner, no tolling agreement was obtained with Mack; nor was any effort made to try to get one. Id. at p. 139; Tr. Eichner 11/14/2006 testimony at p. 45. The reason given by Eichner for not attempting to obtain a tolling agreement with Mack was that they had no leverage against Mack, since they did not have any evidence that he was the tipper. Id at p. 46. Deputy Director Ricciardi stated that he believed the statute of limitations came up in discussions about whether it was appropriate to ask Mack for a tolling agreement, but said there was no basis for doing so. Ricciardi 6/20/2007 Interview Notes at p. 5. Ricciardi explained that usually when the staff asks for a tolling agreement, they have evidence of wrongdoing and will tell defense counsel that they will immediately go to the Commission in the absence of a tolling agreement. Id. Ricciardi stated that he did not think asking for a tolling agreement was the right thing to do in Mack's case, as he thought it was highly unlikely they would have sufficient evidence to bring a case once they took Mack's testimony. Id.

Mack's testimony was eventually taken, but not until August 1, 2006, mere days after the statute of limitations had expired. Aguirre Responses to Questions from Senator Grassley at p. 22.

H. The Closure of the Pequot Investigation and the Case Closing Report

1. The Decision to Close the Investigation

On November 30, 2006, Deputy Director Peter Bresnan signed a case closing report formally closing the Pequot investigation. Case closing report dated 11/30/2006 (hereinafter, "case closing report") attached hereto as Appendix 97. Bresnan stated that fellow Deputy Director Walter Ricciardi and he jointly decided to close the Pequot investigation. Bresnan 8/22/2007 Interview Notes at p. 7. Bresnan said the staff had been ready to close the investigation several months before, but Ricciardi and he suggested additional testimony be taken and evaluated. Id. According to Bresnan, after

[49] According to Aguirre, the statute of limitations expired on July 27, 2001, the day Pequot's last trades in GE and Heller were executed. Responses by Gary Aguirre for the Hearing Record to Questions from Senator Grassley (hereinafter, Aguirre Responses to Questions from Senator Grassley) at p. 22.

[50] Zilkha was a Microsoft employee who went to work as an analyst at Pequot. Even before Zilkha officially began work at Pequot, he had been providing Samberg with information about Microsoft by e-mail. During that same time period, Samberg started buying Microsoft options and, in e-mails, gave Zilkha credit for profits Pequot made in trading Microsoft.

the additional testimony was taken, it was clear nothing had surfaced and it was only fair to the parties to close the investigation. Id. Bresnan said that, to his knowledge, no one disagreed with the decision to close the investigation. Id.

Deputy Director Ricciardi said he agreed with the decision to close the case and, according to Ricciardi, no one in Enforcement objected to that decision. Ricciardi 6/20/20007 Interview Notes at p. 6. Ricciardi stated that Enforcement had alerted the defense that it had decided to close the Pequot investigation. Id. He noted that, in the past, Enforcement has normally waited to make this notification until the FOIA letters were done and the files were closed, and the closing letter was usually not sent until months after the decision to close the case. Id. Ricciardi explained that because of the public nature of the Pequot matter, however, he felt it was appropriate to alert the interested parties that the staff was recommending the investigation be closed. Id.

Branch Chief Eric Ribelin, on the other hand, stated that when he read the case closing report, he "was really stunned that they were closing the case." Tr. Ribelin 11/9/2007 testimony at p. 219. Ribelin, who noted that he was not involved in any way in drafting the closing report, said he did not believe the closing report was a persuasive document. Id. at pgs. 197; 220. Specifically, he disagreed with a reference in the section on "market manipulation," in which the closing report stated that the staff found there was no significant impact on both the market price and volume for any of the stocks from the cross-trading activity, making it difficult to prove market manipulation by Pequot, stating that he believed that there was significant impact on the volume. Id. at pgs. 198-199.

2. The Case Closing Report

The case closing report provided that after a formal order of investigation was issued in January 2005, the staff issued more than 100 subpoenas requesting documents and took the testimony of 19 individuals. Case closing report at p. 1. The report described the investigatory work conducted in three categories of transactions: (1) potential insider trading by Pequot in a number of securities, including GE, Heller, Microsoft, AstraZeneca PLS, and Par Pharmaceuticals; (2) potential insider trading ahead of PIPE offerings; and (3) potential market manipulation. Id.

a. Description of Investigative Work Related to the GE/Heller Transaction

With respect to the issue of potential insider trading ahead of the GE acquisition of Heller, the case closing report stated as follows:

> During the summer of 2005, the investigation focused on whether John Mack, who had a personal relationship with Samberg, as well as a number of business relationships with Pequot, provided Samberg with inside information ahead of the public announcement. Emails indicate that Mack

and Samberg often communicated during this time and 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. Credit Suisse First Boston (CSFB), an investment banking firm and an advisor to Heller in the transaction hired Mack as the 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. In addition, until March 2001, Mack had been the CEO of Morgan Stanley, Inc., which advised GE on the transaction, but records the staff obtained show that Morgan Stanley's first contact with GE regarding a potential transaction with Heller occurred in April 2001, after Mack had already left the firm.

By November 2005, having taken the testimony of Samberg twice, interviewed Samberg's former partner, and obtained email, chronologies, documents, and information regarding Mack from several sources, including CSFB, Morgan Stanley, and Pequot, the staff had found no evidence that Mack had any information about the merger before he joined CSFB on July 12.

Starting in September 2005, the staff focused on identifying other potential tippers who could have provided Samberg information about the GE/Heller transaction. The staff reviewed Samberg's calendar to identify who he met with at the time of Pequot's trading. The staff also obtained from Pequot a list of people hired in 2001 and identified several people on that list who had connections with GE, Heller, or broker dealers involved in the merger. The staff also reviewed the emails obtained searching for relevant documents in the database of emails provided by Pequot.

When this research was complete, the staff evaluated whether to take the testimony for any of these potential tippers. The staff determined that while it had identified people with significant connections to Pequot or Samberg or both, there was no evidence that anyone knew about the merger in advance of its public announcement. Conversely, those who knew about the deal did not have sufficient connection to Pequot and/or contact with Samberg or Pequot during the relevant time period. Thus, the staff had identified a large number of potential tippers, but no likely tippers. Without any evidence suggesting that any of these people were the tipper, the staff decided taking any of their testimony would not be fruitful. At this same time, around December 2005, the focus of the insider trading case shifted to Microsoft, where it remained until June 2006.

Beginning in June 2006, the staff considered whether to take any additional investigatory steps regarding the GE/Heller trading. Ultimately, the staff took the testimony of six witnesses, and received documents requested by subpoena from each. On July 27, 2006, the staff took the testimony of two CSFB employees, a former CFO and a company lawyer, who were both involved in recruiting Mack. Both denied knowing about the merger before it was publicly announced, let alone telling Mack anything about it, and the documentary evidence did not contradict their denials. On August 1, 2006, the staff took the testimony of Mack. Mack denied knowing about the merger before he became CSFB's CEO in mid-July 2001 and denied having any discussions with anyone at Morgan Stanley in 2001 about GE, Heller, or the GE merger with Heller. On August 17, 2006, the staff took the testimony of the head trader at Pequot who executed the trades in both Heller and GE at Samberg's direction. The head trader testified that he did not recall anything about the trades but that the size of the investment in Heller was not unusual. On September 7, 2006, the staff took the testimony of the head trader's assistant at Pequot at the time of the transactions. The assistant testified that his role at Pequot was largely administrative at that time, and he could not remember any involvement in the GE/Heller trading. On September 8, 2006, the staff took the testimony of an analyst at a brokerage firm who provided analyst 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. The analyst denied having any inside information about the merger transaction before it was announced and we have found no evidence to the contrary. Moreover, although he was scheduled to meet with Pequot in June 2001, it appears from the analyst's personal calendar and testimony that the meeting was cancelled.

Conclusion: The staff has been unable to find any evidence that Pequot had information regarding the merger between GE and Heller before the merger was publicly announced, much less that anyone tipped Pequot or Samberg about the merger in advance of its announcement. The staff's investigation found that it is extremely unlikely that Mack tipped Samberg about the purchasing Heller stock. Moreover, emails Samberg sent evidence that Samberg did not even know about Mack joining CSFB until after it was publicly announced. It is unlikely that Mack told Samberg about confidential information about the merger if he learned it in connection with being recruited by CSFB, without revealing his impending employment.

There is additional evidence that casts doubt on the possibility that Pequot traded on the basis of non-public information in regard to its trading in GE and Heller. Although Pequot made a substantial profit purchasing Heller

ahead of the announced merger, the size of its position in Heller was not atypical for Pequot and Pequot purchased other financial stocks around the same time as the Heller purchases, clearly following the financial sector, not just Heller. Moreover, according to its trading records, during 2001 Pequot shorted GE stock on several different occasions. Case closing report at pgs. 1-2.

b. Description of Investigative Work Related to Microsoft Employee Zilkha

The case closing report also described in detail the investigative efforts relating to potential insider trading involving Microsoft employee David Zilkha, who had been providing Samberg with information about Microsoft via e-mail at the same time Samberg began buying Microsoft options, which increased in price throughout that time. Case closing report at p. 2. The report stated that the staff provided the U.S. Attorney's Office for the Southern District of New York with information about Pequot's trading in Microsoft, and in the fall of 2005, the FBI located Zilkha and interviewed him twice. Id. The report also noted that on December 14, 2005, Enforcement staff participated in a proffer session with Zilkha, who stated that he obtained the information from Microsoft employees and provided it to Samberg but did not believe that the information was either material or confidential. Id. The report also described the taking of Samberg's testimony in January 2006, and indicated that Samberg testified that he could not remember why he placed the trades, downplayed Zilkha's role in his trading, and denied receiving any material non-public information concerning Microsoft. Id. In February 2006, Enforcement staff conducted a second joint proffer of Zilkha with the Southern District. Id. Zilkha proffered the names of the Microsoft employees he believed provided him with information in April 2001. Id. Enforcement staff reviewed the results of subpoenas issued to Zilkha and Microsoft. Id.

By March 2006, Enforcement staff had focused on two pieces of information Zilkha provided to Samberg by e-mail. Id. The first was an e-mail dated April 17, 2001, that stated that a Microsoft employee had told Zilkha, a few days before a Microsoft earnings announcement, both that the controller for a Microsoft division was more "relaxed" about earnings than in previous quarters, and that this information suggested the earnings news would be positive. Id. Two days later, on April 19, 2001, Samberg purchased Microsoft call options and sold short Microsoft put options. Id. Later that day and after the market close, Microsoft announced that its earnings had significantly exceeded analysts' expectations. Id. The following day, April 20, 2001, Pequot sold its call options and closed out its short position in the put options, realizing a profit of approximately $1.6 million. Id.

The second e-mail, dated April 27, 2001, stated that a Microsoft employee had told Zilkha that a rumor regarding a delay in the release of a Microsoft product was untrue. Id. The next trading day, April 30, 2001, Samberg purchased call options in

Microsoft. Id. Two days later, May 2, 2001, Microsoft stock rose and Pequot sold the purchased options, realizing a profit of approximately $530,000. Id.

Enforcement staff interviewed by telephone the person Zilkha identified as the source of the first tip; however, she denied even knowing Zilkha, and told the staff she would never have told anyone that type of information. Id. The FBI was unable to locate the alleged source of the second tip, who had left Microsoft and was believed to be living in Brazil. Id. Enforcement staff interviewed two other Microsoft employees identified by Zilkha as his sources for other information he provided to Samberg around the time Pequot traded in Microsoft. Id. Both individuals categorically denied providing Zilkha with any information. Id.

In April 2006, according to the case closing report, Enforcement staff learned more about the product delay that was the subject of the second tip by Zilkha. Id. First, Enforcement staff learned that other events, not related to the product delay rumor, caused a sharp increase in Microsoft's share price a few days after Zilkha provided the information to Samberg. Id. Moreover, Enforcement staff learned that information relevant to both the earnings announcement and the product delay had been provided to Pequot by Goldman Sachs ("Goldman") in advance of Goldman publishing the information and before Pequot's trades. Id. To examine whether Goldman's actions were themselves improper, Enforcement staff obtained information from Goldman and, in early June 2006, took the testimony of two Goldman employees. Id. Both employees told Enforcement staff that during the time in question, they regularly provided research information to Goldman customers in advance of Goldman publishing this information, and that Goldman policy explicitly allowed this practice. Id.

Accordingly, the case closing report concluded that while the e-mails from Samberg praising Zilkha for his work on Microsoft suggest Samberg may have used information from Zilkha to trade in Microsoft options, there was insufficient evidence to bring a case based on this conduct. Id. The case closing report stated that Enforcement staff could only identify two tips related to profitable trading by Pequot in Microsoft. Id. The first tip, the information about a controller being relaxed, was vague, and the alleged source denied providing the information to Zilkha. Id. Moreover, the information Pequot received from Goldman around the same time as Zilkha's tip about the same earnings announcement gave Samberg a justification for his trading. Id. The second tip, the information about the product delay, was not found to drive the rise in Microsoft's stock price. Id. Finally, the case closing report concluded there was nothing illegal about Goldman giving its clients, including Pequot, information it developed internally, before that information was publicly disseminated. Id.

c. Description of Investigative Work Related to Other Issues

The case closing report also described the investigation into trading in AstraZeneca and Par Pharmaceutical. Id. at p. 3. This aspect of the investigation related to Pequot's trading patterns that occurred shortly before an October 2002 Federal district

court decision caused the shares of AstraZeneca to increase in price by 12% and the shares of Par Pharmaceutical to decrease in price by 21%. Id. at p. 3. According to the report, Enforcement staff learned that the Southern District had conducted an investigation regarding whether a judicial law clerk had leaked the outcome of the patent case. Id. That investigation ended because the Southern District was unable to identify anyone who profited from the tip or determine whether there even was a tip. Id. The report stated that Enforcement staff reviewed the formal written statements prepared by the FBI from that investigation and reviewed Pequot e-mails, but was unable to find any links between Pequot and the people interviewed in that investigation. Id.

In November 2005, Enforcement staff examined Pequot's trading records and determined that Enforcement staff's initial inquiry presented an incomplete and misleading picture of Pequot's trading in the stocks of AstraZeneca and Par Pharmaceutical. Id. Although from August 23, 2002 through September 25, 2002, Pequot did reverse a significant portion (approximately $18 million) of a short position it had established in AstraZeneca, Pequot was adding to its position in Par Pharmaceutical during part of the same time period (September 6, 2002, through September 11. 2002), purchasing approximately 200,000 shares of Par Pharmaceutical common stock for approximately $4.8 million. Id. The report stated that Pequot did not begin to reverse its long position in Par Pharmaceutical until September 27, 2002, after it had stopped reversing its Astra short position. Id. Moreover, on October 11, 2002, the date the court decision was made public, Pequot still held a long position in Par Pharmaceutical (close to $2 million) and a significant short position in AstraZeneca (more than $6 million.) Id. The report concluded that both of these positions proved to be losing positions, and it would have made no economic sense to maintain either of them if Pequot had inside information regarding the upcoming decision in the patent case. Id. Finally, during 2002, from February on, Pequot traded in and out of Par Pharmaceutical and AstraZeneca. Id. Accordingly, the report concluded that "[i]t 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." Id.

The case closing report also discussed the aspect of the investigation relating to Private Investment in Public Equities (PIPES), finding that there was insufficient evidence of insider trading. Id. This aspect of the investigation concerned potential insider trading by Pequot in the common stock of companies issuing PIPES ahead of their public announcement. Id. The public announcement of a PIPE often causes the price of the issuer's stock price to fall, making it advantageous to sell short the stock of companies that issue PIPE securities before the transactions are publicly announced, which would violate insider trading laws. Id.

According to the case closing report, Enforcement staff initially evaluated and reviewed Pequot's response to a subpoena issued by the SEC's New York Regional Office (formerly the Northeast Regional Office) with respect to Pequot's PIPE transactions. Id. Enforcement staff then examined Pequot's trading activity in 101 PIPE transactions over a four-year period beginning in 2001. Id. Enforcement staff

specifically examined Pequot's trading data to determine whether Pequot sold short prior to the public announcement of any PIPE it purchased. Id. Of the 101 PIPES purchased by Pequot, Enforcement staff found that Pequot shorted ahead of the public announcements on 11, but the stock prices for eight of the 11 did not decline materially after the announcements of the PIPES. Id. In addition, for the three remaining issuers, according to the report, Pequot sold short ahead of the public announcement. Id. In all three cases, however, its short selling activity occurred more than seven weeks before the PIPE was publicly announced. Id. The report concluded, therefore, that it would be difficult to show that the short selling was based on material nonpublic information concerning the PIPE offering, the trading having occurred so far in advance of the public announcement of the offering. The report concluded that "[b]ecause the staff was unable to find instances where Pequot short sold shares within seven weeks ahead of a public announcement of a PIPE offering in which they participated in and in which there was a material decline in the share price of the issuer, the staff stopped pursuing this aspect of the investigation." Id.

Finally, the case closing report discussed the market manipulation aspects of the Pequot investigation. Id. The report stated that during the fall of 2005, Enforcement staff began to evaluate closely two separate but similar trading practices engaged in by Pequot. Id. The first involved Pequot's selling shares it received in numerous initial public offerings ("IPOs") and simultaneously purchasing the same number of shares soon after the shares began trading in the open market. Id. This trading suggested that Pequot may have engaged in a manipulative trading practice because it appeared as if the trades did not involve a change in beneficial ownership (wash sales.) Id. The second involved Pequot executing an agency cross trade, with one side being a short sale and the other side was a purchase of the same security. Id. The short sale and the buy were for the same number of shares and price and were executed simultaneously. Id. The trade was reported as an agency cross; however, the Pequot trade blotter showed that the same Pequot funds executed both the sales and the purchases, causing no change in beneficial ownership. Id.

The case closing report described the investigatory steps taken including requesting a written explanation from Pequot regarding its apparent wash sale trading, and a follow-up subpoena to Pequot for additional information on the trading practices issued after the staff received Pequot's explanation. Id. at p. 4. According to the report, Pequot provided an extensive written response explaining that its trading occurred to transfer beneficial ownership of the stocks acquired in IPOs from one class of fund investors to another class of investors, and was specifically sanctioned under an NASD interpretation. Id. The report stated that this explanation was consistent with Samberg's testimony. Id. Enforcement staff then reviewed Pequot's supporting documentation and certifications concerning Pequot's compliance with the NASD rule, and found that the documentation was consistent with Pequot's assertion it was transferring beneficial ownership of the securities from one class of investors to another. Id.

The report noted that Enforcement staff met several times with staff from the Division of Market Regulation (now the Division of Trading and Markets) concerning whether Pequot's agency cross trades violated the Federal securities laws. Id. This Division recommended that Enforcement staff first evaluate the market impact from Pequot's cross trading. Id. According to the report, Enforcement staff then analyzed the market impact from Pequot's cross trading in 92 securities and found that the cross trading activity had no significant impact on both the market price and volume for any of the stocks, making it difficult to prove market manipulation. Id.

I. Aguirre's Contentions Regarding the Conduct of the Pequot Investigation After He Was Terminated

According to Aguirre, the investigation that occurred after he was terminated was a "disaster." Tr. Aguirre 4/29/08 testimony at p. 113. He stated that the "investigation of Mack was abandoned." Id. Aguirre said the investigation that was conducted after he was terminated was a "case without a rudder. There's no steering mechanism in it. It just seems to be floating everywhere." Id. at p. 118. Aguirre stated that had Mack's testimony been taken in the summer of 2005, it "would have crystallized . . . where to go with the investigation." Id. at p. 115. He also said he did not understand how the Microsoft "case hit a wall." Id. at p. 117. He said it was a $12 million case involving the largest hedge fund in the world at that moment, and all they did was "some phone interviews." Id. at p. 118. He also said there were other matters in addition to GE/Heller and Microsoft and leads that were entirely written off. Id. at p. 119.

Aguirre further explained that while the SEC took the testimony of two CSFB employees, a former CFO and a company lawyer, who, according to the SEC, denied knowing about the merger before it was publicly announced and, thus, could not have told Mack about the merger, the SEC never interviewed the officials of CSFB's parent, Credit Suisse (CS), who met with Mack immediately prior to his call with Samberg. Aguirre Responses to Questions from Senator Grassley at p. 20. Aguirre further noted that since the Mack testimony did not take place until after the statute of limitations had run, the SEC did not know that they had interviewed the wrong officials (i.e., the CSFB employees, instead of the CS employees who actually met with Mack at the critical time) until the statute of limitations period had expired. Id. at pgs. 21-22.

With regard to the issue of taking Mack's testimony after the statute of limitations had expired, Aguirre stated he was not aware of any Enforcement cases where testimony was taken after the statute of limitations had run. Tr. Aguirre 4/29/08 testimony at pgs. 68-69. Aguirre also recollected that early on in the Pequot investigation, when he identified a large number of referrals to the SEC involving possible insider trading by Pequot that the SEC had not investigated, his first Assistant Director, Richard Grime, instructed him to only go back three, or three and one-half years, because of the statute of limitations. Id. at p. 69; Supplement B to Aguirre transcript attached hereto as Appendix 174.

Aguirre also stated that the SEC's closing memorandum in the Pequot investigation "grossly misstates the facts on GE-Heller, and to some extent on AstraZeneca" and "the explanation makes no sense with respect to the market manipulation case." Tr. Aguirre 4/29/08 testimony at p. 121. Finally, Aguirre stated that he still maintains that his original view that Mack was the tipper is accurate, and said he has learned nothing subsequently to his termination that would lead him to believe that this original view was incorrect. Id. at p. 136. According to Aguirre, had the investigation proceeded in the proper manner, "the case may have been charged, a criminal charge may have been filed [against Mack], [and] it may have made a significant impact." Id. at pgs. 136-137. Aguirre stated, "everything I have read so far confirms the fact that I was on the right track, and that they derailed an investigation that should have gone forward and would have . . . either sent out a message to Samberg, Mack and the industry that the SEC is scrutinizing this stuff . . . and maybe we missed here, but we took a very close look at it, [o]r it may have resulted in somebody going to prison." Id. at p. 137.

Aguirre stated that he believes that the SEC "conduct[ed] a sham investigation to give the appearance Mack was blameless and thus the senior SEC officials who derailed the investigation were also blameless." Letter dated May 13, 2008 from Gary Aguirre to H. David Kotz at p. 6 attached hereto as Appendix 90.

J. Responses by Aguirre's Supervisors to Aguirre's Contentions About the Focus of the Pequot Investigation After He Was Terminated and the Mack Testimony Being Taken After the Statute of Limitations

1. Direction of Investigation After Aguirre was Terminated

Hanson denied that the Mack angle was abandoned after Aguirre was terminated. Tr. Hanson 7/15/2008 testimony at p. 108. Hanson said he spent a lot of time on the case himself and they decided to focus on the Microsoft aspect of the case, in which the AUSA seemed most interested. Id. Hanson said he met with the AUSA and two FBI agents in November 2005, and spoke to them about the possibility that Mack was a potential tipper. Id. at p. 109.[51]

Hanson further stated that he found some e-mails that sort of made it look like Mack probably was not the tipper because Mack was keeping information from Samberg about his leaving Morgan Stanley and joining CSFB that was not publicly known. Id. at p. 110. Hanson also stated that they took the testimony of CSFB employees and learned from them that it was very unlikely they had given Mack the information he would have passed along to Samberg. Id. Hanson explained that it was determined that the CSFB

[51] Benjamin Lawsky, an AUSA in the Southern District of New York, between November 2001 and January 2007, confirmed Hanson's account that such a meeting took place and stated that Hanson and Eichner "were anxious to move the case along," noting that they discussed both the GE-Heller and Microsoft aspects of the case. Notes of OIG Interview with Benjamin Lawsky on April 27, 2007 (hereinafter, Lawsky 4/27/2007 Interview Notes) at p. 2.

employees did not meet with Mack around the times that CSFB probably would have had the information. Id. Moreover, according to Hanson, they stated under oath that they did not tell Mack the information and would not have done so. Id.

Hanson did acknowledge that they never interviewed the officials of CSFB's parent, Credit Suisse, who met with Mack prior to his call from Samberg. Id. However, Hanson noted that these officials were in Switzerland, and the individuals who would have given the information to these Switzerland officials "were pretty emphatic about not sharing [the information] because they said the Swiss were very emphatic about not getting that information." Id. at pgs. 110-111.

2. Decisions on Who Should Take Mack's and Other Testimony

Hanson said it was always understood that Eichner would take Mack's testimony and there was only a question of who else should attend with him. Id at p. 118. Hanson did acknowledge there was a suggestion for Jama to take the testimony of the CSFB officials on pretty short notice. Id. at pgs. 118-119. He also admitted that, at that point, it was probably not fair to ask Jama to take that testimony. Id. at p. 119. Hanson noted that eventually Eichner "stepped up to the plate" and took all the testimony. Id. at p. 120.

Kreitman stated he asked Jama to take the testimony of one of CSFB officials, and Jama "expressed hesitancy" because of the short time frame. Tr. Kreitman Senate 11/15/2006 Senate testimony at p. 104. Kreitman indicated that he replied to Jama, "it was limited testimony and the preparation could be limited." Id.

3. Reasons Mack's Testimony was Taken After the Statute of Limitations Had Run

a. Aguirre's Supervisors' Explanations

When asked at the December 5, 2006 hearing, why the SEC had allowed the statute of limitations to expire before taking Mack's testimony, Hanson stated, "we got to it as soon as we could." Tr. 12/5/2006 Senate Hearing at p. 29. In explaining this statement, Hanson said he meant "as soon as we could after we made the decision." Tr. Hanson 7/15/2008 testimony at p. 116. Hanson said after Deputy Directors Walter Ricciardi and Peter Bresnan decided that Mack's testimony should be taken, Enforcement started calling around and tried to schedule the testimonies as soon as they could. Id. Hanson said he talked to Ricciardi about getting a tolling agreement with Mack, but Ricciardi replied, "I don't think we can. We generally don't unless we have something. There's got to be a quid pro quo." Id. at p. 117.[52]

[52] Hanson also noted that there could have been an argument that the statute of limitations did not begin to run as of the date of the violation, but as of the date the violation was discovered. Tr. Hanson 7/15/2008 testimony at p. 117.

Hanson also stated at the hearing, "we did not think at the time that we took Mack's testimony, that there was any – there was virtually no likelihood, by the time we took Mack's testimony, that he had any information regarding the transaction that he could have passed on." Id. Kreitman noted that the statute of limitations did not bar injunctive relief, or other equitable remedies, such as disgorgement of illegal profits or pre-judgment interest, although he acknowledged there was a significant limitation on what could be done against Mack after the statute of limitations expired. Id.

Deputy Director Bresnan stated that he remembered that they originally wanted to talk to Mack before the statute of limitations expired, but could not recall whether they had set the testimony for an earlier date or had discussed setting it earlier. Bresnan 8/22/2007 Interview Notes at p. 6. Bresnan further stated that he had a vague recollection that someone (possibly Mack or his counsel) was in Europe and they would have had to call this person back from Europe for the testimony to have occurred earlier. Id.

However, when asked whether there were discussions about taking Mack's testimony before the statute of limitations ran, Deputy Director Ricciardi said he was not focused on that issue. Ricciardi 6/20/2007 Interview Notes at p. 5. Ricciardi said he did not recall the topic coming up, adding that "no one said to him they needed to take Mack's testimony before the statute had run." Id. Similarly, both Berger and Thomsen said that they did not recall any discussion about the statute of limitations expiring in connection with the taking of Mack's testimony. Tr. Berger Senate 11/2/06 testimony at p. 276; Tr. Thomsen Senate 9/8/2006 testimony at p. 59.

b. Mack's and His Counsel's Impressions

Gary Lynch, Morgan Stanley's Chief Legal Officer, stated that there were no discussions with the SEC about whether the statute of limitations was about to expire. Transcript of Testimony of Gary Lynch before OIG Investigators on March 5, 2007 (hereinafter, "Tr. Lynch 3/5/07 testimony") at p. 48. Lynch also stated that he scheduled Mack's testimony very promptly after it was requested. Id. at p. 53. Mack stated that he recalled that he came back early from vacation in North Carolina for the testimony and he was not aware of any efforts to delay his testimony, and the date was worked out between the secretaries. Transcript of Testimony of John Mack before OIG Investigators on March 5, 2007 (hereinafter, "Tr. Mack 3/5/2007 testimony") at pgs. 30-32. Mack said he was aware that when his testimony was taken, the statute of limitations had just run. Id at p. 30.

c. Perspectives of Other Attorneys in the Enforcement Division

There is evidence that it was virtually unprecedented in Enforcement for testimony to be taken after the statute of limitations had run. Nine current and former Enforcement attorneys stated that they were not aware of any other situations where Enforcement took testimony after the statute of limitations had run. Tr. [redacted] 4/18/2008

testimony at p. 56; Tr. Bayless 4/24/2008 testimony at p. 17; Tr. Witness 9 4/2008 testimony at p. 30; Tr. Witness 1 4/2008 testimony at p. 41; Tr. Witness 2 4/2008 testimony) at p. 18; Tr. Witness 3 4/2008 testimony at p. 61; Tr. Witness 7 4/2008 testimony at p. 45; Tr. Witness 8 4/2008 testimony at p. 45; Tr. Witness 5 4/2008 testimony at p. 25.

K. Internal Perspectives on Pace and Intensity of the Investigation Post-Aguirre

There is conflicting evidence from other SEC staff who worked on the Pequot case about the intensity level of the investigation after Aguirre was terminated.

Branch Chief Eric Ribelin, who worked closely with Aguirre on the Pequot investigation before his termination, said the level of intensity of the Pequot investigation "went from a ten to a three because Aguirre left or was fired." Transcript of Testimony Eric Ribelin before OIG Investigators on November 9, 2007 (hereinafter, "Tr. Ribelin 11/9/2007 testimony") at p. 56. Ribelin also stated that when Aguirre left, they wanted to close this thing down, stating "I don't think that [Enforcement] investigated it both on the insider trading front, the stock manipulation front. I think they were going through the motions." Id. at p. 212.

Market Surveillance Specialist Craig Miller also indicated that after Aguirre left, he felt the investigation began to slow down; however, he noted that this could have been for any number of reasons, including the fact that there is sometimes a lag because the new people have to get up to speed. C. Miller 11/20/2006 Interview Notes at p. 7.

On the contrary, Market Surveillance Specialist Stephen Glascoe said after Aguirre left, he worked with both Eichner and Jama and, in his view, "nothing changed after Aguirre left and the case continued forward." Glascoe 11/15/2006 Interview Notes at p. 10. Trial unit attorney Kevin O'Rourke concurred, stating that he "observed no change in the investigation after Aguirre left, other than that Jim Eichner, who took over the investigation, had lots of experience and seemed level headed and very, very good." Notes of OIG Investigator Interview with Kevin O'Rourke of September 18, 2006 (hereinafter, "O'Rourke 9/18/2006 Interview Notes") at p. 4.

L. Perspectives of Those Outside the Commission on Changes in Investigation After Aguirre was Terminated

Those outside the Commission stated that they did notice changes in the investigation after Aguirre was terminated, although they did not indicate that the investigation had been slowed or abandoned. Fiona Philip, a partner at the law firm of Howrey & Simon, who represented Morgan Stanley in the Pequot matter, stated that Jama was more willing to listen to their concerns and was more receptive to them than Aguirre had been. Philip 3/12/2007 Interview Notes at p. 2. Philip said Jama helped

focus the subpoena, particularly as to the first request in the May 23rd subpoena to Morgan Stanley for all e-mails in certain groups. Id.

Ashley Wall, Vice President of Regulatory Affairs at Morgan Stanley, who also was involved in the Pequot matter, stated that said she was able to negotiate a reasonable time frame for document production with Jama after Aguirre left. Transcript of Testimony of Ashley Wall before OIG Investigators on April 24, 2007 (hereinafter, "Tr. Wall 4/24/2007 testimony") at p. 32. She said after Jama took over, he reduced the scope and the date range for the documents that had to be produced. Id. at p. 67. Patrick Patalino, Managing Director for Morgan Stanley, said after Aguirre left, Morgan Stanley came to an agreement with the SEC on a variety of points, and there was a "more relaxed dialogue" and the SEC was more cooperative. Transcript of Testimony of Patrick Patalino before OIG Investigators on April 24, 2007 (hereinafter, "Tr. Patalino 4/24/2007 testimony") at p. 64.

FBI Agent David Makol, who worked on the Pequot case in coordination with the U.S. Attorney's Office for the Southern District of New York, stated that, in his opinion, Eichner was pursuing the Pequot matter aggressively. Makol 6/22/2007 Interview Notes at p. 4. Makol said Eichner was very detail-oriented and took one issue after another like an accountant, while Aguirre had a more general perspective. Id. Makol said Eichner did a lot of homework on the Pequot matter and supplemented the binder Aguirre had provided with other e-mails. Id. Makol said he felt the SEC was still working diligently to pursue the Pequot case after Aguirre left, although Makol did not know how much the SEC was pursuing the Mack angle. Id.

M. Conclusion Regarding Progress of the Pequot Investigation After Aguirre's Termination

The OIG investigation found that, initially after Aguirre's termination, a few investigative efforts were made to locate evidence establishing that Mack knew about the GE/Heller transaction before Pequot began trading in Heller. Subpoenas were issued and documents produced in response to the subpoenas were reviewed. However, the record shows that, after Aguirre's departure, the focus of the Pequot investigation shifted from the GE/Heller transaction to the Microsoft aspect of the investigation.

The evidence does show that substantial steps were taken to investigate the circumstances surrounding Pequot's significant profit from Microsoft trades, in particular with regard to Microsoft employee David Zilkha. Zilkha eventually went to work for Pequot and, before he officially started work at Pequot, began providing Pequot Chairman and CEO Arthur Samberg with information about Microsoft via e-mail. Enforcement participated in several proffer sessions the Southern District of New York had with Zilkha, took additional testimony of Samberg, and interviewed Microsoft employees who may have provided Zilkha with inside information before he left Microsoft.

In April 2006, because the statute of limitations was set to expire in July 2006, Enforcement obtained tolling agreements with Pequot, Samberg, and Zilkha. No attempt was made to obtain a tolling agreement with Mack, because, according to Enforcement, they had no leverage against Mack since they had no evidence Mack was the tipper.

As of June 15, 2006, Enforcement had no plans to take the testimony of Mack for the same reasons they gave Aguirre when he sought to take Mack's testimony before he was terminated. Enforcement at that time believed that they had no evidence with which to confront Mack that suggested he passed confidential information to Samberg and, in fact, no further evidence was uncovered by Enforcement. Shortly thereafter, however, in light of Congressional interest in the Pequot investigation and press reports about Aguirre's termination, Deputy Directors Bresnan and Ricciardi decided for the good of the Enforcement program to take Mack's testimony.

In July 2006, Enforcement scheduled the testimony of two CSFB senior officials and John Mack. Initially, a junior Enforcement attorney, Liban Jama, who had previously not been very involved in the GE/Heller portion of the Pequot case, was asked to take the testimony of the senior-level CSFB officials in a very short time-frame. Jama also believed he was being asked to take Mack's testimony as well. Jama felt the request was highly unusual and informed his superiors that he was not comfortable taking the testimony given his lack of knowledge of the case and without proper preparation time. Although Kreitman indicated that "preparation could be limited" and, according to Jama, Kreitman said the testimony was "no big deal," eventually, James Eichner, the lead attorney on the Pequot matter took the testimony of the CSFB officials and John Mack.

Enforcement took Mack's testimony on August 1, 2006, mere days after the statute of limitations had expired. The OIG investigation did not find the explanations provided by Enforcement as to why they delayed in taking Mack's testimony until after the limitations period had run to be credible. In addition, nine current and former Enforcement attorneys confirmed that it was virtually unprecedented in the Enforcement Division for testimony to be taken after the statute of limitations had run.

In November 2006, Enforcement issued a case closing report formally closing the Pequot investigation. In all, the case closing report demonstrates that significant investigatory work was conducted in the Pequot case, both by Aguirre and by others after he was terminated. The case closing report describes in detail the investigative efforts taken by Enforcement and the conclusions of the staff regarding the GE/Heller transaction, the potential insider trading involving Microsoft employee David Zilkha, the Pequot's trading patterns relating to the shares of AstraZeneca and Par Pharmaceutical, and Pequot's PIPES transactions.

In summary, although there is evidence that the Pequot investigation changed focus after Aguirre was terminated and Enforcement seems to have "gone through the motions" with respect to the taking of Mack's testimony, the evidence does not show that the Pequot investigation was abandoned. Consistent with its previous position,

Enforcement maintained there was insufficient evidence against Mack to warrant taking his testimony and, for that reason, did not seek a tolling agreement with him and took his testimony primary for appearance reasons. In fact, under oath, Mack denied having any involvement in insider trading regarding GE and Heller, and denied having any knowledge of the transaction until after he started at CSFB. Enforcement had no evidence with which to confront him, and found no evidence to the contrary. Thus, while there was a shift in concentration by Enforcement away from the Mack aspect of the investigation, there is evidence to suggest that this shift was based upon a reasonable belief that other aspects of the investigation were more promising. Moreover, while one may disagree with the decision to close the case, in light of the documented investigatory work that Enforcement conducted after Aguirre's departure, particularly the efforts made to prove a case against Zilkha, the evidence demonstrates that the Pequot investigation continued to be aggressively pursued until it was closed in November 2006.

V. Bases for Aguirre's Termination – Aguirre's Work Performance and Conduct

A. Termination Notice

By notice dated September 1, 2005, the SEC terminated Aguirre from his employment based "upon [his] demonstrated inability to work effectively with other staff members and [his] unwillingness to operate within the SEC process." Termination notice from Linda Thomsen to Gary Aguirre dated September 1, 2005 attached hereto as Appendix 141.

Specifically, the termination notice stated as follows:

> 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 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 your 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 your 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.
>
> Since those meetings, your conduct has not improved to the level that warrants retention beyond your trial period. Id.

B. Praise of Aguirre's Work from His Colleagues

This investigation revealed that many of Aguirre's colleagues and co-workers who worked closely with him on the Pequot investigation enthusiastically praised his work abilities and products. Hilton Foster, a senior Enforcement attorney at the SEC who conducted training sessions for Enforcement attorneys until he retired in 2005, and who was highly regarded within the SEC,[53] stated about Aguirre: "I've been at the Commission for 30 some-odd years. I've never seen anyone who was any better at pursuing that type of case" meaning an "A number 1 case." Tr. Foster 9/15/2006 Senate testimony" at p. 23. Foster said: "He was on top of his documents. He knew what he had. He was enthusiastic. He didn't jump to conclusions." Id. Foster added, "I don't think there was one suggestion or idea that Gary made that didn't make a hell of a lot of sense to me. In other words, he would not shoot from the hip." Id. at p. 65.

Foster further stated that "in terms of [Aguirre's] quality as a lawyer, not interpersonal skills but in terms of dealing with the evidence, knowing what to get, knowing how to get it: [he was] unmatched." Id. at p. 25. When asked about Aguirre's work ethic, Foster said, "He was one of the few people I knew who would be on an insider trading investigation and out-work me. He was there morning, noon and night, and weekends." Id. at pgs. 41-42. Foster described Aguirre's method of taking testimony, as follows, "he took testimony the way most good SEC attorneys take it . . . It went very long. It was belabored, very meticulous. But that's a sign of thoroughness." Id. at p. 69. Foster also told Aguirre that he was going to use part of Aguirre's transcript in his training of new SEC attorneys. Id. at p. 72.

Foster said that at his retirement party in July 2005 at the Capitol Grille restaurant, he spoke to Enforcement Director Linda Thomsen and pulled Aguirre over to her and said that Aguirre was working on a very important case, if not the most important case, and that Aguirre was doing a great job. Notes of OIG Investigator Interview with Hilton Foster of August 1, 2006 (hereinafter, "Foster 8/1/2006 Interview Notes") at p. 2. Thomsen also stated that she recalled Foster telling her at his retirement party that the Pequot investigation was a great investigation and that Aguirre was doing good work,

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[53] Chief of the Office of Market Surveillance in the Enforcement Division Joseph Cella described Foster as "the best insider trading investigator who had ever come through" the SEC. Notes of OIG Investigator Interview with Joe Cella of August 17, 2006 at p. 4. Enforcement Director Linda Thomsen said Foster was a longstanding employee of the Enforcement Division who was exceptionally good at insider trading cases. Tr. Thomsen 9/8/2006 testimony at pgs. 26-27.

although Thomsen stated that Foster also said Aguirre was difficult to work with. Tr. Thomsen 9/8/2006 Senate testimony at p. 28.[54]

Eric Ribelin, a branch chief in the Office of Market Surveillance in the Enforcement Division of the SEC, who worked very closely with Aguirre, stated that "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." Tr. Ribelin 9/1/2006 Senate testimony at p. 20. Ribelin said Aguirre's time was "very productive, very focused," and no one else on the Pequot team worked the kinds of hours (60-65 hours a week) that Aguirre did, "not even close." Id. at p. 58.

Joseph Cella, Chief of Enforcement's Office of Market Surveillance (OMS) stated that he thought Aguirre was a competent attorney and industrious and hard-working by reputation. Tr. Cella 9/7/2006 Senate testimony at p. 40. Cella noted that Eric Ribelin spoke very highly of Aguirre's ability to take testimony and his organizational skills. Id.

Stephen Glascoe, a Market Surveillance Specialist in OMS, who worked with Aguirre on the Pequot investigation, described Aguirre as a hard worker and "go getter" who was very focused on the case. Glascoe 11/15/2006 Interview Notes at p. 3. Glascoe also noted that Aguirre would come in on weekends and was very conscientious about the Pequot investigation. Id.[55]

[redacted] a Senior Market Surveillance Specialist in the Enforcement Division, who was assigned to work on the Pequot investigation, stated that Aguirre seemed to be a very driven individual. [redacted] 11/20/2006 Interview Notes at p. 3. He also stated that he recalled hearing positive comments from others that Aguirre did a good job and was aggressive and persevered in testimony. Id.

[redacted], a former intern in Enforcement during in the summer of 2005, who worked briefly with Aguirre, said she thought Aguirre was effective in making a presentation to the U.S. Attorney's office regarding the Pequot case. Notes of OIG Investigator Interview with [redacted] of November 14, 2006 (hereinafter, "[redacted] 11/14/2006 Interview Notes") at p. 2.

Margaret Cain, an attorney in Enforcement, stated that Aguirre "had a reputation for being a seasoned litigator." Transcript of Testimony of Margaret Cain by Senate Committee on October 13, 2006 (hereinafter, "Tr. M. Cain 10/13/2006 Senate

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[54] Foster acknowledged that Aguirre may have been "a lot more tense than most people," but said he found him "easy to work with." Tr. Foster 9/15/2006 testimony at pgs. 25; 32.

[55] Glascoe did note that, at times, he became a little frustrated working with Aguirre because unlike the normal practice in Enforcement, Aguirre would request a great deal of information from outside firms at one time and, as a consequence, the computer system was not able to handle the amount of data that Aguirre requested. Glascoe 11/15/2006 Interview Notes at p. 3.

testimony") at p. 38. She said her impression of him was that he was very smart and feisty, someone who "kinds of stands up" and was not a wallflower. Id. at p. 38.

C. Aguirre's Superiors' Acknowledgment of His Work Ethic and Dedication to his Investigations

Among Aguirre's supervisors, there was general agreement that he was a hard worker, and dedicated to his investigations and the Commission. Aguirre's first-level supervisor, Branch Chief Bob Hanson, described Aguirre as industrious and hardworking, and "a zealous advocate and then some." Tr. Hanson Senate 9/5/2006 testimony at p. 206. Hanson also said that Aguirre "worked very, very, very hard and [Hanson] appreciated that a great deal because it is rare to find someone who will work that hard." Id. at p. 153.

Aguirre's second-level supervisor, Assistant Director Mark Kreitman, described Aguirre as a very hard worker, extremely diligent and very motivated, with lots of experience. Tr. Kreitman Senate 9/6/2006 testimony at pgs. 103-104.

Associate Director Paul Berger similarly acknowledged that Aguirre was a hard worker and was dedicated to his investigation. Tr. Berger Senate 11/2/2006 testimony at p. 156.

Aguirre's first Assistant Director Richard Grime said he found Aguirre to be diligent and hard working, although he noted that Aguirre did not keep a fully open mind on matters. Notes of OIG Interview with Richard Grime of August 1, 2006 (hereinafter, "Grime 8/1/2006 Interview Notes") at p. 2. Grime stated that there were times when Aguirre was getting ahead of where the evidence ultimately was. Transcript of Testimony of Richard Grime of September 2, 2008 (hereinafter, "Tr. Grime 9/2/2008 testimony") at p. 12.

Enforcement Director Linda Thomsen stated that after Aguirre began working in the Kreitman group, she heard many more times that he was hardworking and dedicated, although she added that he was very difficult to work with, both with peers and supervisors. Tr. Thomsen 4/28/2008 testimony at pgs. 9-10.

D. Assessments of Aguirre's Work Performance

1. Aguirre's Supervisors' Overall Assessments

Several of Aguirre's supervisors conveyed less than favorable opinions on his overall work performance. Charles Cain, Aguirre's Branch Chief in Enforcement during the beginning of Aguirre's tenure with the Commission, stated he was not at all satisfied with Aguirre's work or his conduct in the performance of his duties. C. Cain 7/31/2006 Interview Notes at p. 2; Transcript of Testimony of Charles Cain before SEC IG on August 29, 2008 (hereinafter, "Tr. Cain 8/29/2008 testimony") at p. 14.

Cain stated that he thought Aguirre had a warped sense of reality and would take things that were said out of context, but then really believe his view of what was said. C. Cain 7/31/2006 Interview Notes at p. 2; Tr. Cain 8/29/2008 testimony at p. 16. Cain further stated that Aguirre quickly became obsessed with the Pequot case,[56] and was a conspiracy theorist (a quality that Cain said showed very quickly) who assumed everything done was wrong and then set out to prove it. C. Cain 7/31/2006 Interview Notes at p. 1; Tr. Cain 8/29/2008 testimony at p. 16. Cain also said Aguirre clearly never checked his work since there were typographical and others errors contained in it. C. Cain 7/31/2006 Interview Notes at p. 2; Tr. Cain 8/29/2008 testimony at p. 17. Cain added that these errors were "fairly regular." Id.

Richard Grime, a former Assistant Director in Enforcement who was Aguirre's second-level supervisor during Aguirre's first few months at the SEC, said he found Aguirre to be "a mixed bag . . . [i.e.,] that he worked long hours but that he jumps to conclusions and prejudges things." Grime 8/1/2006 Interview Notes at p. 2.

Bob Hanson, Aguirre's direct supervisor for the majority of his tenure at the SEC, stated that he "found Aguirre to be highly energetic, but his conduct was erratic and unprofessional, it was extremely difficult to communicate with him, and miscommunications were common." Tr. 12/5/2006 Senate Hearing at p. 15. Hanson further stated that "information that Aguirre presented as fact turned out to be mere speculation." Id. Hanson said that one needed to look at Aguirre's subpoenas very closely because they were error ridden or too broad. Tr. Hanson Senate 9/5/2006 testimony at p. 17. Hanson said the subpoenas had typos, misspellings, or were a cut and past job, and had the wrong names. Id. at p.18. Hanson also said that Aguirre "was fairly careless" in his work and gave an example of when Aguirre had been wrong about the timing of a certain series of actions, which caused a change in his theory of a case. Id. at pgs. 108; 111. Hanson said in some instances, Aguirre would copy the information from one subpoena into another subpoena, and the result would be that the second subpoena would be incorrect. Tr. Hanson 7/15/2008 testimony at p. 33. Hanson also said Aguirre wrote letters that he had trouble understanding, and Aguirre's tone was "more aggressive than [they] usually have been in Enforcement in the investigative side." Id. at p. 34.

Mark Kreitman, Aguirre's second-level supervisor from January 2005 through his termination in September 2005, stated that Aguirre "was unable to fairly and impartially

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[56] James Eichner also said he thought Aguirre was "obsessively focused" on Mack. Notes of OIG Interview with James Eichner of September 27, 2006 (hereinafter, Eichner 9/27/2006 Interview Notes) at p. 7. Former Assistant U.S. Attorney David Anders, who worked on the Pequot matter said his supervisor, David Esseks, mentioned to him after a telephone call Esseks had with Aguirre that Aguirre was "somewhat fixated and obsessed" with the Pequot case. Notes of OIG Interview with David Anders of March 6, 2007 (hereinafter, Anders 3/6/2007 Interview Notes) at pgs. 3-4. While Anders agreed that Aguirre was very focused on Pequot, he felt personally that "obsessed" was too strong a word. Id. Liban Jama described Aguirre as "passionate," but not "obsessive" with the idea of Mack fitting the profile of the tipper. Notes of OIG Interview with Liban Jama of October 12, 2006 (hereinafter, Jama 10/12/2006 Interview Notes) at p. 5.

balance evidence against his preconceived conclusions or articulate his thinking in a linear fashion." Written Testimony of Mark Kreitman for December 5, 2006 Hearing before the Senate Comm. on the Judiciary at p. 2 attached hereto as Appendix 175. Kreitman also said Aguirre's investigation of Pequot was poorly thought out, disorganized and sloppily documented. Id.

2. Co-Workers' Assessments of Aguirre's Work on the Pequot Investigation

James Eichner, a staff attorney who worked with Aguirre on the Pequot investigation, found fault with the manner in which Aguirre conducted the investigation. Tr. Eichner 9/1/2006 testimony at p. 25. Eichner stated that the focus of Aguirre's efforts seemed to be on discovery and document production, and obtaining e-mails as an end to itself rather than as a means to an end. Id. at p. 26. He said there was never a plan, and it was all very disorganized. Id. Eichner noted that a lot of subpoenas had been issued, there did not seem to be a central subpoena file, and it was difficult for him to figure out which subpoenas had actually been issued and which had not. Id. Eichner said that Aguirre would get fixated on things and would spend an enormous amount of time on minutia. Eichner 9/27/2006 Interview Notes at p. 10. According to Eichner, Aguirre "went on frolics and detours that made the case unmanageable." Id. Eichner stated that Aguirre "had millions of emails and no plan." Id.

Eichner further said that, at the time Aguirre left, the Pequot case was a total mess and disaster, noting that the market manipulation part of the case was in its infancy and was fairly narrow. Eichner 9/27/2006 Interview Notes at p. 3. However, according to Eichner, the parts Aguirre had done (the insider trading parts) were a mess. Id. Eichner said this was partly because of the nature of the case, but mostly because of Aguirre. Id. Christopher Conte, an Associate Director in the Enforcement Division and Eichner's superior and "mentor," confirmed that Eichner had indicated to him that the documents in the Pequot case were a mess and the case was a bit unfocused. Notes of OIG Investigator Interview with Christopher Conte of October 30, 2006 (hereinafter, "Conte 10/30/2006 Interview Notes") at p. 1.

In contrast, Liban Jama, a staff attorney who worked with Aguirre on the Pequot investigation for a short period of time (three weeks) stated he had no significant problems working with Aguirre. Jama 10/12/2006 Interview Notes at p. 1. Although Jama said he was not in a position to evaluate Aguirre's work, he noted that, at one point, he asked Aguirre for templates for letters to subpoenas and did not think they were particularly poorly done. Id. He also stated that he did not have a high level of frustration with the way Aguirre managed the case when he worked with him. Transcript of Testimony of Liban Jama before Senate Committee on October 11, 2006 (hereinafter, "Tr. Jama 10/11/2006 Senate testimony") at p. 13. Jama did say that after Aguirre left the SEC, there were problems finding correspondence he kept, and binders and documents. Tr. Jama 4/24/2008 at p. 29. However, Jama stated that this was because Aguirre was personally involved in the case, knew where everything was, and had a

system. Id. at p. 30. According to Jama, Aguirre was the type of person who could find something even if someone else could not. Id. at p. 30.

3. Aguirre's Responses to Negative Assessments of His Work Performance

a. Aguirre's Responses to Statements of Cain, Grime and Eichner

Aguirre has maintained that because his evaluations were all positive until he questioned Mack's favored treatment, and particularly since his two-step merit increase became effective on August 21, 2005 and he was terminated 11 days later, the only possible reason for this change in the SEC's opinion of him was that he was seeking to take Mack's testimony. Testimony of Gary Aguirre before U.S. Senate Committee on the Judicial, Part III dated December 5, 2006 at p. 6, excerpted pages attached hereto as Appendix 176.

With regard to specific statements made by his supervisors, Aguirre noted that neither Cain nor Grime ever gave him any specific feedback that his work performance needed improvement. Tr. Aguirre 4/29/2008 testimony at p. 20.[57] Aguirre stated that if what Cain said about his performance was true, if Cain did not fire him, he should have at least placed him on a performance improvement plan (PIP). Tr. Aguirre 8/26/2008 testimony at p. 117. Aguirre noted that internal SEC procedures require supervisors to provide "immediate feedback" to their subordinates. Id. at p. 118; Securities and Exchange Commission Personnel Operating Policies and Procedures attached hereto as Appendix 177, at 2-3, "Monitoring and Feedback" (which states the importance of rating officials providing "timely feedback to employees on performance issues . . .").

Aguirre further stated that he received positive feedback on several occasions from both Cain and Grime, specifying one instance in which Cain was impressed that he had found a particular theory in a Fannie Mae case called the "cookie jar theory." Tr. Aguirre 4/29/2008 testimony at p. 22. According to Aguirre, Cain said this was great, and brought together the whole team – like 7 or 8 lawyers – to explain to them what Aguirre had found. Id. Aguirre also stated that Cain seemed to be positively impressed with his work on a case involving GE taking over a Swedish company and also sent him an e-mail about an assignment he did on the Lucent case, saying "good job." Id. at p. 24. Aguirre also noted that he never got any feedback from Kreitman, Hanson or others that he was having a difficult time operating within the supervisory structure. Id. at p. 37.

Aguirre also provided evidence of possible motivations for negative comments made by Cain and Eichner after he was terminated. With respect to Cain, Aguirre explained that on October 6, 2004, he prepared a draft Formal Order memorandum in the

[57] Cain stated that he pointed out to Aguirre when there were errors in his work, but acknowledged that he did not have any formal conversations about his work performance. Transcript of testimony of Charles Cain before SEC IG on August 29, 2008 (hereinafter, Tr. Cain 8/29/2008 testimony) at pgs. 21; 30.

Pequot case, and submitted it to Cain for his comments. Aguirre Responses to Questions from Senator Grassley at p. 44. Aguirre stated that Cain made revisions to his draft, denoting that staff investigation had identified at least six transactions involving possible insider trading by Pequot. Id. at p. 45. Aguirre stated that he told Cain that the revisions were not accurate because they suggested the SEC had uncovered six insider trading matters, when in fact they had been referred to the SEC. Id. According to Aguirre, Cain angrily stated that the memorandum was not going to state that OMS Branch Chief Joseph Cella had been informed but had failed to act on the prior referrals. Id. Aguirre responded that the statement contained in the revised draft that the staff identified the transactions was unsupportable, although he was not saying that Cella made a mistake. Id.; October 8, 2004 e-mail from Aguirre to Grime, attached hereto as Appendix 178. Aguirre said he spoke with Richard Grime about the matter, and Grime said he would not go along with what Cain had recommended. Tr. Aguirre 4/29/2008 testimony at pgs. 32-33. According to Aguirre, Grime sided with him, and they redrafted the documents accordingly. Id.

When Cain was asked about this incident, Cain said that "Aguirre fought tooth and nail" about a boilerplate item that he believed showed the Formal Order was a huge conspiracy, and he accused both Grime and Cain of being unethical and trying to hide things from the Commission. C. Cain 7/31/2006 Interview Notes at p. 2. Cain said the information Aguirre sought to put on the Formal Order cover was explained in the body of the Order. Id. at 2. Grime's view on this incident was that Aguirre wanted to put "outside groups that had come to the Commission two years before" as the "source" of the case referrals, while Grime and Cain felt the source of the referral was the Market Surveillance group. Grime 8/1/2006 Interview Notes at p. 1. Grime said Aguirre thought that because of the way the memorandum was drafted, Enforcement was misleading the Commission. Id. Grime said Cain and he disagreed with Aguirre about the document being misleading, and Cain and he were on the same page. Id.

Aguirre acknowledged another disagreement with Cain, related to a Fannie Mae case regarding something Aguirre said on a phone call about a document production. Tr. Aguirre 4/29/2008 testimony at p. 30. According to Aguirre, after the call, Cain turned beet-red, and said in an angry voice, "you're going to have to take my instruction on this." Tr. Aguirre 4/29/2008 testimony at p. 30. Aguirre said he responded to Cain, "we'll go with your theory and I got it, I understand," as evidence that Aguirre did not further dispute the issue. Id.[58]

Aguirre also revealed an e-mail communication between Eichner and him shortly after Eichner joined the SEC, as a possible motivation for Eichner's criticism of him. Aguirre to Questions from Senator Grassley at p. 27 attached as Appendix 5. In this e-mail, Eichner asked Aguirre if he was related to Michael Aguirre, Aguirre's brother and the San Diego City Attorney, who was quoted in a Los Angeles Times article as being critical of Chairman Cox. Id.; e-mail dated June 9, 2005 from Eichner to Aguirre

[58] When asked about this incident, Cain had no recollection of it, stating, "I have no idea what he's talking about." Tr. Cain 8/29/2008 testimony at p. 23.

attached hereto as Appendix 179. In the e-mail string, after Aguirre informed Eichner that he was related to the person quoted in the article, Eichner responded "You might want to change your name when the new Chairman arrives." Id. Eichner's explanation of this e-mail exchange was that "it was meant to be a joke." Eichner 9/27/2006 Interview Notes at p. 12. Eichner said at the time he sent the e-mail, he did not know Aguirre very well and was trying to build a working relationship with him. Id.

With regard to complaints expressed by his supervisors about his writing abilities, Aguirre averred that he finished very close to the upper 5% of his class at Georgetown Law School, and his essay was given the highest grade in the class. Tr. Aguirre 8/26/2008 testimony at p. 40. Aguirre noted that Kreitman (his professor at the time) specifically commented on Aguirre's essay, saying it was "smart, thoughtful, scholarly, timely, significant, and fun to read, and gave him an A." Id. In response to claims that his subpoenas were error-ridden or had "typos," Aguirre said he had prepared numerous subpoenas for both Hanson and Kreitman, and he believed those subpoenas were "fairly well done, and "nobody ever seemed concerned about" them. Tr. Aguirre 8/26/2008 testimony at p. 149.[59]

b. Aguirre's Response to Statements about His Lack of a Plan and Disorganization

In response to the contentions, primarily by Eichner, that Aguirre was disorganized and had no investigative plan, Aguirre stated that he had presented the Pequot investigative plan to Kreitman and Hanson, and Kreitman sent him a responsive e-mail on February 3, 2005, saying, "Gary – All this looks good." Responses by Aguirre to Questions from Senator Grassley at p. 7 attached as Appendix 5; e-mail dated February 3, 2005 from Kreitman to Aguirre attached hereto as Appendix 180.[60] Aguirre stated that he received another response to his plan in a May 20, 2005 e-mail from Kreitman, in which Kreitman said, "sounds like Gary's strategy outsmarted (or terrified) Audrey and is resulting in real progress. Excellent." Id.; e-mail dated May 20, 2005 from Kreitman to Aguirre attached hereto as Appendix 181.[61]

Aguirre also stated that all of his incoming and outgoing correspondence and subpoenas were organized in three-ring binders until July 2005, and all of the outgoing material was also on the "SEC j drive," in electronic folders for each category of

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[59] Aguirre also noted that after he raised concerns about preferential treatment for Mack, he got a "pretty harsh" response from Kreitman to a subpoena Aguirre had prepared as a rough draft, in which Kreitman stated, "never send out a subpoena without fully proofing it." Tr. Aguirre 8/26/2008 testimony at pgs. 150-151.

[60] Kreitman noted that prior to his statement in the e-mail of "Gary, all this looks good," he expressed concern in the same e-mail about Aguirre's communication with Audrey Strauss, counsel for Pequot, and offered to call her to resolve the issues. Tr. Kreitman 7/17/2008 testimony at p. 23. Kreitman also said a statement like, "oh, this looks good" is the kind of language he frequently uses to follow language that might be interpreted as critical and is an attempt to soften the previous critical language. Id.

[61] Kreitman described this comment as "a little tongue in cheek." Tr. Kreitman 7/17/2008 testimony at p. 24.

subpoena. Tr. Aguirre 8/26/2008 testimony at pgs. 173-176. Aguirre said that perhaps Eichner was not aware of the state of his files, noting that Eichner did not volunteer to help him with the filing, "or he might have known something about how they were filed." Id. at p. 175.

Further, Aguirre noted that the formal evaluation he received in which his performance was determined to be acceptable incorporated references to planning work assignments and execution of duties. Id.; U.S. SEC Performance Plan and Evaluation for Gary Aguirre signed on November 1, 2004 attached hereto as Appendix 182.

4. Concerns About Aguirre Having to Withdraw Subpoenas that He Issued

a. "Subpoena" Incident as Described by Aguirre's Supervisors

Although not specifically listed in the termination notice, Aguirre's supervisors referenced an incident when Aguirre had to withdraw subpoenas that he had issued, as evidence of his poor work performance.[62]

Assistant Director Kreitman said it was his policy that the Branch Chief review the subpoenas before they went out, particularly for a new employee. Tr. Kreitman Senate 9/6/2006 testimony at p. 25. Kreitman said that policy was not followed by Aguirre, and Hanson reported to him that, on two occasions, Aguirre sent subpoenas that had to be recalled because they were in violation of the Right to Financial Privacy Act (RFPA). Id. Kreitman said these subpoenas were sent to Internet providers seeking information that the SEC was not permitted to seek under the RFPA and had to be withdrawn. Id. at p. 26. Kreitman said this had not happened before in his group. Id. Kreitman said they were withdrawn close in time from being sent out as there had been no production in response to the subpoenas. Id. at p. 29. Kreitman said he memorialized this issue in the supplemental evaluation he prepared on Aguirre. Id. at p. 31. Kreitman said he had a discussion with Hanson about the subpoenas, but did not recall if he ever talked to Aguirre about this matter. Id. at pgs. 32-33.

Branch Chief Hanson also recalled the incident involving the subpoenas and said he had a conversation with Aguirre about the problem. Tr. Hanson 7/15/2008 testimony at p. 37. Hanson said he told Aguirre that he was unhappy and indicated to Aguirre that the subpoenas were not in compliance with Commission policy. Id. at p. 38. Hanson said Aguirre was "very casual about it" and "kind of laughed it off." Id. When asked if he, Hanson, was casual about it, Hanson replied, "no, I was very unhappy," and he said he "tried to convey that to Gary." Id.

[62] Linda Thomsen noted that the termination notice was meant to summarize the issues that had occurred and is consistent with the reasons for termination, but was not meant to include every particular point. Tr. Thomsen 4/28/2008 testimony at p. 10.

Associate Director Berger said he also heard about the subpoenas that Aguirre issued in potential violation of the RFPA and remembered saying, "How could that happen?" Tr. Berger Senate 11/2/2006 testimony at pgs. 50-51. Berger had a conversation with Kreitman in which he said Aguirre has got to run things by his supervisors. Id. Berger said these subpoenas were sent to financial institutions where there is personal liability for violations of RFPA, and he believed issuing the subpoena was in and of itself a violation of the statute. Id. at p. 55. Berger said he did not talk to Aguirre about this directly because Kreitman said he was going to talk to him. Id. at p. 58. Berger said he did not remember specifically telling Aguirre that he could not issue a subpoena without approval, but thought Aguirre understood that. Id. at pgs. 62-64. Berger said after the subpoenas issued by Aguirre were withdrawn, they were reissued in a revised form. Id. at p. 66. Berger said he did not think he ever spoke to Thomsen about the subpoenas erroneously issued by Aguirre. Id. at p. 68.

Thomsen said she knew that Aguirre had issued subpoenas that did not conform to the law, although she did now know when she learned of it. Tr. Thomsen 9/8/2006 Senate testimony at p. 36. Thomsen said when she heard about the subpoenas, she was not happy, but that the problem was resolved by the time she heard about it. Id. Thomsen said something similar had happened before, but not frequently. Id. at p. 37. According to Thomsen, when it happened before, the attorney was counseled as was Aguirre, although she admitted she did not actually know if Aguirre was counseled on this. Id. Thomsen said she understood the subpoena was issued in a manner that did not follow the required procedures under RFPA. Id. at pgs. 37-38. Thomsen did not remember how soon before Aguirre's termination Berger told her about the problem with the subpoenas. Id. at p. 38.

b. Views of Aguirre's Colleagues on Withdrawal of Subpoenas

Some of Aguirre's colleagues did not share the view that the incident with Aguirre having to withdraw subpoenas was so critical. Hilton Foster was asked if it was a "serious issue" that one of the subpoenas issued to an Internet service provider had to be withdrawn, and he replied, "it depends . . . if I were a supervisor and I had somebody who couldn't do the work and was habitually screwing up stuff, it would be, you know, the straw that broke the camel's back." Tr. Foster 9/15/2006 Senate testimony at p. 39. "If, on the other hand, I had a guy who was doing a tremendous job, who'd been there for a year and this is the first time sending out an Internet subpoena or whatever it is, I might say, well, maybe I didn't train this guy right." Id. Foster further said about the subpoena withdrawal, "Does it happen? Yes. It is something you're proud of? No. It is the end of the world? No. Can it be fixed? Yes." Id.

Eric Ribelin adopted the same viewpoint as Foster, stating that in terms of the subpoena to the Internet service provider that Aguirre sent out and had to be retracted, he had the impression it was "kind of, no harm, no foul." Tr. Ribelin 9/1/2006 Senate testimony at p. 59.

c. Aguirre's Statements about the "Withdrawal of Subpoenas"

Aguirre acknowledged the error in sending out the subpoenas, but explained that he had sent Hanson copies of the draft subpoenas, and Hanson did not respond to his e-mail. Aguirre Responses to Questions of Senator Grassley at p. 47. Aguirre stated that he apologized to Hanson for the error and informed him that he would not assume Hanson's consent in the future, if he did not respond to Aguirre's e-mails. Id. at p. 48. According to Aguirre, Hanson said he was fine with his response, and that was the end of it. Id. Aguirre said he never heard another word about the subpoena issue in his tenure with the SEC, and his evaluation was certified on June 1, 2005 several days after this incident arose. Id.

5. Aguirre's Resignations

a. Claim in Termination Notice and Statements by Aguirre's Supervisors About Resignations

The termination notice issued to Aguirre claimed, "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." Termination notice dated August 1, 2005 attached hereto as Appendix 141.

Aguirre's supervisors stated that Aguirre resigned on more than one occasion and, at one point, indicated that he would not complete his investigatory work. Hanson said that in March 2005, Aguirre left the office in the middle of the day and said he was going to think about what he was going to do, and returned the next day and said he was going to continue to work at the SEC. Tr. Hanson Senate 9/5/2006 testimony at p. 80. Hanson stated he believed that this took place after Aguirre participated in a telephone conversation with Paul Berger and outside counsel about the Pequot case. Tr. Hanson 7/15/2008 testimony at p. 19.

Hanson said Aguirre engaged in similar behavior [leaving the office and threatening to resign] in May of 2005 after a disagreement with Kevin O'Rourke because Aguirre he did not like what Berger was doing vis-à-vis opposing counsel. Id. at p. 81. Hanson said this resignation was also after Berger participated in a phone conversation with opposing counsel, and Hanson said he encouraged Aguirre to stay because at that point he had nobody else on the case. Id. at p. 84. According to Hanson, at that time, he said to Aguirre, "Gary, I really hope you don't leave." Tr. Hanson 7/15/2008 testimony at p. 20. Hanson said his request to Aguirre at that time was genuine because he was concerned about Hanson's workload and the fact that Aguirre was handling the Pequot case, stating, "if I had inherited that case at that point in time, it would have been a total nightmare for me." Id. at p. 22. Hanson said Aguirre thanked him for supporting him and decided at that point to stay. Id. at p. 27.

Hanson said Aguirre also tendered his resignation to Berger a third time in July 2005, and then withdrew it sometime thereafter. Id. at p. 81. Hanson stated that Aguirre also said one time he would work on the case through September, another time that he would work on the case through December and yet, another time that he would work on it through the investigative stage, but not do the write-up. Id. at pgs. 81-2.

Kreitman referenced the facts that Aguirre quit twice and told his supervisor two levels up that "I refuse to write the action memo" as reasons why Kreitman did not believe Aguirre was surprised that he was being fired. Tr. Kreitman Senate 11/15/2006 testimony at pgs. 87-88. Kreitman stated that, on one occasion, Berger said Aguirre had told Berger that he had resigned and Aguirre left the office for the day and, on the other occasion, Aguirre said to Kreitman "I can't work under these circumstances any more," and left for the day without permission. Id. at p. 91. Kreitman reiterated that both times Aguirre left the building without permission. Id. at p. 92. Kreitman said he believed Aguirre's first resignation was tendered in June 2005, at which point, Aguirre said he would stay until September, and at one point, Aguirre said he would stay on until December. Id. at p. 94.

Berger said Aguirre threatened to resign twice and, one time, Berger asked him when he thought he would finish the investigation. Tr. Berger Senate 11/2/2006 testimony at p. 146. According to Berger, Aguirre replied he thought he would finish in a month or two, but said he would finish the investigation and leave, and not do the action memorandum. Id. Berger said he had only one conversation with Aguirre about his resigning. Tr. Berger Senate 11/7/2006 testimony at p. 66. Berger said he talked about Aguirre's resignation with Kreitman and perhaps Hanson, but he did not remember if he mentioned it to Linda Thomsen. Id.

b. Recollections by Aguirre's Co-Workers About Aguirre's Resignations

Several of Aguirre's co-workers who worked closely with him on the Pequot investigation stated that they were not aware of Aguirre resigning. Hilton Foster stated that Aguirre never told him that he was going to resign from the Commission. Foster 8/1/2006 Interview Notes at p. 4. James Eichner stated that "he only learned about Aguirre quitting and unquitting after Aguirre had left." Eichner 9/27/2006 Interview Notes at p. 2. Stephen Glascoe stated that he had no knowledge of Aguirre submitting his resignation or talking about resigning. Glascoe 11/15/2006 Interview Notes at p. 9. Liban Jama stated that "he was not aware at the time that Gary had resigned." Tr. Jama 4/24/2008 testimony at p. 14.

Eric Ribelin stated that Aguirre had told him a couple of times that he was going to quit. Notes of OIG Investigator Interview with Eric Ribelin of August 3, 2006 (hereinafter, "Ribelin 8/3/2006 Interview Notes") at p. 7. Ribelin said the first time may have been in March or April 2005, and he recalled one other time. Id. Ribelin said the reason Aguirre gave for wanting to quit was that Aguirre felt "they" (Berger and

Kreitman) were trying to close down the Pequot investigation. Id. Ribelin said he understood that one time Aguirre said he was going to quit was related to his trying to do something in connection with sending out a subpoena, and he did not like the way it was handled. Id. According to Ribelin, Aguirre said something like, "That's it, I'm going to quit." Id. Ribelin said a couple of times when Aguirre told Ribelin he was resigning, Ribelin did not know if Aguirre was just "popping off" because he was angry or if he really was serious. Id. Ribelin said he remembered Aguirre threatened to resign two or three times and thought he was serious one of those times. Id. Ribelin said he thought that on one occasion in the spring or summer of 2005, Aguirre had given two weeks notice. Id. However, Ribelin said Aguirre would then change his mind, saying that he wanted to continue to investigate and did not want to give up. Id. Ribelin noted that Aguirre's work did not drop off after he threatened to resign. Tr. Ribelin 9/1/2006 Senate testimony at p. 58.

c. Aguirre's Response to Contentions About his Resignations

Aguirre described the "evolution" of the allegation about his resignations, from an example of a single instance in the termination notice to the "multiple resignation theory," which Aguirre claims was a "lie" created to show that "he was just an unstable employee who habitually offered his resignation and withdrew it." Aguirre Responses to Questions from Senator Grassley at pgs. 16-17. Aguirre stated that he submitted one resignation on June 30, 2005, which occurred immediately after both Kreitman and Berger refused to reverse or even discuss the decision giving Mack preferential treatment. Id. at p. 17.

With respect to the claims that Aguirre resigned in March 2005 after participating in a telephone conversation with Berger, Aguirre stated that he was delighted that Berger became involved in the case, and that on the day of the phone conference in question, March 10, 2005, Aguirre had indicated that he was feeling under the weather, and on the next day, March 11, 2005, he left the office at approximately 4:30 pm, but never said anything about quitting. Tr. Aguirre 8/26/2008 testimony at pgs. 55, 59-61. With respect to the contention that Aguirre resigned in May 2005 after a dispute with Kevin O'Rourke, Aguirre noted that the issue with O'Rourke occurred on May 24, 2005, he worked on May 24 and 25, 2005, and took off the afternoon of May 26, 2005 to get a marriage license and the day of May 27, 2005 to get married. Id. at pgs. 81-82, 84-87.

Aguirre further explained that while he did indicate that he wished to resign on one occasion, the contention that he refused to write up the action memorandum is simply false. Aguirre Responses to Questions from Senator Grassley at p. 13. Aguirre stated that when he talked to Berger, he said he was thinking about leaving but that he just wanted to finish up the case. Tr. Aguirre 4/29/2008 testimony at p. 103. According to Aguirre, Berger said "we need for you to give me a date," and Aguirre replied, "OK, September 30th, I should be able to wind the case up by then, but there was never a hint that didn't include writing up the case." Id. Aguirre also referenced an e-mail he sent on June 30, 2005, to Paul Berger that stated, "Paul: I just want to assure you that Pequot

will get 110% between now and September 30. Gary." E-mail dated June 30, 2005 from Aguirre to Berger attached hereto as Appendix 183. Aguirre said he had no problem writing as a general matter, and he would have been disappointed if he did not have the opportunity to write-up the investigation. Id. at p. 105. Aguirre pointed out that on July 27, 2005, by e-mail, he rescinded his June 30, 2005 resignation. E-mail from Aguirre to Berger dated July 27, 2005 attached hereto as Appendix 184. He also indicated that his work was in no way affected between the time he stated he wished to resign on June 30, and when he rescinded his resignation on July 27. Tr. Aguirre 8/26/2008 testimony at p. 94.

E. Evidence that Aguirre was Difficult to Work with and Resistant to Supervision

1. Termination Notice

The termination notice issued to Aguirre stated that he was being terminated because of his "demonstrated inability to work effectively with other staff members and [his] unwillingness to operate within the SEC process." Termination Notice from Linda Thomsen to Gary Aguirre dated September 1, 2005 attached hereto as Appendix 141. The termination notice also cited "personality conflicts and resistance to standard supervision," as well as conflicts with other staff attorneys, [his] branch chief and a Trial Unit attorney assigned to [his] primary case responsibility." Id. It further made reference to his "continually express[ing] dissatisfaction with the supervisory structure and ignor[ing] the chain of command in [his] Division." Id.

2. Evidence from Aguirre's Supervisors on his Ability to Work with Others

Aguirre's supervisors stated that he was difficult to manage and did not work well with others. Aguirre's first Branch Chief, Charles Cain, said he assigned Aguirre and others in his group work routinely, and that "Gary did not take direction well." C. Cain 7/31/2006 Interview Notes at p. 1; Tr. Cain 8/29/2008 testimony at pgs. 17-18. Cain said Aguirre went to Cain's supervisor Assistant Director Richard Grime, "all the time" instead of going to Cain. C. Cain 7/31/2006 Interview Notes at p. 1. He also noted that Grime told him that Aguirre had gone around Cain, and he saw it for himself as well. Cain 8/29/2008 testimony at p. 18. Cain said "Aguirre didn't seem to like to take direction and didn't like it if you disagreed with him." C. Cain 7/31/2006 Interview Notes at p. 1; Tr. Cain 8/29/2008 testimony at p. 16. Cain said he was not sure why Aguirre did not want to deal with him, but eventually it started to feel personal to Cain. C. Cain 7/31/2006 Interview Notes at p. 1.

Cain said that Grime and he had many meetings with Aguirre when he was yelling and complaining. Id. at p. 2; Cain 8/29/2008 testimony at p. 19. Cain said he recommended that Aguirre be fired, by "no later than December" because Aguirre did not take direction, lacked professionalism, had no appreciation for governmental power, and

was not at all a good fit at the Commission. C. Cain 7/31/2006 Interview Notes at p. 2; Cain 8/29/2008 testimony at p. 20. Cain said Aguirre had made clear that he really wanted to work in the Trial Unit and did not really want to work with them. C. Cain 7/31/2006 Interview Notes at p. 2. Cain said he found Aguirre to be rude, oppressive, and insubordinate. Id.

Grime also said he had problems with Aguirre's work style. Grime 8/1/2006 Interview Notes at p. 2. Grime said Aguirre was not getting along with Cain, and that Cain generally gets along with most people. Id. Grime further said Cain and Aguirre had disagreements and that Cain can be blunt and was not "touchy/feely," although he thought Cain was not being unreasonable with Aguirre. Id.

Grime added that Aguirre would also raise his voice with both Cain and him. Id.; Tr. Grime testimony at p. 13. Grime said Aguirre was "less willing" than other staff to follow Cain's direction. Id.[63]

Grime recounted that Aguirre came to his office and asked to report directly to Grime. Grime 8/1/2006 Interview Notes Id. at p.1; Tr. Grime 9/2/2008 testimony at p. 12. Grime said he told Aguirre no, that he could not treat Aguirre differently from the other staff attorneys in Grime's branch, it would not be fair, and he did not have time to manage him day to day. Grime 8/1/2006 Interview Notes at p. 1; Tr. Grime 9/2/2008 testimony at p. 12. Grime noted that Aguirre's asking to report directly to Grime after only a few months on the job was unprecedented. Grime 8/1/2006 Interview Notes at p. 2.

Aguirre's second Branch Chief, Bob Hanson, said that "one by one Aguirre alienated the other staff attorneys and the assigned trial attorney on the case, treating them with open hostility, for no valid reason." Transcript of December 5, 2006 Hearing before the Senate Comm. on the Judiciary, S. HRG. 109-898 (hereinafter, Tr. 12/05/2006 Senate Hearing) at p. 15, attached as Appendix 185. Hanson said Aguirre and Assistant Director Kreitman argued about communicating with Irv Pollack and Larry Storch[64] and

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[63] In his interview with an OIG investigator on August 1, 2006, Grime provided an example of Aguirre's being asked to write up a summary of the Pequot case, but never doing so. Grime 8/1/2006 Interview Notes at p. 2. This statement was contradicted by Cain. Tr. Cain 8/29/2008 testimony at pgs. 11-12. Cain indicated he did not know why Aguirre would have been asked to prepare a memorandum on Pequot because the matter was being transferred with him, although Cain noted that Aguirre was directed to prepare other transition memoranda, which Cain claimed Aguirre did not complete. Id. at pgs 12-13. Later in testimony under oath, Grime stated that he had no recollection of asking Aguirre to prepare a transition memorandum for Pequot and noted that he did not see any reason for Aguirre to do so, since Aguirre took the Pequot case with him to his new group. Tr. Grime 9/2/2008 testimony at p. 9. The OIG referred the possible false statement on the part of Grime to the U.S. Attorney's Office for the District of Columbia. However, on September 17, 2008, Assistant U.S. Attorney for the Fraud and Public Corruption Section John D. Griffith issued a declination of prosecution of the matter and, because Grime is no longer an SEC employee, no disciplinary action could be recommended.

[64] Storch and Pollack were retained to assist in Pequot's representation in connection with the SEC investigation. Aguirre Complaint to the Office of Special Counsel dated January 20, 2006 at p. 16. Storch was a law school classmate and close friend of Kreitman. Tr. Kreitman Senate 9/06/2008 testimony at

about Aguirre's run-ins with James Eichner, as well as Kevin O'Rourke. Tr. Hanson 9/5/2006 Senate testimony at p. 39. Hanson said Aguirre was also frustrated with the way Associate Director Berger handled a situation and that Aguirre did not like the fact that Berger was even involved in the investigation. Id. at p. 40.

Hanson said Berger told him that he could not communicate with Aguirre. Id. at p. 55. Hanson said Kreitman and Aguirre were also not communicating well with others, including staff attorney Liban Jama, who Hanson described as "a gentle fellow." Id.

Mark Kreitman, Aguirre's second level supervisor from January 2005 through his termination in September 2005, stated that Aguirre was a hard worker, but unfortunately treated his colleagues who questioned him or his methods with "disrespect, bordering on contempt." Tr. 12/5/2006 Senate Hearing at p. 20, attached hereto as Appendix 185. Kreitman said Aguirre "viewed all supervision, direction and even inquiry concerning his work as unwarranted intrusion." Id.

Kreitman stated that Aguirre was transferred into his group after having some difficulties with his initial supervisors, Cain and Grime. Tr. Kreitman 7/17/2008 testimony at p. 10. Kreitman indicated that Berger informed him that Aguirre had difficulty in taking direction from Cain or Grime because "he thought he was much more experienced than them." In fact, Kreitman noted that prior to Aguirre joining his group, Aguirre had actually complained to him on a number of occasions that he thought Cain was inexperienced and he was unhappy being supervised by him. Id. at p. 11.

Kreitman when Aguirre first joined his group, he asked to report directly to Kreitman, and Kreitman said he told Aguirre he could not favor him and he had to report through Hanson. Tr. Kreitman Senate 9/6/2006 testimony at p. 53. Kreitman said he told Aguirre that he thought very highly of Hanson and although Kreitman said he acknowledged to Aguirre that he had more years of law practice than Hanson did, Kreitman told Aguirre that he had to accept supervision from Hanson because he knew what Aguirre needed to know about how investigations were conducted at the SEC. Tr. Kreitman 7/17/2008 testimony at p. 17. Kreitman said Aguirre was dismissive of Hanson and was very insistent that he be allowed to operate independently. Id. at p. 19.

Kreitman expressed concerns about Aguirre's complaining about matters in the office, noting that although he assigned more support staff to Aguirre than any other staff attorney in the office, Aguirre was still dissatisfied with the level of staffing on his case. Id. at p. 18.

Kreitman also said Aguirre complained bitterly about Eichner, saying that he was a destructionist and very difficult to work with. Tr. Kreitman Senate 9/6/2006 testimony at p. 69. Kreitman said, in fact, the opposite was true. Id. Similarly, Kreitman said

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p. 60. Aguirre claimed that Kreitman instructed Aguirre that he could not speak with Pollack and Storch, thus closing off an avenue for obtaining evidence regarding the scope of the GE-Heller tip to Samberg. Aguirre Complaint to the Office of Special Counsel dated January 20, 2006 at p. 16.

Aguirre had an altercation with O'Rourke after Aguirre prepared a draft letter in which he made a representation about Commission policy, and O'Rourke responded that it was not necessary to address Commission policy in the context of the letter. Id. at pgs. 70-71. Kreitman maintained that Aguirre's letter was not accurate. Id. Kreitman said he tried to smooth the waters by saying to O'Rourke in a May 25, 2005 e-mail, that Aguirre was new at this, and to give him some slack. Id. at p. 71.

Kreitman further said Aguirre complained about his inability to subpoena Mack and the supervisory structure generally. Id. at p. 83. Kreitman stated that Aguirre said he could not work in an environment in which "he was required to report to multiple levels of hierarch supervision." Id.

Associate Director Berger stated that both Aguirre and Charles Cain had raised issues to him concerning an action memorandum, and that Aguirre accused Cain of not wanting to provide information to the Commission. Tr. Berger Senate 11/2/2006 testimony at p. 9. Berger also recalled that Aguirre had issues with Cain on the Fannie Mae investigation. Id. at p. 10. Berger said Aguirre came to him and asked if he could report directly to Grime, and Berger said he told him "that was not possible." Id. at pgs. 10-11.

Berger recalled that after only two weeks of "try[ing] to work this out" with Grime and Cain, Aguirre came to him and said he wanted to move to Kreitman's group because he knew Kreitman and liked him and felt he could work well with him. Id. at pgs. 11-12. Berger said he told Aguirre that there seemed to be issues surfacing about him having difficulty taking supervision, and Aguirre assured him that it was just a personality issue. Id. at p. 12. Berger said he told Aguirre that there was no opening in Kreitman's group, but that he would take the request under consideration and asked Aguirre "to try and with [Cain and Grime.]" Id. A week later, Berger said Aguirre came back and asked again to be moved. Id. Berger said someone in Kreitman's group was leaving and Kreitman "said he would be fine with that," and so Berger moved Aguirre. Id. at p. 13.

Berger mentioned that Aguirre had gotten into a dispute with his first Assistant Director (Grime), who felt Aguirre was drawing a conclusion not based on the facts. Id. at p. 24. Berger said when he transferred Aguirre, he was concerned about his ability to be supervised and said to Aguirre, "I hope in this new atmosphere we're not going to have the issue again with not taking supervision." Id. at p. 60. According to Berger, Aguirre "assured [him] that that would be the case." Id.

Berger said, at one point, Hanson would come in at night to Berger and complain about Aguirre, and that this occurred a couple times of week. Id. at p. 94. Berger said Hanson would complain and vent about getting Aguirre to share information, getting him to run things by his supervisors, the fact that Aguirre was dumping a lot of work on the interns, and the fact that a lot of documents were coming in and Hanson did not have

comfort that these documents were being reviewed. Id. at p. 95.[65] Berger said he was concerned that Hanson would leave because of Aguirre and the fact that his job had become so difficult and burdensome. Id. at p. 97.[66]

Enforcement Director Thomsen stated that initially Aguirre did not like his supervisors and wanted to be reassigned. Tr. Thomsen 9/8/2006 Senate testimony at p. 21. Thomsen said she was initially against reassigning Aguirre it because people do not get to decide where they want to work. Id. However, she said Berger suggested reassigning Aguirre to Kreitman's group because Kreitman had been Aguirre's professor and was a reference for his coming to work in the Division. Id. Thomsen said Berger thought he was putting Aguirre in the ideal setting for him, with someone (Kreitman) he already knew and liked and respected. Id. at p. 22.

Thomsen said one of the reasons Aguirre switched to Kreitman's group was associated with his difficulty in working with others. Tr. Thomsen 4/28/2008 testimony at p. 8. She said after Aguirre began working in Kreitman's group, she heard many more times that he was hardworking and dedicated, but very difficult to work with, both with peers and supervisors. Id. at p. 10. She said she heard this complaint from Berger, Kreitman, Cain, Hanson, maybe Grime and perhaps some peers. Id.

Thomsen said she never talked to Grime or Cain about the problems Aguirre had before he was reassigned, although after the reassignment; both of them mentioned that "he was very very difficult to work with." Tr. Thomsen 9/8/2006 Senate testimony at p. 22.

Thomsen said Berger, Kreitman and Hanson all told her that Aguirre's peers did not want to work with him. Id. at p. 32. Thomsen also said Foster told her at Foster's going-away party that Aguirre was difficult, although that was not the first time she had heard about difficulties with Aguirre. Id. at p. 33. Thomsen said she understood that Berger thought Aguirre was difficult to work with from early in Aguirre's tenure beginning with his request to transfer. Id. Thomsen further said she understood that Kreitman and Hanson had counseled Aguirre on his having difficulty reporting to supervisors. Id. at pgs. 34-35. She said Kreitman, Hanson and Berger told her this over time. Id. at p. 35.

Thomsen said there were red flags about Aguirre from the start, based on his difficulty working in a governmental structure and operating as if he were a private attorney but not appreciating how to operate as a government attorney, where one has a lot of restraints. Id. at p. 39. Thomsen said she never heard the particular words, "loose

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[65] Hanson recalled at least one specific conversation he had with Berger about Aguirre on August 1, 2005, and said "[i]t wouldn't surprise me" that Berger would say that Hanson would come into his office frequently to complain about Aguirre. Tr. Hanson 7/15/2008 testimony at p. 76.

[66] When asked about Berger being concerned that Hanson would quit rather than have to deal with Aguirre, Hanson replied, "I don't know about that, but it could be true, it could be true . . . it was a very frustrating experience." Tr. Hanson 7/15/2008 testimony at p. 76.

cannon," used to refer to Aguirre, but she said this term is consistent with what she heard about Aguirre over the course of his employment with the SEC. Id. at p. 81. Thomsen said she heard Aguirre did not go through chain of command, and that he was belligerent, easy to anger and difficult. Id.

3. Evidence from Co-Workers on Their Conflicts with Aguirre

Several co-workers of Aguirre also stated that they had conflicts with him. For example, Kevin O'Rourke, an Assistant Chief Litigation Counsel in Enforcement's Trial Unit, who was involved in the Pequot investigation, said that, as time developed, he started having questions about Aguirre's approach to things. Notes of OIG Interview with Kevin O'Rourke of September 18, 2006 (hereinafter, "O'Rourke 9/18/2006 Interview Notes") at p. 2. O'Rourke said he most vividly recalled that Associate Director Berger had laid down certain rules about document issues during a discussion with Aguirre in Kreitman's office. Id. Thereafter, in a discussion with O'Rourke, Aguirre said, "I'm not really interested in what Paul Berger has to say." Id. O'Rourke said that, at this point, he started questioning Aguirre's approach, although he thought Aguirre might be letting off steam. Id.

O'Rourke also described meetings he attended with Aguirre in Kreitman's office about ongoing document issues. Id. at p. 3. According to O'Rourke, they would conclude to do something a particular way. A week or so later, they would meet again and it would be clear to O'Rourke that Aguirre had not done what had been agreed to. Id. O'Rourke said he realized that "this guy was going to do what he wanted to do." Id. O'Rourke added that, over time, he began to feel that Aguirre's language and approach to certain matters were not of a manner with which O'Rourke was comfortable. Id. O'Rourke said he eventually concluded that Aguirre was a "loose cannon." Id. There is a documentary record of O'Rourke commenting on Aguirre's performance in May 2005, stating as follows: "Gary is very dedicated and quite skilled. However, he can be somewhat of a loose cannon and needs to be supervised." May 2005 comments attached hereto as Appendix 186.[67]

Senior Counsel James Eichner stated that Aguirre was prone to conflicts with his supervisors and colleagues. Eichner 9/27/2006 Interview Notes at p. 3. Eichner said he wanted to be taken off the Pequot case because Aguirre "drove him crazy and was impossible to work with." Id. Eichner also expressed the view that Aguirre's relationships with various counsel or other parties in the case were "overly and unnecessarily contentious and hostile." Tr. Eichner 9/1/2006 testimony at p. 33. Hanson confirmed that Eichner complained about Aguirre "daily" for "more than a month," specifically, that Aguirre "wasn't sharing information," and "the case was out of control. Tr. Hanson 7/15/2008 testimony at p. 30. Hanson said Eichner expressed to him that Aguirre "didn't appreciate Jim [Eichner] being involved with the [Pequot] case." Id. Hanson said Eichner began complaining about Aguirre on a daily basis shortly after

[67] Hanson described "O'Rourke as a "very good lawyer" and a "very, very smart guy." Transcript of testimony of Robert Hanson on July 15, 2008 (hereinafter, Tr. Hanson 7/15/2008 testimony) at p. 28.

Eichner began working on the case and well before August 2005. Id. at p. 31. (Eichner stated he first became involved in the Pequot case in May or maybe June 2005. Tr. Eichner 9/1/2006 testimony at p. 17.)

Eichner also stated that there was increasing friction between Aguirre and Kreitman and Hanson over time. Id. at p. 134. Eichner said his office was located across from Hanson's office and, often times, he would see Aguirre go in to Hanson's office and close the door and Eichner would hear yelling. OIG Eichner 9/27/2006 Notes at p. 3. Eichner said it was always Aguirre who was yelling and very wound up. Id.

Eichner said towards the end of August 2005, he was dealing with Aguirre on one lingering issue (about the insider trading part of the case), and Aguirre was driving him crazy. Aguirre sent Eichner some nasty e-mails, and according to Eichner, things then "came to a head." Id. at p. 4. Eichner further stated that Liban Jama and he met with Kreitman and Hanson on August 23, 2005, and during that meeting, Eichner expressed his desire not to work with Aguirre. Id.[68]

4. Response from Aguirre to Claims that He Was Difficult to Work with

With regard to the claim that he was difficult to work with, Aguirre stated that he worked with over 20 staff members, and sought assistance from five other offices and all his relationships were cordial and productive. Responses by Aguirre to Questions from Senator Grassley at p. 25. He stated that he believed that his relationships with all of these staff members were cordial and productive. Id.

Aguirre also noted that he received a card from one of the interns in Kreitman's group, [redacted], which said that she enjoyed working with him during the summer, and thanked him for making her experience such a rewarding one. Id. at p. 26; copy of [redacted] note dated August 6, 2005 attached hereto as Appendix 187. Aguirre also mentioned the recollections of [redacted] who stated that her office was immediately next door to Aguirre's office and she never heard him shout or raise his voice. Tr. Eggert 4/18/2008 testimony at p. 10.

With respect to Kevin O'Rourke, Aguirre said he could think of no encounter with O'Rourke that could have been a contributing factor to the decision to fire him; Aguirre stated that he attended several meetings with O'Rourke and consulted with him. Aguirre 4/6/2006 Response to Wheeler at p. 4. According to Aguirre, they agreed on most, but not all, matters, and the exchanges were generally cordial. Id. It is also worthwhile to note that during the same time period in which O'Rourke formed his conclusions about Aguirre, he was involved in an EEO matter regarding Aguirre, and O'Rourke failed to disclose this fact to Aguirre, while he continued to work with him.

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[68] While Jama said Eichner indicated he told Kreitman and Hanson that Eichner did not want to work with Aguirre any more, Jama said he was not present during any such discussions. Jama 10/12/2006 Interview Notes at p. 3.

E-mail from Kevin O'Rourke to James Clarkson dated March 15, 2005 attached hereto as Appendix 188.

In terms of the other staff, Aguirre said he knew of no problem with any staff attorney that could have been a factor in his termination, although that was not to say there was never an unpleasant communication. Aguirre 4/6/2006 Response to Wheeler at p. 4. As an example, Aguirre referenced Eichner's e-mail, suggesting that Aguirre change his last name because his brother, a securities attorney, had questioned the credentials of Christopher Cox to serve as the SEC's new Chairman. Responses by Aguirre to Questions from Senator Grassley at p. 27; June 9, 2005 e-mail from Eichner to Aguirre attached hereto as Appendix 179. Aguirre also noted that it was after he complained about preferential treatment for Mack that Eichner began to have problems with him. Tr. Aguirre 8/26/2008 testimony at p. 208.

Aguirre did acknowledge that he was critical of Eichner's handling of two matters involving the same opposing counsel but provided explanations for his criticism. Response by Aguirre to Questions from Senator Grassley at p. 32. One issue involved Eichner's problems concerning taking a witness testimony, in which the testimony had to be scheduled, rescheduled and unscheduled because of Eichner's changing calendar conflicts. Id. at p. 34; e-mail from dated August 24, 2005 from Aguirre to Hanson and Kreitman about scheduling difficulties and follow up e-mails dated August 26, 2005, between Hanson and Aguirre.

The second issue involved back-up tapes that Aguirre wanted to obtain. Response by Aguirre to Questions from Senator Grassley at p. 34. Aguirre said Eichner asked questions in a phone call that gave the impression that the staff lacked confidence in their position. Id. at p. 36. According to Aguirre, both Hanson and Kreitman supported Aguirre's, rather than Eichner's, position. Id. Aguirre claimed that before he left on vacation, he circulated an e-mail describing Pequot pending matters, which Jama and Eichner were supposed to follow through on, but did not progress an inch after he left. Id. Aguirre stated that he left Jama with a draft subpoena for CSFB to be finalized, which required one hour of Jama's time, but was not sent out until Sept. 1, 2005. Id. at p. 37. Aguirre referenced an e-mail he sent to Hanson on August 26, 2005, asking, "Has a decision been made on the CSFB subpoena and expressing that "these docs are critical . . . if we are to have any chance in getting over what I see as a 9' bar." E-mail dated August 26, 2005, from Aguirre to Hanson, attached hereto as Appendix 189.

Aguirre also stated he knew of no occasion when he expressed dissatisfaction with the SEC's supervisory structure, except for comments made while serving on official SEC committees or focus groups examining diversity problems at the SEC. Aguirre 4/6/2006 Response to Wheeler at p. 5. Aguirre said he did persistently question a specific decision made by his supervisors to give Mack special treatment. Id. Aguirre responded to the claim that he ignored the chain of command by saying he did go outside the chain of command when he questioned the special treatment senior staff were giving Mack. Id. at p. 6. Aguirre said, outside of this, his communications with senior staff and

his conduct conformed to his supervisors' instructions and SEC protocols, regarding the chain of command, as expressed to staff. Id.

Aguirre said he sought the approval of his superiors and followed their guidance on every significant aspect of the Pequot investigation, even where he disagreed with them. Response by Aguirre to Senator Specter's Questions in Light of Testimony of Thomsen, Berger, Kreitman and Hanson (hereinafter, "Aguirre Response to Senator Specter's Questions") at p. 2. Aguirre cited numerous e-mails in support of this statement, including a March 14, 2005 e-mail he sent Hanson with a copy to Kreitman, forwarding several documents for review and approval, that begins as follows:

> First, I recognize that it is your responsibility to make the decisions in this case. I also know both of you are very busy and this is a new matter for you. However you decide to proceed, I will accept your guidance. In this spirit, for the reasons below, I believe the current draft confirming last Thursday's call should not be sent in its current form.
>
> * * *
>
> For these reasons, I think the language in my proposed draft of March 11 better addresses the issues than the current one. But if you guys disagree with me, I will carry out your instructions with alacrity. E-mail from Aguirre to Hanson, dated March 14, 2005, attached hereto as Appendix 190.

While Aguirre acknowledged discussing with Grime the possibility of reporting directly to him, he stated that he only raised this issue after [Thomsen's Counsel] Donna Norman requested it and described Cain as a control freak. Tr. Aguirre 4/29/2008 testimony at p. 34. Aguirre said while Grime said no to his request to report directly to him, Grime was "congenial" about it. Id. at pgs. 35, 38. With respect to the contention that he requested that he report directly to Kreitman, Aguirre stated he never requested that he report directly to Kreitman, just that he be transferred to Kreitman's branch. Responses by Aguirre to Questions from Senator Grassley at p. 43.

F. Statements About Aguirre Having Conflicts with Opposing Counsel

1. Evidence from Co-Workers About Conflicts with Opposing Counsel

Several of Aguirre's colleagues stated that, at times, Aguirre's interaction with opposing counsel became very contentious.

Eichner stated that Aguirre's relationship with various counsel or other parties in the case seemed to be overly and unnecessarily contentious and hostile. Tr. Eichner 9/1/2006 testimony at p. 33. Eichner said Aguirre had a deep distrust of all the counsel on the other side that Eichner felt was unwarranted. Id.

Eichner also said the second Samberg testimony [in which Aguirre was the lead questioner] was unnecessarily contentious and he felt Aguirre brow-beat the witness unnecessarily. Id. at p. 35. According to Eichner, the relationship between Aguirre and counsel for Pequot was fairly contentious. Id. at p. 58. Eichner said Aguirre's practice was to ask for more than he needed in a subpoena and then negotiate it down, while Eichner tried to make the subpoenas narrow to capture only the documents he needed. Id.

O'Rourke also expressed concern about Aguirre's style vis-à-vis opposing counsel. He referenced an e-mail in which Aguirre complained about not getting documents in the context of testimony being scheduled for the following day. O'Rourke 9/18/2006 Interview Notes at p. 2; e-mail dated April 28, 2005 from Aguirre to O'Rourke, Berger, Kreitman and Hanson attached hereto as Appendix 191. O'Rourke said Aguirre used phrases like, "This case needs more muscle," and referred to the law firm representing Pequot's "obstructive tactics." O'Rourke 9/18/2006 Interview Notes at p. 2. In O'Rourke's view, a large law firm going slowly is not necessarily obstruction of justice, although it can be frustrating. Id. O'Rourke added that, in his view, the remedy was to postpone the testimony if there were serious deficiencies in the document production. Id. O'Rourke stated that he was concerned when read Aguirre's e-mail. Id.

Stephen Glascoe said Aguirre did have problems with opposing counsel on occasion when Aguirre felt they were not providing timely responses to his requests for information, and Glascoe said he thought Aguirre was somewhat inflexible at times. Glascoe 11/15/2006 Interview Notes at p. 4. Glascoe said that in the Pequot investigation, Aguirre was asking for lot of information. Id. According to Glascoe, Aguirre wanted the information "now," and as a result, Aguirre ran into some problems with opposing counsel. Id.

Glascoe also stated that there were some tense moments when Aguirre was questioning Samberg in his first session of testimony. Id. at p. 5. Glascoe said he could see that Aguirre was visibly getting agitated, although Glascoe did not feel that Aguirre's questioning was out of line. Id. In Glascoe's opinion, nothing during the first Samberg testimony got out of control. Id. However, he noted that the situation was tense, which was probably due to frustration more than anything else. Id. [69]

Liban Jama likewise described the Samberg testimony as "pretty tense." Transcript of Testimony of Liban Jama before Senate Committee on October 11, 2006 (hereinafter, "Tr. Jama 10/11/2006 Senate testimony") at p. 32. He referred to it as "pretty unusual" in terms of testimony he has sat in on at the Commission. Id. at p. 34.

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[69] Thomas Conroy, an Enforcement Market Surveillance Specialist, who also worked on the Pequot investigation and attended Samberg's testimony, also indicated that Aguirre got frustrated in testimony. Interview with Thomas Conroy of November 16, 2006 (hereinafter, "Conroy 11/16/2006 Interview Notes") at p. 5.

Jama viewed Aguirre as being "very aggressive" and said at certain points he lost his composure and was a "tightly wound guy." Id.

2. Complaints from Outside Counsel About Aguirre

There were also instances when opposing counsel complained about the manner in which Aguirre interacted with them.

a. Complaint Raised by Morgan Stanley Chief Legal Officer Gary Lynch

Gary Lynch, the Executive Vice President and Chief Legal Officer of Morgan Stanley (and former Director of Enforcement at the SEC) described a telephone call he had with Aguirre in June 2005, regarding the Pequot investigation where Aguirre asked Morgan Stanley to keep a certain matter confidential, as follows:

> So I said to him that I understood that he had asked Mr. Patalino to keep the investigation confidential. And I was trying to understand, as Mr. Patalino was trying to understand, what that meant in this context. And he said "I ask you to keep it confident." . . . And I said -- . . . I know you're saying that, but what does that mean? Does that mean it can be -- that I cannot share that with other people here at Credit Suisse?" And he said "I ask that you keep the fact of the investigation confidential." And I said "I hear you saying that, but Mr. Aguirre I don't understand what that means. Does that mean that I'm not free to share the fact that there is an investigation with" -- and I can't remember if I said Mr. Mack's name or said the subject of your request for information in e-mails. And he said "I ask you to keep the investigation confidential." And I said "You keep saying that. And I've been doing this for a while, both on the SEC side and on private practice side, and I still don't know what you mean." And he said "You've asked the same question four times, and I've answered it four times. And as far as I'm concerned, the conversation is over," or words to that affect. And I think I said something like "I still don't understand what you mean." And the conversation ended abruptly thereafter. Transcript of Testimony of Gary Lynch before OIG Investigators on March 5, 2007 (hereinafter, "Tr. Lynch 3/5/07 testimony") at pgs. 15-16.

Lynch said he thought Aguirre's demeanor during the conversation was "rude and unprofessional." Id. at p. 16. Lynch also said he did not raise his voice and the call ended abruptly and, although he could not recall if Aguirre hung up on him, he said he did not hang up on Aguirre. Id. at pgs. 16-17.

Lynch stated that he then called Associate Director Paul Berger and told him that he thought Aguirre dealt with him in a rude and unprofessional manner. Id. at p. 25.

Lynch said Berger apologized for Aguirre and said he was new to the staff. Id. Lynch said Berger told him that "he could share information about the investigation with anyone who he felt was appropriate." Id. at p. 26.

Patrick M. Patalino, Managing Director for Morgan Stanley, who reported to Lynch, stated that he was also on the telephone call between Aguirre and Lynch. Transcript of Testimony of Patrick Patalino before OIG Investigators on April 24, 2007 (hereinafter, "Tr. Patalino 4/24/07 testimony") at p. 40. Patalino described Aguirre's tone as "very aggressive and angry" and "certainly bordering on shouting." Id. at pgs. 40-41. Patalino noted that Lynch asked for the name of Aguirre's Branch Chief, and Aguirre gave him all the names of his supervisors up to Steve Cutler (then-Director of Enforcement). Id. at p. 44. According to Patalino, Lynch said, "very good, and the call ended." Id. Patalino said Aguirre did not hang up on them. Id. at pgs. 44-45.

Patalino said that contrary to a document written by Gary Aguirre, Patalino did not recall saying that he would prefer that the matter be kept confidential. Id. at p. 51. Patalino also said that Lynch did not act aggressively, but, in fact, kept his composure. Id. at p. 52. Patalino noted that during the conversation, Aguirre said, "I don't have to answer to you," which Patalino thought was particularly rude. Id. at p. 55.

Patalino said that after the call, Lynch called Berger and, while he did mention that he thought Aguirre was unprofessional, the main purpose of the call was to get clarification on the extent of the confidentiality Morgan Stanley needed to maintain. Id. at pgs. 47-48. Patalino said he understood that Berger clarified the confidentiality part and they received comfort that they were able to discuss the investigation in the normal course with other parties. Id. at p. 49.

Berger testified that Lynch had called him and in reference to Aguirre said, "Who is this guy?" and stated, "The guy just hung up on me." Berger Senate 11/2/2006 testimony at p. 207. Berger said Lynch asked him if the Commission had a policy for instructing a private party to keep something confidential, and Berger replied, "there is no such policy." Id. Berger said he talked to Kreitman and said, "you've got to get this guy on the reservation," and that "he can't just scream and hang up on people." Id. at p. 208. Berger said this was also an example of Aguirre inaccurately stating Commission policy to outside counsel. Id. at pgs. 208-209.

b. Complaint Raised by Pequot Counsel Audrey Strauss

Peter Bresnan, the Enforcement Deputy Director, described a meeting he attended with attorneys for Pequot in June 2006, six months after Aguirre was terminated. Notes of OIG Investigator Interview with Peter Bresnan of August 22, 2007 (hereinafter, "Bresnan 8/22/2007 Interview Notes") at p. 2. Bresnan recalled that Audrey Strauss of Fried, Frank, the primary law firm that represented Pequot was present, as well as Stanley Sporkin and Irving Pollack, who were also retained by Pequot, and Walter Ricciardi, Mark Kreitman, Bob Hanson and perhaps Jim Eichner from the SEC. Id. Bresnan said

the message Strauss conveyed at the meeting was that Aguirre's behavior was "the most unprofessional and outrageous conduct she had ever witnessed by an SEC attorney." Id. Bresnan said he was totally stunned when he heard the types of things Aguirre had done. Id. Bresnan recalled Strauss mentioning unreasonable demands for document production and the timing of witness testimony, as well as accusing counsel of obstruction or threatening them with obstruction charges. Id. According to Bresnan, there was probably a half-hour litany consisting of a point-by-point recitation of events. Id.

When asked what response the SEC gave to Strauss's concerns, Bresnan replied that they mostly listened. Id. Bresnan said he had no reason to disbelieve what Strauss was saying and that she seemed credible. Id. While Bresnan recognized that Strauss was representing her client, he did not think she was making up stories about Aguirre. Id. Bresnan stated that he had never had a discussion like this about an SEC attorney before – nothing even came close. Id. Bresnan acknowledged that he did not really try to verify what Strauss had said about Aguirre at the meeting, as most of the conversations took place between Aguirre (who was gone) and Strauss or her firm. Id.

Bresnan provided contemporaneous notes of the June 2006 meeting with Strauss that described her concerns regarding improprieties in the investigation. Notes of Peter Bresnan dated June 28, 2006 attached hereto as Appendix 192. Bresnan's notes indicated that Strauss said she had four four-inch binders of communications with Aguirre, which would evidence his unreasonable demands and recriminations. Id. According to Bresnan's notes, Strauss mentioned as an example that they had to prepare a huge privilege log that had 41,000 entries. Id. Further, the notes indicated that Strauss said Pequot spent over $35 million in responding to the investigative demands. Id. In addition, according to Bresnan's notes, Strauss said nine individual professionals were subpoenaed to testify even though they had no association with the trades at issue. Id. Strauss said Aguirre cancelled all but one of the nine testimonies, but did not do so until one day before the testimony would take place. Id. Bresnan's notes then stated that Aguirre repeatedly threatened subpoena enforcement actions. Id.

Walter Ricciardi, former Enforcement Deputy Director, also attended the meeting with Strauss and recollected that she felt Aguirre had gone way overboard in terms of both the accusations he made and the volume of documents he requested. Notes of OIG Investigator Interview with Walter Ricciardi of June 20, 2007 (hereinafter, "Ricciardi 6/20/2007 Interview Notes") at p. 2. According to Ricciardi, Strauss talked about Aguirre demanding documents and testimony and then cancelling testimony at the last minute and indicated she felt "jerked around" and mistreated. Id.

Eichner also recalled attending the meeting, stating that Strauss said Aguirre threatened them with taking testimony of lawyers and unreasonable discovery demands; and she and her firm were intimidated from seeking redress on things. Tr. Eichner 11/14/2006 testimony at pgs. 121-2. Eichner said Strauss stated that they were subject to unrealistic discovery demands and that Aguirre had the basic facts wrong. Id. Eichner said the presentation rang a little true to him. Id. at p. 122.

3. Aguirre's Response to Claims About his Conflicts with Opposing Counsel

With respect to the claim that he engaged in conflicts with opposing counsel, Aguirre said he was dealing with more than 50 defense attorneys and only knows of three attorneys with whom he had an issue. Responses by Aguirre to Questions from Senator Grassley at p. 14. Aguirre acknowledged that there were three occasions that he knew of when opposing counsel went to one of his supervisors to raise an issue. Tr. Aguirre 4/29/2008 testimony at p. 138. Aguirre said that one of these occasions was when opposing counsel complained that he required them to come to Washington, D.C., instead of flying out to San Francisco. Id. Aguirre said he told his supervisor about the issue, and his supervisor backed him up and said the attorney had to come to D.C. Id. at p. 139. Aguirre said in the second situation, the GE case, he sent out a subpoena and the attorney was unhappy about his decision not to continue to negotiate with them and complained to his supervisors. Id. Aguirre said Hanson was very dismissive of the attorney's complaint. Id.

Aguirre stated that the third conflict involved a conversation with Patrick Patalino and Gary Lynch, although Aguirre stated that there were two telephone calls involving this matter. Responses by Aguirre to Questions from Senator Grassley at p. 14; Tr. Aguirre 8/26/2008 testimony at p. 121. Aguirre indicated that in the first call with Patalino, he concurred with Aguirre's request to keep the issuance of a subpoena confidential. Id.; notes of Gary Aguirre 6/6 conversation with "P" stating "I also asked that investigation be kept confidential. He said 'that's what we want to [sic]'" attached hereto as Appendix 193. A couple of days later, according to Aguirre, he spoke with Lynch and the conversation was less cordial. Id. at pgs. 122-123. In that conversation, Aguirre asked that they keep the issuance of the subpoena confidential, and Lynch then asked if he should keep this matter confidential from John Mack and Aguirre said, no, just keep it confidential. Responses by Aguirre to Questions from Senator Grassley at p. 14. According to Aguirre, Lynch then asked the same question two additional times, and Aguirre said I have answered the question three times, and Lynch left the call. Id. at pgs. 14-15; notes of Gary Aguirre conversation with Lynch, stating Lynch "asked if request included John Mack . . . 4 times," and "I said I had just asked for it to be kept confidential" attached hereto as Appendix 194. Aguirre said Lynch called Berger, and Kreitman came in to Aguirre's office, and Aguirre explained what happened. Id. Aguirre said Kreitman never mentioned that Aguirre mishandled the call in any way, and that Kreitman told him later he discussed the matter with Berger, and Berger was fine with the way Aguirre handled the call. Id.

Aguirre also noted that as far as being tough with opposing counsel, Kreitman set the standard or model in terms of his approach of being aggressive with opposing

counsel, particularly with Audrey Strauss.[70] Tr. Aguirre 4/29/2008 testimony at p. 140. According to Aguirre, Hanson told him that Kreitman was very aggressive in examinations and, if Aguirre did an examination, Kreitman might come into the room, jump into the middle of it, dominate it, get aggressive, and Aguirre might think about diving under the table. Id. at p. 141. Aguirre said he never got feedback from his supervisors that he was being too aggressive toward opposing counsel. Id. In fact, he said, none of them ever came to his testimony, although they went to testimony taken by other attorneys, such as [redacted]. Id. at p. 142.

Aguirre further pointed out that with the full knowledge of his supervisors, he handled numerous matters in connection with the Pequot investigation over an extended period of time with many respected members of the securities regulation bar, including three former Directors of Enforcement. Aguirre 4/6/2006 Response to Wheeler at pgs. 11-12. He also noted that he negotiated an agreement on the SEC's behalf without the presence of his Branch Chief, his Assistant Director, or any other SEC attorney, and was allowed to meet with the FBI and the AUSA in connection with a possible criminal investigation without any of his supervisors in attendance. Id. at p. 12. Aguirre therefore reasoned that he would not have been allowed to handle these delicate matters without supervision if his supervisors believed he was interacting improperly with opposing counsel. Id.

G. The Documentary Evaluation Record of Aguirre and His Perception at Work

1. Written Performance Plan and Evaluation

Although, as discussed above, numerous individuals have come forward to express complaints about Aguirre's performance, it is significant to note that in contrast to this testimonial evidence, all written evaluations Aguirre received until very late in his tenure at the SEC were uniformly positive. Testimony of Gary Aguirre before U.S. Senate Committee on the Judiciary, Part III dated December 5, 2006 at p. 6 attached hereto as Appendix 176.

Aguirre began work with the SEC in September 2004, and he clamed that shortly thereafter, on November 1, 2004, he received his first evaluation completed by his initial immediate supervisor, Charles Cain. Aguirre Complaint to the OSC dated January 20, 2006 at p. 27. According to Aguirre, in the November 1, 2004 evaluation, Cain certified his performance as acceptable. Id. at p. 27; U.S. SEC Performance Plan and Evaluation for Gary Aguirre signed on November 1, 2004 attached hereto as Appendix 182. Cain disputed this assertion of Aguirre, stating that he did sign the document in question, but was just signing off that he was giving Aguirre a performance plan with specific elements, and at no point did he certify that Aguirre was performing acceptably. Tr. Cain

[70] Aguirre noted that at one point during the investigation, Strauss had to apologize to Aguirre and Eric Ribelin for exaggerating the extent of the information she claimed she had to review to comply with a document request. Tr. Aguirre 8/26/2008 testimony at pgs. 233-234.

8/29/2008 testimony at pgs. 28-29. Cain acknowledged, however, that he never had any formal conversations with Aguirre about his performance. Id. at p. 30.

It is not disputed that on June 1, 2005, Aguirre's second-level supervisor Mark Kreitman conducted a performance assessment certifying Aguirre's performance as "acceptable" under each of the following four boxes: "knowledge of field or occupation," "planning and organizing work," "execution of duties," and "communication." Aguirre Complaint to the OSC dated January 20, 2006 at p. 27; U.S. SEC Performance Plan and Evaluation for Gary Aguirre signed on November 1, 2004 attached hereto as Appendix 182; Tr. Kreitman Senate 9/6/2006 testimony at pgs. 97-98.

2. Unofficial Evaluation

Aguirre also noted that on June 14, 2005, he received "an unofficial evaluation" of his performance, when his second-line supervisor, Kreitman gave him the unofficial "Perry Mason" award for his work on the Pequot investigation. Copy of Perry Mason Award attached hereto as Appendix 195.

Kreitman described this "award" as "very tongue in cheek," stating that he presented a Xerox picture of Raymond Burr (who played the part of Perry Mason) to Aguirre in a highly formalistic and kind of pompous way as though it were a real award. Tr. Kreitman 7/17/2008 testimony at p. 26. Kreitman said "it was kind of a joke, really" and "not an official SEC award." Id. at p. 27. Kreitman acknowledged, however, that the picture did represent his appreciation for Aguirre's enthusiasm and hard work. Id. at p. 26.

3. How Aguirre Was Perceived at Work

The evidence shows that Aguirre was viewed at work in a positive manner when he initially joined Kreitman's group and that, over time, Aguirre's supervisors' perception of him worsened. A fellow Enforcement senior counsel who worked for both Kreitman and Hanson, recalled that Kreitman introduced Aguirre at a staff meeting saying that Aguirre had been his student and used him as a mentor in writing his law review article, specifically mentioning, "we're lucky to have him." Tr. Witness 5 4/2008 testimony at pgs. 9-10. Another colleague and direct report to Kreitman stated that Kreitman was "very very high" on Aguirre when he brought him over to Kreitman's group, and recalled that Kreitman was talking about Aguirre joining their group, as if "it was the biggest coup ever." Tr. Witness 6 4/2008 testimony at p. 13. Fellow Senior Counsel [redacted] who worked for both Hanson and Kreitman, also recalled Kreitman introducing Aguirre at a staff meeting, and stated that Aguirre was initially held in high regard, noting that he had been a student of Kreitman. Tr. [redacted] 4/18/2008 testimony at p. 9.

Market Surveillance Specialist Thomas Conroy, who worked on the Pequot investigation, stated that shortly after Aguirre was transferred to Kreitman's group,

Kreitman made a comment that was complimentary of Aguirre, indicating that Kreitman was instrumental in bringing Aguirre to the Commission. Interview with Thomas Conroy of November 16, 2006. (hereinafter, "Conroy 11/16/2006 Interview Notes") at p. 4.

Bob Hanson also acknowledged that it was considered "a good thing" when Aguirre joined Kreitman's group and said he thought Kreitman "was enthusiastic about it." Tr. Hanson 7/15/2008 testimony at p. 11.[71]

Senior Counsel Liban Jama, who joined the SEC in June 2005, stated that when he first started, he thought Aguirre was a Branch Chief because of his demeanor and the way he comported himself. Tr. Jama 4/24/2008 testimony at p. 57. Jama said there was no sense that Aguirre had to consult with anybody. Id. Jama also stated that he also got that sense because of the way other people interacted with Aguirre. Id. at p. 58.

In late May 2005, Kreitman became involved in a contentious dispute between Aguirre and Kevin O'Rourke. On May 25, 2005, O'Rourke and Aguirre engaged in a contentious e-mail exchange, in which O'Rourke questioned a statement Aguirre made in a letter to outside counsel. E-mail string between O'Rourke and Aguirre dated May 25, 2005 attached hereto as Appendix 196. In a long e-mail exchange, Aguirre responded to O'Rourke, stating, "Your advisory comments were invited, but not your insults," to which O'Rourke responded, "I didn't realize that you were the sensitive type." E-mail from Aguirre to O'Rourke dated May 25, 2005 attached hereto as Appendix 196. Kreitman was copied on the e-mail string and responded to O'Rourke, as follows:

> 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 find grating. E-mail from Kreitman to O'Rourke, dated May 25, 2005, attached hereto as Appendix 197.

O'Rourke responded to Kreitman's e-mail, stating "I have already given him a huge amount of slack, and will continue to do so. However, he has shown signs of being a loose cannon." E-mail from O'Rourke to Kreitman dated May 25, 2005, attached hereto as Appendix 197. Kreitman responded with a one-word e-mail, stating, "mortar," and O'Rourke replied "I hope his correspondence is being reviewed and mortar applied before it goes out." E-mail between O'Rourke and Kreitman dated May 25, 2005 attached hereto as Appendix 197. When asked about his use of the word "mortar" in the

[71] Hanson noted that he had not spoken with either Cain or Grime at all about Aguirre's performance or conduct until August 2005, long after Aguirre joined the Kreitman group. Tr. Hanson 7/15/2008 testimony at pgs. 12-14.

e-mail, Kreitman said he was making a joke since a mortar is a big cannon, and he was saying that Aguirre was a very large loose cannon. Tr. Kreitman Senate 9/6/2006 testimony at p. 73. Kreitman further said he expressed to Aguirre that he wanted O'Rourke to work on the Pequot case, and he did not want the difficulties between Aguirre and O'Rourke to get to a point where O'Rourke would no longer be interested in working on the case. Tr. Kreitman 7/17/2008 testimony at p. 35. Kreitman referenced the fact that he used the term "grating" in the e-mail quoted above to refer to Aguirre and noted that he was not defending Aguirre in this e-mail, but was placating O'Rourke. Id.

David Anders, the Assistant U.S. Attorney with whom Aguirre worked on the Pequot case, and for whom Aguirre gave a presentation in June 2005, stated that he received a phone call from Mark Kreitman, who indicated he was concerned about how the investigation was going and wanted to know if Anders was happy with the progress of the investigation. Anders 3/6/2007 Interview Notes at p. 8. Anders indicated that based on hindsight and Kreitman's tone, Kreitman was obviously concerned with what Aguirre was doing. Id. Anders' phone log contains a notation that this call occurred on July 11, 2005. Id.; copy of Anders' phone log attached hereto as Appendix 198.

[redacted] stated that around the June 2005 time period (or possibly later)[72] Hanson and Kreitman approached her and gave her a choice of working on the Pequot case with Aguirre or a case with another attorney, Janene Smith. Tr. [redacted] 4/18/2008 testimony at p. 10. [redacted] said that when Hanson and Kreitman described Aguirre's "work habits," they made the choice of working on a case with Aguirre sound "not as appealing" as working with Smith. Id. She said they told her that if she decided to take the case with Aguirre, "he would start sending [her] e-mails at all times of the night and bothering [her] at 2 and 3 o'clock in the morning." Id. at pgs. 10-11.

4. The Supplemental Evaluation Prepared for Aguirre

Although, according to Aguirre's supervisors, there were concerns about his performance and/or conduct in the spring of 2005 (or even earlier), such concerns were not documented until August 1, 2005, in the form of a supplement to an evaluation that Kreitman prepared, which read as follows:

> 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

[72] It should be noted that in her December 28, 2006 statement, [redacted] indicated that this conversation occurred "sometime after June 2005" and in her April 18, 2008 testimony, she stated it "definitely was between April and August 2005," and while she thought it was around the June time period, she could not say for sure. December 28, 2006 Statement of [redacted] attached hereto as Appendix 199; [redacted] Tr. 4/18/2008 testimony at p. 11. Later, Aguirre provided a copy of an e-mail from [redacted] to him dated June 22, 2008, in which [redacted] stated that she believed the conversation occurred sometime after July 15 and before August 10, 2005. E-mail from [redacted] to Gary Aguirre dated June 22, 2008 attached hereto as Appendix 200.

> 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 the 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. Supplemental Evaluation of Gary Aguirre attached hereto as Appendix 201.

Branch Chief Hanson said the idea for the supplemental evaluation actually originated from a meeting he had with Berger about complaints made against Mark Kreitman. Tr. Hanson Senate 9/5/2006 testimony at p. 35. Hanson acknowledged that when he wrote Aguirre's June evaluation, he did not intend at that time to prepare a supplemental evaluation documenting concerns he had about Aguirre's performance. Id. He stated that he met with Paul Berger on the morning of August 1, 2005, and Berger told him that he had heard some complaints about Kreitman's management style. Id. Hanson said he told Berger to discount heavily any input from two employees, Aguirre and another staff attorney who is being referred to in this report as "Smith." Id. at pgs. 35-36. Hanson said he informed Berger that the work of these two employees "was not so great," and noted that he thought to himself at that time that it looked like they were meeting together, and he thought it improper that "they would be doing a coup against Mark [Kreitman]." Id. at p. 36.

Hanson said Berger asked him what ratings Hanson had given these two employees, and Hanson replied he had given them both two-step increases. Id. According to Hanson, Berger said to him, "you're not doing them any favors," and "you're not doing the Commission any favors by giving them those ratings." Id. at p. 37. Hanson said he stated that he agreed his evaluations were somewhat inflated and actually apologized to Berger a number of times for that fact. Id. Hanson said that same day, Kreitman and he drafted supplemental evaluations for Aguirre and Smith. Id.

Kreitman described a similar version of events. He explained the evaluation process he utilized, noting that his practice is that the Branch Chief prepares the evaluations of staff and, if he, as the Assistant Director, wants to add something, then he adds it to and separate from the evaluations.[73] Tr. Kreitman Senate 9/6/2006 testimony at p. 96. Kreitman said after Aguirre and Smith's evaluations had been written, Hanson

[73] Although Kreitman discussed his "practice" of adding language to an evaluation after it was initially prepared by the Brach Chief, he later acknowledged that he had never prepared a supplemental evaluation per se for anyone other than Aguirre and Smith. Tr. Kreitman Senate 11/15/2006 testimony at p. 30.

reported to him that Berger expressed the view that, in the case of Aguirre and Smith, it might be advisable to supplement the evaluations to reference some of the problems that had arisen with respect to their conduct. Id. at p. 97. Kreitman said he did not know what the context was for the conversation that precipitated Berger's instruction to prepare a supplemental evaluation, but noted that Hanson immediately reported the instruction to him, and he believed the supplemental evaluation was prepared that same day. Id. at pgs. 100-101. Kreitman said the supplemental evaluation was not designed with an eye toward Aguirre's ultimate termination. Id. at p. 101.

Hanson said Kreitman prepared a first draft of the supplemental evaluation and sent it to Hanson electronically in a word document attached to an e-mail. Tr. Hanson Senate 9/5/2006 testimony at p. 197. Hanson said he opened the word document, and saved it to his computer hard drive. Id. Hanson said he then edited the document and sent back a red-lined version to Kreitman. Id. Hanson said that was his last involvement with the document. Id. at p. 198. Kreitman recollected the sequence of events similarly, stating that he prepared the first draft of the supplemental evaluation in a word document, and attached it in an e-mail to Hanson. Tr. Kreitman Senate 9/6/2006 testimony at p. 161. Kreitman said Hanson then made edits to the document. Id. at p. 162. Kreitman also said he had a number of drafts on his computer and to the extent the drafts differ, it was as a result of suggestions made by Hanson. Id.

After reviewing relevant documents, Kreitman noted that the first draft of the supplemental evaluation appears to have been prepared by him and sent to Hanson at 12:13 p.m. on August 1, 2005. Tr. Kreitman Senate 11/15/2006 testimony at p. 17; e-mail from Kreitman to Hanson dated August 1, 2005 enclosing 8-05 Supplemental Evaluations attached hereto as Appendix 202. Kreitman then reviewed an additional e-mail which indicated that Hanson e-mailed him back a revised version of the supplemental evaluation entitled "8-05 bob changes.doc" at 1:14 p.m. on August 1, 2005, and said he recalled getting edits from Hanson. Id. at p. 21; e-mail from Hanson to Kreitman dated August 1, 2005 attached revised document attached hereto as Appendix 202. Kreitman noted that certain changes were made to the Aguirre portion of document during that day, including Hanson's addition of the phrase, "He is willing to go the extra mile," which Kreitman deleted, and Hanson's proposed deletion of the statement that "other staff attorneys find it difficult to work with him." Tr. Kreitman Senate 11/15/2006 testimony at pgs. 22-25; draft marked-up supplemental evaluation attached to Hanson's August 1, 2005 1:14 p.m. e-mail to Kreitman attached hereto as Appendix 202. Kreitman also noted Hanson's comment next to the statement in the supplemental evaluation that Aguirre's "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," which said, "don't think we should allege if it only raises a question." Tr. Kreitman Senate 11/15/2006 testimony at pgs. 25-26; draft marked-up supplemental evaluation attached to Hanson's August 1, 2005 1:14 p.m. e-mail to Kreitman attached hereto as Appendix 202.

Kreitman also said the supplemental evaluations for both Aguirre and Smith were drafted in one document, after Hanson reported to him that Berger "felt as though the original evaluations of these two employees failed to accurately memorialize problems that had occurred in connection with their work during the rating period." Tr. Kreitman Senate 11/15/2006 testimony at p. 18.

The record shows that during the time Kreitman was working on the draft supplemental evaluation, Kreitman was forwarded an e-mail from Smith by Branch Chief David Fielder, who supervised some of Smith's cases, that was critical of Kreitman's conduct, referencing concerns about how Kreitman handled a particular investigation, and stating as follows:

> In any event, the staff just not get [sic] the kind of support it needs here. [redacted] 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. E-mail dated August 1, 2005 at 3:42 p.m. from Dave Fielder to Kreitman attached hereto as Appendix 203.

At 6:17 p.m. on that same day, August 1, 2005, Kreitman sent a draft of the supplemental evaluation he prepared for both Smith and Aguirre to Branch Chief Fielder stating: "Dave – Paul has asked for supplementation of these two evaluations. Please let me know if I should make any changes. Thanks. Mark." E-mail dated August 1, 2005, at 6:17 p.m. from Kreitman to Fielder attached hereto as Appendix 203. One minute later, at 6:18 p.m., Kreitman sent the draft supplemental evaluations to Berger, stating: "Paul – My draft, Bob's comments included. Will have Dave's, if any, tomorrow morning. Mark."[74] E-mail dated August 1, 2005 at 6:18 p.m. from Kreitman to Berger attached hereto as Appendix 203.

Ten minutes later, Kreitman prepared an e-mail to Berger in response to Smith's e-mail complaint about him that Fielder had forwarded to him.

In the e-mail, Kreitman wrote as follows:

> Paul – Though I emphasize that I don't discount, indeed welcome, constructive criticism, regardless of the source, my inquiries of Bob [Hanson] and Dave [Fiedler] concerning their sense of the morale of the group lead me to believe that it continues to be strong, with the obvious exception of [Smith] and Gary [Aguirre], and to a lesser extent [redacted], who is having trouble with productivity. The excerpt below from

[74] Fielder did not recall if he actually gave any input on the supplemental evaluation prepared for Smith. Transcript of Testimony of J. David Fielder before SEC IG taken on April 14, 2008 (hereinafter, Tr. Fielder 4/14/2008 testimony) at pgs. 80-82.

> an email [Smith] sent Dave [Fielder] July 21 may shed some light on his complaint:
>
> [redacted] Aguirre and perhaps, have all become disturbed at their treatment. E-mail to Paul Berger (in draft) attached hereto as Appendix 203.

According to metadata, this e-mail was saved on Kreitman's computer on August 1, 2005, at 6:28 p.m. in his draft file folder. Document showing "[Smith's] Complaint" saved in Drafts Folder attached hereto as Appendix 203. Although the e-mail was saved as a draft, Kreitman stated that he remembered sending the e-mail. Tr. Kreitman Senate 11/15/2006 testimony at p. 31. He also said he specifically recalled sending the e-mail to Berger relating to a complaint made by Smith about his management style, although Kreitman stated that he did not recall whether the complaints in the e-mail about him were from Aguirre or Smith or both. Id. at p. 32.

Berger acknowledged that he discussed with Hanson whether or not he wanted to "provide some constructive criticism" for Aguirre's and Smith's evaluations, and that he asked Hanson, "do you want to say something about all the issues that you've been coming to me and talking to me about for the past few months." Tr. Berger Senate 11/7/2006 testimony at p. 110. Berger said he told Hanson to go back and think about whether or not he needed to provide constructive criticism to a couple of individuals with respect to their conduct and performance. Tr. Berger Senate 11/2/2006 testimony at p. 155. Berger stated he "did not instruct anyone to write anything." Id. at p. 182.

Berger further acknowledged that both Aguirre and Smith complained about the quality of management in Kreitman's group and noted that Smith complained about Kreitman on more than one occasion. Id. at pgs. 185-186. Berger also stated that he spoke with Hanson about the concerns expressed about Kreitman, and Hanson gave him feedback that "people really like Mark [Kreitman], liked working with him." Id. at p. 192. Berger denied, however, that the supplemental evaluations were reprisal for the complaints made about Kreitman, and stated he did not believe that the conversation with Hanson about Kreitman's management style was in the same conversation in which he talked to Hanson about rethinking the evaluations. Id. at pgs. 189; 193-194. Berger said he did not recall if Smith came to him to complain about Kreitman during the same time period in which the supplemental evaluation was prepared. Id. at pgs. 194-195.[75]

5. Aguirre's Two-Step Merit Pay Increase

The record shows that during the same time period in which Aguirre's supervisors drafted his negative supplemental evaluation, an Enforcement compensation committee met and approved a two-step merit increase for him based upon his initial evaluation. The entire process was follows. On June 1, 2005, Mark Kreitman had completed an

[75] As discussed above, the documentary record shows that Smith's e-mail was prepared on the same day that Kreitman and Hanson prepared the supplemental evaluations.

official performance assessment for Aguirre, in which he found Aguirre's performance "acceptable" under each of the four categories, thus qualifying him for a merit step increase. Aguirre Complaint to the Office of Special Counsel dated January 20, 2006 at p. 28.

On June 17, 2005, Aguirre submitted a self-evaluation or contribution statement, describing his own performance, to his first-level supervisor, Bob Hanson, thereby initiating the merit pay review process. Id.; Contributions of Gary Aguirre to Staff Investigations and Litigation attached hereto as Appendix 204. Hanson then prepared a supervisory comment on Aguirre's performance, which provided as follows:

> I supervised Gary Aguirre from January 18, 2005 through the end of the rating period. As shown on his contribution statement, Gary worked extremely hard on one investigation during his time with 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 principles. 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 pf[sic] Compliance Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads. He has gone the extra mile, and then some. Gary can work on presenting information in a clearer and concise manner to enhance the effectiveness of his communications both to those he reports to and those he works with. Written Statement by Robert Hanson attached hereto as Appendix 205.

Berger explained that the process of determining merit step increases incorporates review of an employee's initial evaluation, the employee's contribution, and the supervisory comment. Tr. Berger Senate 11/02/2006 testimony at pgs. 124-126. After all the supervisory comments are compiled and reviewed and Berger speaks to the Branch Chiefs and Assistant Directors, an Enforcement compensation committee meets to discuss the evaluations and determine how to split up a pool of money for employee bonuses. Id. at p. 127. Berger stated that he understood that the employee's contribution statement would be placed in the employee's personnel file. Id. at p. 129.

Susan Markel, the Chief Accountant for Enforcement, coordinated the compensation committee process beginning in June 2005. Notes of OIG Investigator Interview with Susan Markel of April 16, 2007 (hereinafter, "Markel 4/16/2007 Interview Notes") at p. 1. Markel stated that there were generally about 10 Senior Officers who comprised the compensation committee, but said this number has varied over time. Id. Markel said she believed that in 2005, Enforcement's compensation committee, in

addition to Markel, consisted of Associate Director Paul Berger and other senior Enforcement officials Antonia Chion, Larry West, Joan McKown, Peter Bresnan, Lou Mejia, Mark Adler and Scott Friestad. Id.

Markel stated that a packet was submitted for each employee that consisted of the supervisor's transmittal form recommending "x" number of steps, the supervisor's write up and, if one is provided, the employee's write up. She explained that for each employee, there were four possible categories of contributions that correspond to the number of steps being recommended: (a) contributions of the highest quality; (b) contributions of high quality; (c) contributions of quality; and (d) no significant contribution beyond an acceptable level of performance. Declaration of Susan Markel dated January 8, 2007 at p. 2 attached hereto as Appendix 206; Markel 4/16/2007 Interview Notes at p. 2. The record reflects that in Aguirre's case, on June 29, 2005, Hanson completed a merit pay form where he checked the line marked, "made contributions of high quality," as guidance to the compensation committee for a merit step increase. Merit Pay form dated 6/29/05 attached hereto as Appendix 207.

Markel stated that these packets were submitted to her, and she obtained a shell printout of Enforcement employees from the Office of Human Resources (OHR). Markel 4/16/2007 Interview Notes at p. 2. Markel said she then filled in information on the spreadsheet, with the supervisor's recommendation being the starting point. Id. Markel said that when the Committee met, they would have the spreadsheet in front of them. Id.

Markel produced the Enforcement Division 2004-2005 merit pay determination non-supervisory spreadsheets, which showed that for "Gary J. Aguirre" the category of "high" was checked, which corresponded to a two-step increase. Enforcement 2004-2005 spreadsheets attached hereto as Appendix 208.

She also reviewed documents that provided various dates relating to the compensation process in 2005, and verified that July 18, 2005 "sounded about right for the day the Compensation Committee met." Markel 4/16/2007 Interview Notes at p. 2; List of compensation committee dates for 2005 attached hereto as Appendix 209. Markel also said that July 19, 2005 could be the date when the compensation committee's recommendations were provided to Linda Thomsen. Markel 4/16/2007 Interview Notes at p. 2. Markel said she believed she gave Thomsen a copy of the spreadsheet containing the recommendations. Id. Pursuant to two additional documents that Markel reviewed, July 27, 2005 was the date on which Thomsen, as deciding official, finished the merit pay process for the Division of Enforcement; August 1, 2005 was the date the Enforcement Division transmitted the final results to the Office of Human Resources (OHR); and August 15, 2005 was scheduled to be the date that OHR processed the merit pay increases, that would become effective on August 21, 2005. The Performance Management and Merit Pay Calendar attached hereto as Appendix 210; compensation committee dates attached hereto as Appendix 209.

The record reflects that on August 18, 2005, SEC Chairman Christopher Cox sent an e-mail to Agency employees stating that the "performance cycle for 2005 has closed and I have completed my review and approval of the merit step increase proposals." E-mail from Christopher Cox dated August 18, 2005, attached hereto as Appendix 211. Further, according to Aguirre's official Notification of Personnel Action, his two step merit increase from grade level SK-14, step 24, with an annual salary of $130,257, to grade level SK-14, step 26, with an annual salary of $134,110 became effective on August 21, 2005. Notification of Personnel Form for Gary J, Aguirre with an effective date of 8/21/05 attached hereto as Appendix 212.

Markel said she has no recollection of Gary Aguirre being discussed during the 2005 compensation committee meeting, and his name was not highlighted on the spreadsheets (which would have indicated that he had been discussed during the meeting.) Markel 4/16/2007 Interview Notes at p. 4. Markel also said she did not recall having any discussions about Aguirre with any of his supervisors (Bob Hanson, Mark Kreitman and Paul Berger) and noted that Aguirre was one of 50 staff under Berger, and she did not remember Berger talking about Aguirre. Id. Markel was shown an e-mail from Kreitman to Enforcement's Supervisory Program Analyst Charles Staiger dated September 26, 2005, in which Kreitman provided Staiger with the contents of the supplemental evaluation he prepared for Aguirre and asked whether it could be included in his record, and Markel noted that by the date of the e-mail containing the supplemental evaluation (September 26, 2005), it was too late for the compensation committee to consider it; they had already made their decision. Id. at p. 5; e-mail string dated October 8, 2005 from Linda Borostovik to Charles Staiger attached hereto as Appendix 213. Markel stated that the supplemental evaluation would have drawn more attention had it been in the file when the Compensation Committee met. Markel 4/16/2007 Interview Notes at p. 5.

Berger initially stated that he believed the Compensation Committee met in the July/August 2005 timeframe, and that he thought that he had seen the supplemental evaluation before the compensation committee made its decision, but then acknowledged that he may have been mistaken about the timing. Tr. Berger Senate 11/02/2006 testimony at p. 253. Berger was asked about a memorandum from Charles Staiger to Gary Aguirre's Supervisory Summary File dated October 5, 2006, which stated, "The attached supervisory summary from Mark Kreitman mistakenly did not go to the compensation committee. It is being made available to Gary [Aguirre] as Berger/Kreitman have requested it be part of the record." Id. at p. 220. Memorandum from Staiger dated October 5, 2005 attached hereto as Appendix 214. Berger was unable to explain how it was possible the "supervisory summary" (i.e., the supplemental evaluation) could have gone to the compensation committee as Charles Staiger's October 5, 2005 memorandum implied, when the supplemental evaluation was prepared on August 1, 2005, and the compensation committee met in July 2005. Id. at p. 221.

Susan Markel was asked about an e-mail exchange with Berger on August 1, 2005, wherein Berger stated that he needed to make a change to the merit pay schedule,

and Markel responded that if it was more than a "typo," he may want to circulate it to the larger Committee, and Berger responded it was "not a typo." Markel 4/16/2007 Interview Notes at p. 4; e-mail string between Berger and Markel on August 1, 2005 attached hereto as Appendix 215. Berger stated that "[a]s far as I can recall, the email with Susan Markel had nothing to do with Mr. Aguirre." Answers to Senator Grassley by Paul Berger attached to Senate Hearing transcript (S. HRG. 109-898) at p. 445 attached hereto as Appendix 216. Markel stated that she did not recall if any changes to the merit pay schedule were made at Berger's request or which employee Berger was referring to in his e-mail, but confirmed that she sent Enforcement recommendations to OHR for processing of the merit pay increases before Berger's e-mail to her seeking a change to the merit pay schedule. Id.; e-mail from Markel to Victoria Hebert dated August 1, 2005 at 1:41 p.m. attaching spreadsheet containing results of Enforcement merit pay process (prior to Berger's 2:28 p.m. e-mail on August 1, 2005) attached hereto as Appendix 217.[76]

6. Procedural Irregularities with the Supplemental Evaluation

The record reflects that while it was prepared on August 1, 2005, the supplemental evaluation was not considered by the compensation committee, and Aguirre received a two-step merit pay increase based upon previous positive statements about his performance effective August 21, 2005. In addition, the supplemental evaluation was not placed in Aguirre's official personnel file. Tr. Berger Senate 11/2/2006 testimony at p. 199. Berger stated that he became aware that the supplemental evaluation prepared for Aguirre was not placed in his personnel file in the September/October 2005 timeframe (after Aguirre's termination), when Kreitman came to him and mentioned that Aguirre was requesting all information in his personnel file. Id. Berger said Kreitman told him that the supplemental evaluation did not get into the file, and Berger said, "how it that possible?" and stated he "was pretty upset over it." Id. Berger said he then asked Kreitman if he told Aguirre what was in the supplemental evaluation, and Kreitman replied that Hanson and he had conveyed what was in the supplemental evaluation, but did not give Aguirre the actual document because of internal policy that such documents were not supposed to be provided to the employee. Id. at p. 200.

Berger was asked about a October 6, 2005 e-mail that Kreitman sent to Charles Staiger, responding to Staiger's question as to whether the "supplemental endorsement" had been given to Aguirre either verbally or in writing by saying "none of the above," and Berger stated that he did not know what Kreitman meant by "none of the above," although he recollected that Kreitman had told him that he did convey the substance of the supplemental evaluation to Aguirre. Id. at p. 224; e-mail string dated October 8, 2005 from Linda Borostovik to Charles Staiger attached hereto as Appendix 213. Kreitman acknowledged that he answered "none of the above" in response to Staiger's question about whether he provided the supplemental evaluation to Aguirre either verbally or in writing, but stated that he did discuss with Aguirre a number of times the problems with his behavior. Tr. Kreitman Senate 11/06/2006 testimony at p. 129.

[76] Aguirre maintained that in this August 1, 2005 e-mail exchange, Berger was contacting Markel about Aguirre, perhaps in an effort to stop his merit step increase. Tr. Aguirre 8/26/2008 testimony at p. 99.

Hanson stated that he never gave Aguirre a copy of his supplemental evaluation. Tr. Hanson Senate 9/5/2006 testimony at p. 51. Hanson also stated that he never conveyed the substance of the supplemental evaluation to Aguirre. Tr. Hanson 7/15/2008 testimony at pgs. 93-94.

Berger stated that after he became aware that the supplemental evaluation was not placed in Aguirre's personnel file, he had telephone conversations with the Offices of General Counsel and Human Resources about whether to withdraw the supplemental evaluation and what documents to provide to Aguirre. Tr. Berger Senate 11/02/2006 testimony at pgs. 200-201. Berger stated that because of assurances provided by Kreitman and Hanson that the substance of the supplemental evaluation had been communicated to Aguirre (which the evidence shows may have been false), the decision was made not to withdraw the supplemental evaluation, but to provide Aguirre with a copy of it. Id.

In addition, the evidence shows that the issuing of a supplemental evaluation was virtually unprecedented in Enforcement. Director Thomsen stated that she was not aware of any other supplemental evaluations done in her years at the SEC. Tr. Thomsen 9/8/2006 Senate testimony at p. 115. Kreitman stated he had never done a supplemental evaluation for anyone other than Aguirre and Smith. Tr. Kreitman Senate 11/15/2006 testimony) at p. 30. Hanson also acknowledged he had never before done a supplemental evaluation. Tr. Hanson Senate 9/5/2006 testimony at p. 46.

In addition, numerous other current and former Enforcement employees stated that they had not prepared or even heard of a supplemental evaluation. Joseph Cella, the Chief of the Office of Market Surveillance, stated that he had never prepared a supplemental evaluation. Tr. Cella 9/7/2006 Senate testimony at p. 44. Enforcement Branch Chief Lawrence Renbaum stated that he had never prepared a supplemental evaluation. Transcript of Testimony of Lawrence Renbaum before Senate Committee on November 1, 2006 (hereinafter, "Tr. Renbaum 11/1/2006 Senate testimony") at p. 49. Robert Bayless, Associate Chief Accountant in the Enforcement Division, stated that he never heard of a supplemental evaluation or a situation where a person was given an evaluation and later given a document that supplemented the previous evaluation. Tr. Bayless 4/24/2008 testimony at p.16. Senior Counsel in the Enforcement Division [redacted] who worked for Hanson and Kreitman, stated she never heard of a supplemental evaluation or other evaluation after the formal process other than with Aguirre. Tr. Eggert 4/18/2008 testimony at p. 64. Liban Jama also stated he was not aware of a supplemental evaluation and never heard of anyone else getting one. Tr. Jama 10/11/2006 Senate testimony at p. 53.

Furthermore, six other current and former Enforcement attorneys who requested confidentiality, some of whom had worked for numerous years in Enforcement, stated that they had never seen or even heard of a supplemental evaluation. Witness 9never heard of a supplemental evaluation and did not know of any situation where additional information was given after the formal evaluation.. Tr. Witness 9 4/2008 testimony at

p. 39. Witness 1 never heard of a supplemental evaluation or an evaluation given after the formal process. Tr. Witness 1 4/2008 testimony at pgs. 33-34. Witness 2 was not familiar with a supplemental evaluation or any evaluation that was added or supplemented after the initial evaluation was given. Tr. Witness 2 4/2008 testimony at p. 18. Witness 3 said he has never heard of a supplemental evaluation. Tr. Witness 3 4/2008 testimony at p. 20. Witness 8 said he has never seen a supplemental evaluation other than for Aguirre. Tr. Witness 8 4/2008 testimony at p. 47. Witness 5 was not familiar with nor had ever seen a supplemental evaluation or any evaluation after the regular process. Tr. Witness 5 4/2008 testimony at p. 31.

7. Aguirre's Supervisors' Explanation of His Evaluation Process

Aguirre's supervisors were questioned as to why his initial and supplemental evaluations were so different, and how during the same period of time in which they provided Aguirre with a negative supplemental evaluation, he was being a two-step merit pay increase. Hanson noted that it was Kreitman, not he, who in June 2005, signed the initial evaluation for Aguirre in which all four boxes of acceptable for "knowledge of field or occupation," "planning and organizing work," "execution of duties," and "communication" were checked. Tr. Hanson Senate 9/5/2006 testimony at pgs. 29-30. Hanson also noted that as of June 2005, while Aguirre was "difficult," Hanson "had hopes, expectations that it would work itself out." Tr. Hanson 7/15/2008 testimony at p. 45.

When asked about the supervisory comment Hanson prepared for Aguirre on June 29, 2005, and specifically why he did not include negative information about Aguirre's subpoenas in that evaluation document, Hanson replied that "it was sort of an evolving process with Gary." Id. at p. 32. Hanson further stated that the June 29, 2005 supervisory comment on Aguirre's performance was intended to cover the period until April 30, 2005 because the evaluation period ran from May 1, 2004 to April 30, 2005. Id. at pgs. 33-34. He further stated that when he checked the box of "made contributions of high quality" on June 29, 2005, which recommended that Aguirre receive a two-step merit pay increase, he was basing his recommendation on the period up to April 30, 2005. Id. at pgs. 34-35.

Hanson also explained that he "tried to give Gary the most generous evaluation" he could covering the period through April 30, 2005. Transcript of Testimony of Robert Hanson before Senate Committee on November 9, 2006 (hereinafter, "Tr. Hanson Senate 11/9/2006 testimony") at p. 88. Hanson stated that Aguirre "worked very hard while he was in my group." Id. Hanson stated that he should have discussed Aguirre's performance with the group he was in prior to coming to his group. Id. Hanson said at the time he wrote the supervisory comment, "it preceded the time when [Hanson] got more involved with [Aguirre's] work because [Hanson] was tied up on two [other] cases that consumed most of [his] time." Id. Hanson said at the time he wrote the comment, he had concerns about Aguirre's performance or conduct, but did not convey them in the

document, saying, "I'm pretty generous with respect to these things . . . it's money, it's [a] little money." Tr. Hanson 7/15/2008 testimony at p. 48.

Hanson said he became more aware of Aguirre's behavior and professional dealings after he wrote the evaluation, and noted that, on August 1st, he wrote a supplemental evaluation that that articulated some of the issues they were having with Aguirre. Id. Hanson admitted, though, that he never made any effort to prevent Aguirre from getting his two-step merit pay increase. Id. at p. 89.

Kreitman acknowledged that in June 2005, he completed and signed the evaluation for Aguirre, in which he rated Aguirre satisfactory on all elements. Tr. Kreitman Senate 9/6/2006 testimony at pgs. 97-98. Kreitman stated that he specifically did not have any discussions with Charles Cain, Aguirre's former supervisor, when he signed Aguirre's evaluation because he had promised Aguirre a "fresh start," and said he was going to evaluate Aguirre on the basis of what he did in Kreitman's group. Tr. Kreitman Senate 11/15/2006 testimony at pgs. 118-119. Kreitman said he did not want to be prejudiced by getting into details about problems that Aguirre had elsewhere. Id. at p. 119. Kreitman stated that at the time he prepared Aguirre's performance evaluation in June 2005, he had concerns about Aguirre's work product and behavior, but he did not choose to reflect those concerns in Aguirre's performance assessment. Id. at p. 121. Kreitman explained that because the only choices were "acceptable" and "unacceptable" and there are immediate and very serious consequences if one is rated "unacceptable," he was not prepared to take that step with respect to a new employee who had been in his group for only four months. Id. at pgs. 121-122.

Kreitman acknowledged that he was consulted on, and approved all the recommendations for, step increases for those in his group, including Aguirre. Tr. Kreitman 7/17/2008 testimony at p. 58. Kreitman also admitted that, at the time, he had "pretty serious reservations" about Aguirre, yet approved the two-step increase, explaining he felt his staff was underpaid and wanted them to get what money was available. Id. at p. 59. He also noted that at that time, he "still wanted to keep Gary." Id.

Berger stated that the pay increase that Aguirre received was a reward for his "hard work," noting that Berger's view of the pay increases considered the fact that the people working at the SEC worked very hard and did not make a lot of money compared to the private sector, explaining that "Gary was a hard worker and was dedicated to his investigation, and so he was being rewarded for his hard work." Tr. Berger Senate 11/2/2006 testimony at p. 156. Berger stated that he "was not uncomfortable" with the fact that Aguirre was rated "acceptable" in all four categories in June 2005, stating that, in his view, the evaluation related to "the performance area as opposed to the general conduct area." Id. at p. 178. Berger stated that when he reviewed the recommendation to give Aguirre a two-step increase, he asked:

> [A]re you comfortable with this number? And for Gary, it was a two. And they said, yeah. I said, in light of everything else? And they said, yeah, we want to reward him for his hard work. And I said, fine. Id. at p. 247.

Berger also stated that while officially the rating period ended on April 30, 2005, in his mind was the fact that a lot of time had passed since the end of April, and they should at least, as supervisors, address anything outstanding that had happened between April and June. Id. at p. 249.

Thomsen stated that she did not consider the merit increase that Aguirre received "a significant raise." Tr. Thomsen 9/8/2006 Senate testimony at p. 127. She said that two steps "was sort of midpoint." Id. Thomsen stated that the "process was designed exclusively to recognize contributions, and no one to this day disputes that Mr. Aguirre worked hard" and was "extremely diligent about pursuing an investigation." Id. When asked why if there were issues with Aguirre's performance during the time of the award, a performance improvement plan not considered, Thomsen replied that they understood he was resigning and, therefore, a performance improvement plan would not be necessary. Id. at pgs. 128-129.

8. Aguirre's Explanation of His Evaluation Process

Aguirre pointed out that the supplemental evaluation was a process rarely, if ever, used at the SEC, and noted the significance of the series of events that occurred immediately prior to the preparation of the document. Aguirre Responses to Questions from Senator Grassley at p. 28. Aguirre noted that he met with Berger on July 21 or 22, 2005, and informed him about Hanson's decision blocking the Mack subpoena and Hanson's statement attributing that decision to Mack's political influence. Id. In addition, Aguirre noted that on July 27, 2005, he sent an e-mail to Berger that contained references to Hanson's comments about Mack's political influence and, three days later, on August 1, 2005, Berger, Kreitman and Hanson collaborated to create the supplemental evaluation. Id.; e-mail dated July 27, 2005 from Aguirre to Kreitman and Berger attached hereto as Appendix 218.

According to Aguirre, the supplemental evaluation described a person who had no future at the SEC. Aguirre Responses to Questions from Senator Grassley at p. 28. It contained negative feedback regarding conflicts with other staff, complaints from opposing counsel, issuance of subpoenas that violated the privacy laws, refusal to share information, and resistance to supervision, and was equivalent to an "unacceptable" rating in each of the four categories on Aguirre's original evaluation. Id. Aguirre also indicated that the supplemental evaluation was a three-level drop from what Berger approved less than two weeks earlier at the compensation committee meeting [i.e., from level 2 (contributions of high quality) to a level of unacceptable, which would be lower than level 4 (no significant contribution beyond an acceptable level of performance.)] Id.

Aguirre also noted that during the period between July 18, 2005, when the compensation committee met, and the August 1, 2005 supplemental evaluation, he was out of the office on official leave for most of that time and, therefore, nothing could have happened during that time that would have triggered the supplemental evaluation. Id. at p. 29. Aguirre also questioned why the supplemental evaluation was never placed in his personnel file. Id. at p. 30. He further noted that the SEC's explanation that the supplemental evaluation was just mistakenly not sent to the compensation committee is not believable and evidences a cover-up. Aguirre 4/6/2006 Response to Wheeler at p. 15.

Aguirre concluded that the August 1, 2005 supplemental evaluation was the first step to terminating him, but since it came too late to intercept his two-step merit pay increase, which had been approved two weeks before, the "SEC needed a little time to dilute the obvious causal connection between [his] July 27 email and the August 1" supplemental evaluation and his termination approximately one month later. Id.

H. Reactions to Aguirre's Firing and Evidence Concerning Other Terminations in the Enforcement Division

Numerous employees in Enforcement stated that they were surprised when they heard about Aguirre's firing. Senior Counsel Liban Jama stated that he knew there were disagreements between Aguirre and Eichner and there were tensions, but he was surprised that Aguirre had been terminated. Tr. Jama 10/11/2006 Senate testimony at p. 42. Jama said he was particularly surprised that Aguirre was fired because, at the time, he had the impression that Aguirre's supervisors thought the Pequot case was fantastic and was going to be a good case. Tr. Jama 4/24/2008 testimony at p. 63. Jama noted that there was a change in tone later about the Pequot matter from the case being viewed as "promising" to the feeling that they did not have "the goods" with respect to Mack. Id. at p. 64. Jama said, even with the disagreements Aguirre was having with others, he did not have the sense that Aguirre thought there were any severe ramifications in terms of his performance and ever had a sense of worry about his position at the SEC. Id. at p. 59.

Branch Chief Eric Ribelin stated that he learned of Aguirre's termination when Aguirre called him from California and told him he had been fired. Notes of OIG Interview with Eric Ribelin of August 3, 2006 (hereinafter, "Ribelin 8/3/2006 Interview Notes") at p. 7. Ribelin said he was both surprised and upset. Id. Ribelin explained that he felt that, with Aguirre's termination, folks were "putting the kibosh" on the case. Id. at p. 8. He also said he thought Aguirre's firing was "outrageous" and said, in his experience, no one of Aguirre's competence and intelligence and experience who was moving his case forward had been fired before his first year was over, calling it "unbelievable." Tr. Ribelin 11/9/2007 testimony at p. 48. Ribelin said he was so upset that he wanted to distance himself from the Pequot case, and felt that working on the case would not be a productive use of his time. Ribelin 8/3/2006 Interview Notes at p. 8.

However, Ribelin said that Cella and Kreitman asked for his continued assistance in the investigation and he agreed to continue to work on the case. Id.[77]

Similarly, Market Surveillance Specialist Thomas Conroy stated that he was surprised at Aguirre's termination because his overall impression was that Aguirre was doing a good job. Conroy 11/16/2006 Interview Notes at p. 8.

Eichner, to the contrary, stated that he was not surprised to learn Aguirre had been fired because that possibility had been discussed with him previously in a private meeting with Mark Kreitman on August 24, 2005. Eichner 9/27/2006 Interview Notes at p. 5. Eichner also noted that Aguirre's firing made more sense to him when it was mentioned to him that Aguirre was a probationary employee. Id.

Numerous other Enforcement employees stated that they were surprised about Aguirre's termination because, in their experience, terminations were very rare in the SEC and in Enforcement. Joseph Cella, the Chief of OMS, said when Aguirre was terminated, it somewhat surprised him, because they did not tend to have a lot of people get fired at the SEC. Tr. Cella 9/7/2006 Senate testimony at p. 49. Cella said he was not aware of any other terminations of investigators or attorneys in his history at the SEC. Id. at pgs. 49-50. Enforcement Branch Chief Lawrence Renbaum stated he was only aware of one other case of a termination involving an employee who got into a dispute about whether he was properly barred or practicing law without a license. Tr. Renbaum 11/1/2006 Senate testimony at p. 48.

Chief Accountant Susan Markel noted that although an employee can be removed more easily during the first year of employment, this does not happen all that often. Markel 4/16/2007 Interview Notes at p. 4. Margaret Cain, an attorney in Enforcement, stated that she was surprised by the Aguirre firing because it does not happen very often that people get fired from the government. Tr. M. Cain Senate 10/13/2006 testimony at p. 14. Robert Bayless, who worked as the Associate Chief Accountant in Enforcement for several years, stated he did not know of a situation where an individual was terminated in Enforcement, either within his or her probationary period or after. Tr. Bayless 4/24/2008 testimony at pgs. 17-18. Former Enforcement Senior Counsel [redacted] said she was surprised to hear that Aguirre had been fired, and that she was not aware of anyone else having been terminated, even in his or her probationary period. Tr. [redacted] 4/18/2008 testimony at pgs. 18-19, 65.

Furthermore, several other current and former Enforcement attorneys, who requested confidentiality, some of whom had worked for numerous years in Enforcement, stated that there were aware of very few instances, if any, of employees in Enforcement being fired. Witness 9 expressed surprise that Aguirre was fired because she never got the impression Enforcement management would fire anybody. Tr. Witness 9 4/2008 testimony at p. 30. Witness 1 was surprised to hear Aguirre was terminated because he

[77] In fact, Ribelin stated that Cella's reaction to him not wishing to continue to work on the Pequot matter was that "not working the case was not an option." Ribelin 8/3/2006 Interview Notes at p. 8.

only knew of two or three instances in 37 years when someone was fired from the SEC. Tr. Witness 1 4/2008 testimony at p. 14. Witness 2 was perplexed upon hearing Aguirre had been fired, and did not know of any attorneys in seven years who were fired from Enforcement, even in their probationary period. Tr. Witness 2 4/2008 testimony at pgs. 12; 19. Witness 3 said he was surprised to hear about Aguirre's termination because he did not know of any other attorneys who were fired while he worked in Enforcement. Tr. Witness 3 4/2008 testimony at p. 11. Witness 8 was surprised to hear that Aguirre was terminated because virtually no one gets terminated. Tr. Witness 8 4/2008 testimony at p. 46. Witness 6 stated the only person he can remember being fired in Enforcement was a paralegal; he did not know of any lawyers being fired. Tr. Witness 6 4/2008 testimony at p. 18.

Bob Hanson also acknowledged that he had not heard of any other performance or misconduct terminations of attorneys or investigators in his eight years at the SEC. Tr. Hanson Senate 9/5/2006 testimony at pgs. 166-167. Paul Berger also admitted that he never fired an attorney other than Aguirre, although he said he fired a paralegal. Tr. Berger Senate 11/2/2006 testimony at p. 214.

Linda Thomsen stated that, in addition to Aguirre, there have been a few circumstances involving probationary employees who were terminated, or resigned after being told they would be terminated, including at least one attorney. Tr. Thomsen 9/8/2006 Senate testimony at p. 15. She also recalled three instances of proposed terminations involving attorneys who were not in their probationary periods, and she thought, in at least two of those cases, they ultimately resigned. Id. at p. 17. Specifically, Thomsen identified one attorney who resigned before the end of the probationary period, in lieu of being terminated for "not working hard enough and making enough progress and just not getting it." Tr. Thomsen 4/28/2008 testimony at p. 23. She also identified another person who resigned after being caught taking notes in an investigation when it was agreed no notes would be taken, and then lied about taking notes. Id. at p. 24.

Thomsen observed that, in the government, you can terminate someone for any reason as long, as it is not a bad reason, in the probationary period and, after the probationary period, the process is much longer, with lots more involvement from OHR. Id. at p. 24. She did, acknowledge, however, that the rate of probationary employees who become non-probationary employees is 90 percent or higher. Tr. Thomsen 9/8/2006 Senate testimony at p. 18.

OHR records show that five Enforcement employees, including Aguirre, were either terminated, or resigned after notice of proposed termination, in the years 2005 and 2006. E-mail from OHR Employee Relations Branch Chief, [redacted] dated February 21, 2008 attached hereto as Appendix 219. Four of these employees, including Aguirre, were within their probationary period of employment. Id.

I. Atmosphere in Office Environment Where Aguirre Worked

1. Lack of Feedback and Abusive Environment

The OIG investigation uncovered substantial evidence concerning the management styles and abilities of Aguirre's primary supervisors during his tenure with the Commission. The evidence showed a pattern of little or no feedback provided to staff attorneys working for Branch Chief Hanson and Assistant Director Kreitman, as well as an atmosphere of "abuse" and "unfairness" that pervaded the office environment in which Aguirre worked.

Numerous employees in Enforcement who worked with Kreitman and Hanson indicated they felt their treatment by both Hanson and Kreitman was often inappropriate in nature and at times punitive or retaliatory. Nearly of all the employees who agreed to speak with the OIG about these issues requested confidentiality because of their concern about possible retaliation for providing information to the OIG. For this reason, their names and identities will not be divulged in this report.

2. Mark Kreitman's Supervisory Conduct

a.. Statements of Current and Former Attorneys Who Worked for Kreitman

A former staff attorney in Mark Kreitman's group who requested confidentiality,[78] stated that Mark Kreitman "was abusive to him" and "had a habit of retaliating against people." Notes of OIG Investigator Interview with Witness Smith of September 14, 2006 (hereinafter, "Smith 9/14/2006 Interview Notes") at p. 1-2. This attorney gave an example of one occasion, when he was on the phone with a former SEC attorney and Kreitman came by and pointed to Kreitman's office with an angry, contorted face, whereupon Smith pointed to his phone and shrugged. Notes of OIG Investigator Interview with Witness Smith of October 3, 2006 (hereinafter, "Witness Smith 10/3/2006 Interview Notes") at p. 2. According to Smith, Kreitman came back two to three minutes later, pointed to his office again and indicated for Smith to put the phone down. Id. Smith then went into Kreitman's office, and Kreitman yelled at him about something and, according to Smith, had the facts completely wrong. Id. Smith stated that he had 20 or 25 very similar inappropriate interactions with Kreitman within a one-year period.

Smith described Kreitman's management skills as "abysmal." Id. He reported that Kreitman said to him with some "glee" that he had gotten two other senior attorneys to retire and that the front office was pleased he had managed to do so. Id. Smith added that Kreitman indicated that he kept "raising the bar" on these two senior attorneys. Id. He stated that after the two senior staff attorneys retired, Kreitman began making

[78] Several individuals who no longer work for Enforcement or the Commission nonetheless requested confidentiality in this investigation because they were in positions where they may have continued interactions with Enforcement, including Hanson and Kreitman.

unreasonable demands on another Enforcement attorney who worked for him, which resulted in this attorney having medical problems. Witness Smith 10/16/2006 Interview Notes at p. 3. Smith stated that "when Kreitman gets upset with someone, he rides them until they leave." Id. at p. 4.

Smith indicated that when he would complain about Kreitman to Berger, Berger would immediately go straight to Kreitman, who would then blow up at Smith about something else. Witness Smith 3/26/2007 Interview Notes at p. 1. Smith stated that on one occasion, he asked Paul Berger why he had told Kreitman about Smith's complaint about him and, according to Smith, Berger replied, "I was just trying to help you, by making things better." Redacted e-mail from Smith to Inspector General David Kotz dated July 31, 2008 attached hereto as Appendix 154

Another former Enforcement staff attorney who worked for Hanson and Kreitman and requested confidentiality said Kreitman had a very short temper with outsiders and remembered being on conference calls with outside counsel and Kreitman being very short with them. Tr. Witness 9 4/2008 testimony at pgs. 16-17. Witness 9 felt Kreitman was disrespectful with outside counsel, and said there were times when they were on conference calls with Kreitman and would be compelled to call opposing counsel back afterward and apologize because they were so embarrassed after Kreitman hung up them, or after a face-to-face meeting where Kreitman banged on the table. Id. at p. 17. Witness 9 said Kreitman has an "abrasive personality," the way he spoke to people was very short, and people were offended by the tone he would use. Id. at p. 18. Witness 9 said Kreitman's behavior made people "very very uncomfortable and very unhappy." Id. This staff attorney said she heard him yell at people from time to time even with the door closed and, on one or two occasions, recalled behavior that would be considered "abusive." Id.

Witness 9 said staff discussed the possibility of complaining about Kreitman since numerous people were unhappy, but they thought they would not get certain assignments if they complained, and feared there would be some kind of retaliation. Id. at p. 20. Witness 9 said there was talk about going above Kreitman's head with complaints, but people knew that they still had to work for him and thought he might take it out on them and might make the work environment even worse and even more uncomfortable. Id. at p. 21. Witness 9, who had a distinguished educational and work background, decided to leave the SEC after a few years because of the atmosphere in Kreitman's group. Id. at p. 25.

Senior Counsel [redacted] who worked for both Hanson and Kreitman for approximately two years, described Kreitman's supervisor manner as "haphazard," and said he had "temper tantrums quite often" and used profane language. Tr. [redacted] 4/18/2008 testimony at pgs. 19-20. She also stated Kreitman acted in a disrespectful way toward a colleague or subordinate, for example, by speaking with Hanson in front of her about another attorney's performance problems. Id. at pgs. 20-21. [redacted] said she saw Kreitman lecture an attorney in a staff meeting, and create a situation that was

uncomfortable or even humiliating for that individual. Id. at p. 23. She said Kreitman singled out certain attorneys for praise, and he stated that they were the only ones who were performing well. Id. [redacted] said Kreitman's style was to cross-examine or speak harshly to attorneys. Id. at p. 24.

[redacted] said she had the impression that three senior attorneys had been pushed out, and that Aguirre was falling into that category as well for whatever reason. Id. at p. 56. [redacted] said Kreitman was gleeful that a senior staff attorney who Kreitman referred to as an "old horse" was leaving. Id. at p. 54.

[redacted] said she had a pre-existing medical condition that was exacerbated by her treatment in the office and her stress level, as well as her other personal issues in her life. Id. at p. 52. [redacted] stated that she absolutely believed that her medical condition was exacerbated by the treatment she received from Kreitman and Hanson and eventually led to her need to take a leave of absence from the Commission. Id. [redacted] stated that while she was going through medical difficulties, she expressed her problems to Kreitman, and asked to be removed from Hanson's group and to be transferred to a different office for a disability accommodation. Id. at p. 75. [redacted] said Kreitman replied that she needed a thicker skin, had to suck it up, and really just needed more work. Id. She said when her efforts to transfer failed, she had no choice but to leave, and even noted that, at one point, her doctor called the Agency's disability office and said, "she needs to leave." Id. at p. 77.

[redacted] said before she left the SEC, she contacted Donna Norman, Linda Thomsen's Counsel, to express concerns about things that were going on in the group, and then saw Donna Norman immediately in a meeting with Kreitman, and the next day she received a call from Kreitman saying, "I heard you don't like me, I heard you don't like working in our group." Id. at pgs. 22-23. [redacted] said there were attorneys who wanted to complain about Kreitman and Hanson, but were scared about retaliation, and thought that complaints about Kreitman and Hanson could definitely move someone from the favored to disfavored list or, even if an attorney was already on the disfavored list, complaining would impact the assignments the attorney would be given. Id. at p. 59. [redacted] said she did not know of any other attorneys who enjoyed working for Kreitman, except for Hanson. Id. at p. 72.

Another former senior attorney who worked for Kreitman and Hanson and requested confidentiality stated that employees who worked for Kreitman often spoke about the atmosphere under him, saying, "all of us felt that Kreitman was overpowering, and dictatorial and arbitrary." Tr. Witness 1 4/2008 testimony at p. 15. Witness 1 stated that "Kreitman is brash, both internally and externally and somewhat volatile." Id. at p. 16. This witness said Kreitman yelled, and was emotional and excitable. Id. at p. 17. Witness 1 stated that he did not feel Kreitman treated him fairly and that was why he left the Commission. Id. at p. 18.

Witness 1 stated that a colleague of his who worked for Kreitman was a very competent, trained lawyer for whom Kreitman seemed to have a dislike. Id. at p. 19. The witness said Kreitman was disrespectful to the staff attorneys and was dictatorial and arbitrary. Id. at p. 24. Witness 1 stated that he found an interaction between Kreitman and outside counsel to be offensive in that Kreitman acted "so holier than thou" and "autocratic" toward them. Id. at p. 43.

Another Enforcement attorney who worked for Hanson and Kreitman, and requested confidentiality, stated that he saw Kreitman "engage in an abusive manner not infrequently." Tr. Witness 3 4/2008 testimony at p. 25. Witness 3 said he heard Kreitman engage in inappropriate gender, ethnic-based remarks, including a comment that was demeaning to homosexuals. Id. at p. 26. This witness said anybody whom Kreitman did not think was following, or would question, his directional advice would be subject to his wrath. Id. at pgs. 26-27.

Witness 3 recalled a meeting with an outside accountant's lawyers, where Kreitman was getting exercised, and both of the associate directors present at the meeting invited him to calm down and relax, but he did not do so until Deputy Director Ricciardi literally turned to him and said, "Stop." Id. at p. 29. The witness said on that day and others, he was embarrassed on behalf of the SEC because of Kreitman's actions. Id. at p. 30. Witness 3 described another situation in which he and two other attorneys were in a meeting in Kreitman's office, in which Kreitman was animated, angered and speaking in harsh tones, and characterized this conduct as Kreitman acted in an "abusive" manner. Id. at pgs. 24-25.

Witness 3 said he believed Kreitman's treatment of two particular senior-level attorneys was "abusive," and that they both felt he was trying to force them out. Id. at p. 27. He said he felt Kreitman acted toward another staff attorney in an "abusive" way. Id. at p. 28. He identified another attorney, of whom he noted that it would be difficult to find a harder-working person in the SEC, and yet stated that Kreitman acted toward him in an "abusive" way. Id.

Witness 3 stated that Kreitman berated or lectured certain attorneys more than others. Id. at p. 26. He said there were certain people who Kreitman liked without any particular justification and certain people he did not like. Id at p. 54. According to this witness, Kreitman was favorable to the people he liked, and "abusive" or difficult to the people he did not like. Id. at p. 54.

Witness 3 said he himself complained about Kreitman to the new Associate Director Christopher Conti (who replaced Paul Berger), but his response was non-committal, and he did not take any action to address the complaint. Id. at p. 31. In addition, Witness 3 stated that the information about his complaining got back to Kreitman. Id. at p. 32. He said a number of folks have discussed their concerns about Kreitman and complaining about him, but "everyone's too fearful" to complain. Id. at p. 51. He said when a complaint was made, the information would get back to Kreitman,

and Kreitman would go to his superiors in an attempt to smear the people who complained. Id. at p. 55.

Witness 3 said he was and is concerned every day about retaliation on the part of Kreitman. Id. at p. 31. When asked if Kreitman has engaged in retaliation in the past, Witness 3 said, "Well, Gary [Aguirre]'s not here." Id. at p. 33. He also said "[Smith's] not working here anymore." Id.

Witness 3 said he did not know anybody who worked for Kreitman who felt he was a good supervisor. Id. at p. 44. He said Kreitman created an atmosphere such that Smith felt he needed to leave, but there was no talk about firing him. Id. Witness 3 said every day is tough to come to work, noting "it's never ever, ever, ever been like this for me at any other job." Id. at p. 56.

Another former Enforcement attorney who worked for Kreitman, and requested confidentiality, stated that Kreitman's style and personality can be very difficult. Tr. Witness 6 4/2008 testimony at p. 20. Witness 6 said Kreitman can be erratic, has mood swings, and he has seen him be "abusive" (verbally) to people. Id. at pgs. 20; 25. Witness 6 gave an example of a staff attorney who was working on a case and was scheduled to provide Kreitman a status report, and prepared a very detailed outline to brief Kreitman, but Kreitman never gave him a chance. Id. at p. 27. According to the witness, for 30 minutes, Kreitman unleashed on the attorney "the worst verbal abuse [Witness 6] had ever seen in the job place." Id. at pgs. 27-28. Witness 6 gave another example of a staff meeting in which Kreitman was "abusive" to a staff attorney, with everyone present in an inappropriate and disrespectful way. Id. at pgs. 28-29. Witness 6 said Kreitman threw tantrums and yelled for no reason. Id. at p. 29. This witness also stated that he personally had been berated many times by Kreitman. Id. at p. 31.

Witness 6 gave another example at a meeting with a company that had been cooperative in an investigation, whose representatives were coming in to make a preliminary presentation. Id. at p. 42. He said there were seven or eight people at the meeting, including an Assistant U.S. Attorney from New York. Id. Witness 6 noted that the meeting was supposed to start at 10 a.m., but it was changed to 11 a.m., in that because of Kreitman's [late morning work] schedule, they could not schedule any meetings before 11 a.m. Id. Witness 6 stated that at about 11:15 a.m., Kreitman had not arrived and they began the meeting without him. Id. at p. 43. Witness 6 said the company representatives had put together two three-ring binders of "hot documents," and a copy of a Power Point presentation that they were going to make at the meeting. Id. According to Witness 6, Kreitman came in 20 minutes late very noisily, slammed the door opened and sat down, opened the 3-ring binder very loudly, smacked it against the deck and started flipping through the pages. Id. Witness 6 said after about three minutes, Kreitman pushed the binder across the table and said, "This is bullshit, This isn't helpful." Id. at pgs. 43-44. Witness 6 said for the next 27 minutes, Kreitman berated the individual who was trying to make the presentation. Id. at p. 44. (The witness said he

knew it was 27 minutes exactly because he kept looking at his watch, thinking, "how long is this going to go on?" Id.).

Witness 6 said in a telephone call with a lawyer for Morgan Stanley with whom the SEC was in advanced settlement negotiations, the Morgan Stanley attorney started a brief introduction, and began making her case and arguments in favor of her client. Id. at p. 48. Witness 6 said Kreitman cut her off and said, "where are you with our settlement offer." Id. At that point, the Morgan Stanley attorney started to lay out her case again and, after about 15 seconds, Kreitman said "Well we've looked at it and we don't think there's anything to your points" and said "see ya" and hung up the phone on her. Id. at pgs. 48-49. Witness 6 said he immediately called back the Morgan Stanley attorney back and said, "on behalf of the SEC, I apologize," to which she responded that she had never been treated so rudely in her life. Id. at p. 48.

Witness 6 stated that Kreitman seemed always to need to have one staff attorney who was targeted and really ridden. Id. at p. 20. He said Kreitman talked openly about a staff attorney whom he was trying to convince to leave by making his life miserable. Id. Witness 6 said Kreitman treated people differently, in that there were some people in the group who were allowed to do nothing and were not criticized, and there were other people who were working very hard, but maybe were not perfect and were ridden unmercilessly. Id. at p. 22. Witness 6 said there were times when Kreitman came to the office and fixated on certain people, not caring what anyone else was doing, but finding out what they were doing wrong and yelling at them about it. Id. at p. 23. According to Witness 6, when Kreitman is going to ride you about something, he will go through a list of 15 things until he finds something that you have not yet done, and then all of a sudden no matter how absurd that one thing is, that should have been the priority. Id. at p. 28.

Witness 6 said Kreitman could turn on a dime on people and cases. Id. at p. 22. He said the Pequot case went from Kreitman commenting about it being the greatest case in the world, to, "what a piece of crap." Id. Witness 6 said the same was true with individuals; they can be golden and they can then be someone that has to be ridden out of the SEC. Id. at p. 23. Witness 6 said Aguirre and Kreitman were a bad mixture, with Aguirre being difficult to supervise, and Kreitman's having a poor management style, which contributed to the mismanagement of the case and the Aguirre matter. Id. at pgs. 24-25. Witness 6 noted that Kreitman's personal feelings about a particular staff member had an impact on how he dealt with the case that staff member was bringing. Id. at p. 59. The witness gave an example of the Gabelli case, which was Smith's main case, and said that, when it came to Smith's case, you could not talk to Kreitman reasonably or objectively because of his dislike for Smith. Id. at p. 60.

Witness 6 said there were several cases concerning which he told Kreitman, "this is a dog of a case," and Kreitman insisted on bringing them, only to be shot down by the Commission. Id. at p. 54. The witness noted that Kreitman is the only person to whom this happened. Id.

Witness 6 said many attorneys have complained privately about Kreitman and they would all like to leave the group. Id. at p. 33. He said the group is beaten down and believes that the front office does not care, so there is no point to raise concerns. Id. Witness 6 related that after Smith complained to Berger on a few occasions, immediately after Smith left Berger's office, Berger would be standing in Kreitman's office telling him that Smith had complained about him and, for the next week or two, Kreitman would be even harder on Smith. Id. at p. 30. Witness 6 said, "If you got on [Kreitman's] bad side, you paid a price." Id. Witness 6 said he was so concerned about Smith's treatment, he went to Kreitman's superiors to complain, but nothing changed. Id. at pgs. 38-49.

Another senior-level Enforcement attorney who worked for Kreitman stated he felt Kreitman treated a fellow Enforcement attorney unfairly. Tr. Witness 7 4/2008 testimony at p. 18. Witness 7 stated that on one occasion, Kreitman gave this staff attorney a thick transcript to read and, roughly 10 to 15 minutes later, Kreitman asked him what it said. Id. Witness 7 stated that Kreitman asked him to put a negative statement in this staff attorney's evaluation that was unfair and equally applied to others, but did not have him put this kind of statement in the evaluations of others in the group. Id. at p. 19. Witness 7 said he had the impression that Kreitman wanted to push this staff attorney out, noting that Kreitman "was always on top of him, riding him." Id. at p. 19.

Witness 7 also said he saw Kreitman act in a disrespectful way to opposing counsel in settlement discussions in a case involving Vaso Active, stating that Kreitman was very confrontational, and it was unlike any meeting he has ever attended at the SEC. Id. at p. 20. Witness 7 said he thought it was "personal, not professional." Id. Witness 7 said Kreitman told him that he wanted two senior attorneys to retire, at one point saying to the witness, "tell [this staff attorney] it's time to retire." Id. at p. 21.

Witness 7 said he left Enforcement under pressure from Mark Kreitman. Id. at p. 9. Witness 7 reported that at one point in the fall of 2004, Kreitman came to his office and said, "You've got to go." Id. Witness 7 noted that he had never received a bad performance rating, but only outstanding ratings. Id. Witness 7 said he decided to leave, explaining that he did not want to make the situation unnecessarily confrontational and stating, "If the man wants me to leave, I've got to leave, right." Id. at p. 18. When asked if there were performance based or other actions taken against him, Witness 7 replied, "We are all smart enough to leave before actions are taken against us." Id. at p. 21.

Witness 7 called Smith a brave person for complaining, saying, "I would not want to incur the wrath of Mark Kreitman by complaining." Id. at p. 29.

Witness 7 said he believed that if you asked people anonymously, a very clear majority, if not virtually everyone, would want to leave Kreitman's group. Id. at p. 30. This witness noted that he did not know of anyone who was happy working with Kreitman, perhaps with the exception of Hanson. Id. at p. 34.

Another staff attorney who worked for Kreitman and requested confidentiality, stated that Kreitman is a "very arrogant person," and "not personally fit to manage other people." Tr. Witness 8 4/2008 testimony at p. 11. Witness 8 said Kreitman was not genuine or sincere, that he has almost a Jekyll and Hyde personality at times, and can suddenly become very angry. Id. at p. 12. Witness 8 said he would characterize Kreitman's actions as "disrespectful . . . all the time." Id. at p. 13. He gave an example of Kreitman "exploding" at him after he was summoned to his office, saying, according to witness 8, "I'm tired of being angry with [you], I'm tired of having to tell you stuff 100 times over." Id. at pgs. 12-13.

Witness 8 said he never got substantive feedback from Kreitman about his work performance and was not aware of any reason why Kreitman was so angry with him. Id. at p. 15. He described the office environment as "terrified," saying Kreitman is "mercurial," and "plays a lot of games." Id. at p. 15. Witness 8 stated that Kreitman would come into a meeting with a notebook and tell him, you have to do three things, and would ask him if he could complete those items. Id. at p. 15. Later, according to Witness 8, Kreitman would ask for a progress report, say what about the two other things (in addition to the first three items) that I asked you to do, why did not you do those as well. Id. at pgs. 15-16. Witness 8 said Kreitman would give you a list of things to do and you would never succeed, and he would always lift the bar and every time you came back to him and reported, you would find the bar is higher than it was set before. Id. at p. 18.

Witness 8 said he saw a senior attorney crying and he understood he had just come from Kreitman's office. Id. at p. 55. Witness 8 said this attorney worked very hard and tried to meet the obligations, but had the bar raised and was scolded for not fulfilling his tasks, and was sort of crushed by the pressures placed on him. Id. Witness 8 also noted that Kreitman was overbearing with outside counsel. Id. at p. 34.

Witness 8 said Kreitman "always had a target" and drove five men out of his group. Id. at p. 17. He said the target went from one senior staff attorney to a second senior staff attorney, to the witness, to Aguirre, and then to Smith, just like clockwork. Id.

Witness 8 said at one point, a Branch Chief told him that "Kreitman wanted [the witness] eliminated from his group," although in the witness's view, there was nothing he did to precipitate this. Id. at p. 15.

Witness 8 said he went to Linda Thomsen, stating that he had been with the Commission for 20 years, that he had been in an untenable situation for the past year, and that Kreitman's management was impeding his ability to produce and strongly affecting his health. Id. at p. 22. Witness 8 noted that his blood pressure was up around 160 over 100, and then it went up to 170 over 110. Id. He said his cardiologist told him his health problems were work-induced and that he needed to leave his job. Witness 8 said he doubled the medication and his blood pressure went up to 180 over 120, and his doctor said to him, "You have [a] family history of stroke, and if you can't follow my advice

[and leave], find another doctor." Id. at 22. Witness 8 said that as his blood pressure got worse and worse, Kreitman actually escalated the tone of meetings, which started getting "hostile." Id. at p. 24. Witness 8 said he would describe the environment as "abusive." Id. at p. 25. Witness 8 also said he ended up severely depressed and went to a psychiatrist, and was told he needed to be medicated. Id. At that point, according to Witness 8, after he described to his doctor Kreitman's behavior, his doctor told him, "As a clinical matter, the behavior of your supervisor is sadistic." Id.

Witness 8 said there was much discussion about complaining to higher-ups about Kreitman, and Smith eventually did. Id. at p. 27. When asked what the result of Smith's complaint, Witness 8 said "the result was [Smith] went to [another regional office.]" Id. Witness 8 said there was fear or trepidation on the part of staff attorneys under Kreitman to complain about him, and concerns about Kreitman retaliating against them. Id. at pgs. 27-28. Witness 8 said Kreitman made Smith's life miserable, and Smith complained a lot but got no satisfaction. Id. at p. 36.

Witness 8 said he spoke with then Associate Director Peter Bresnan, and told him about the problems he had with Kreitman, specifically noting that Kreitman treated him with contempt. Id. at p. 57. According to Witness 8, Bresnan responded that he had supervised Kreitman, and Kreitman had treated him with contempt so he understood what Witness 8 was talking about. Id.

Witness 8 said he saw situations where if Kreitman did not like a particular attorney, anything that attorney did was wrong. Id. at p. 42. He noted that if Kreitman found out that an employee like Aguirre was complaining about him, "he'd put it down in any manner possible." Id. at p. 36. Witness 8 said he was surprised to hear that Aguirre was terminated because virtually no one gets terminated, but he noted that "Kreitman manages to push people out without terminating them." Id. at p. 46. Witness 8 said he did not really know anybody in the group who did not have those kinds of concerns about Kreitman. Id. at p. 35.

Another Enforcement attorney who currently works for Kreitman stated that Kreitman was "unfairly disapproving of him" and did not treat him the same as he treated other attorneys in the group. Tr. Witness 2 4/2008 testimony at pgs. 22; 28. He described a situation at a staff meeting where Kreitman made him feel embarrassed in front of his colleagues. Id. at pgs. 31-32.

Another attorney who works for Kreitman said he would characterize Kreitman's approach as "harsh" when he questions subordinates. Tr. Witness 4 4/2008 testimony at pgs. 28, 36. Witness 4 said he agreed with some of the complaints made about Kreitman, although he thinks management is well aware of the deficiencies, but has no desire to make any changes. Id. at p. 43. Witness 4 also said that he was concerned when complaints are made because management, instead of asking the complainant about the complaint, asked the supervisor against whom the complaint was made about it. Id. at p.

44. Another enforcement lawyer who used to work for Kreitman said that "Kreitman has a very abrasive personality." Tr. Witness 5 4/2008 testimony at p. 32.

b. Statements by Gary Aguirre on Kreitman's Conduct

Gary Aguirre reported some of the same concerns about Kreitman's behavior that were expressed by others who worked for him. He noted that Kreitman shouted and once threw one of the Pequot case spreadsheets at him. Tr. Aguirre 4/29/2008 testimony at p. 60. He also said Kreitman displayed anger when Aguirre was discussing bringing Mack in for testimony. Id. at p. 62. Aguirre described a tantrum of Kreitman, at approximately 4:30 p.m. on June 29, 2005, following a meeting between them in his office, when, according to Aguirre, Kreitman followed him and screamed, "Let's go see Paul," after Aguirre tried to discuss with him evidence against Mack. Aguirre Responses to Questions from Senator Grassley at p. 16.

Aguirre also said that Kreitman used strong language in his communications with outside counsel, and that he saw Kreitman "highly agitated and angry" in a conversation with outside counsel in the Pequot matter, Audrey Strauss, saying "Mark lost it in this conversation with Audrey." Tr. Aguirre 4/29/2008 testimony at p. 62.

Aguirre also said he believed that Kreitman found out about Aguirre's complaint to Thomsen about Kreitman, and took it personally. Id. at p. 93. An e-mail dated August 23, 2005 from Aguirre to Thomsen, stated as follows:

> Linda:
>
> Over the past four months five staff members left Mark Kreitman's group: three Senior Attorneys and two persons of color. Others are thinking about leaving. Still others share the same view, but cannot afford to leave of fear speaking out.
>
> I suggest that you speak with those who have left and current members regarding their views of the working environment in Mark Kreitman's group. E-mail from Aguirre to Thomsen dated August 23, 2005 attached hereto as Appendix 220.

Aguirre said he thought this complaint could have turned Kreitman against him. Id. at p. 94. He further noted that there was a very significant concern in the office that Kreitman and Hanson would engage in reprisal against those who complained, and view those who complained as traitors and punish them. Id. at p. 95. Aguirre said Hanson protected Kreitman, and there were concerns among the staff about Aguirre and Smith bringing these complaints against Kreitman, which would also reflect poorly on Hanson. Id. at p. 96.

c. Statements by Hanson, Berger and Thomsen on Kreitman's Conduct

Hanson stated that "Mark has a temper, no doubt." Tr. Hanson 7/15/2008 testimony at p. 99. When asked if he had ever seen Kreitman engage in inappropriate behavior with opposing counsel by being overly critical of opposing counsel or almost humiliating them, Hanson answered, "I would say yes." Id. at p. 100. He also acknowledged that he had seen Kreitman act in a disrespectful manner towards opposing counsel on more than one occasion. Id. at pgs. 100, 101. Hanson further admitted that, on a few occasions, he has seen Kreitman act towards somebody in a way that he would characterize as abusive. Id. at p. 101. Hanson denied that there was a "favorite" and "unfavorite" group working under Kreitman, and stated he never saw Kreitman act in a disrespectful manner toward [redacted] Id. at pgs. 101-102.

Associate Director Berger stated that he recalled both Aguirre and Smith complaining about the quality of management in Kreitman's group. Tr. Berger Senate 11/2/2006 testimony at p. 185. Berger said Smith complained that Kreitman was a difficult manager and was constantly editing his work and making corrections. Id. at p. 186. Berger said Smith told him that people were bristling under Kreitman's leadership. Id. Berger said he talked to Kreitman about Smith's complaint and some of the staff as well. Id. Berger said at one point he went into Hanson's office to ask him about concerns expressed about Kreitman's management, although he expressed it in terms of asking about lots of people and eventually asked about Kreitman. Id. at p. 191. Berger said the feedback he was getting was that people really liked Kreitman, and liked working with him. Id. at p. 192.

Director Thomsen described Kreitman as a very, very tough and tenacious investigator, who has a blunt style. Tr. Thomsen 9/8/2006 Senate testimony at p. 106. In September 2006, Thomsen said she believed that Kreitman had risen to management challenges pretty effectively. Id. at p. 107. Thomsen said she did not believe there were any complaints about Kreitman's management style, and that, while people left the group, no complaints got to her. Id. Thomsen said the general view is that in the category of managers, Kreitman was not necessarily the best, but certainly not the worst. Id.

When asked about Aguirre's August 23, 2005 e-mail to her about attorneys leaving Kreitman's group and asking her to speak to current and former employees about the work environment, Thomsen admitted that she did not speak with those who have left and current members of Kreitman's group, as Aguirre requested. Id. at p. 140. Thomsen also said she did not ask Berger to do this either. Id. Thomsen did forward Aguirre's August 23, 2005 e-mail to Berger, saying "Fyi-let's discuss when you get back. I'll make a few calls to personnel types in the meantime and hope you're (otherwise) having a great vacation." E-mail string from Berger to Thomsen dated August 24, 2005 attached hereto as Appendix 221. Berger responded to Thomsen in pertinent part: "Keep in mind the source. I'm sure you're aware of the circumstances under which most of the personnel

left (2 retirees, [redacted] and [redacted] (medical))." Id. Thomsen then responded by saying, "I agree –but I want to protect us and him (and has [redacted] actually left?). Id. Thomsen explained that the "him" she was trying to protect was Kreitman and stated that by "protect" us and him, she meant following up on complaints and taking the steps to make sure what they did was appropriate. Tr. Thomsen 9/8/2006 Senate testimony at p. 137.

In April 2008, Thomsen said in recent months she had heard complaints about Kreitman, that "they were of increasing frequency of late," and that they were "currently in the process of thinking through what, if any, action to be taken." Tr. Thomsen 4/28/2008 testimony at p. 20.

d. Kreitman's Description of His Own Supervisory Conduct

Kreitman acknowledged there were situations when employees working for him were encouraged to leave or transfer to another group. Tr. Kreitman 7/17/2008 testimony at p. 68. He mentioned a Branch Chief who was "not up to the job" and volunteered to go to another division, and two elderly gentlemen who had been staff attorneys since the 1960's who decided they did not want to make the move to a new building and he did not discourage them from leaving. Id. Kreitman also referenced Smith, saying that he was transferred to a regional office at his request and Kreitman advised the front office that he no longer wanted Smith in his group. Tr. Kreitman Senate 11/15/2006 testimony at p. 43. Kreitman described an incident when Smith flew into a rage after Kreitman asked to him to get some documents from his office. Id. at pgs. 43-44. Kreitman said this was the last of a significant number of similar acts of inappropriate conduct on Smith's part. Id. at p. 44.

Kreitman said when he became an Assistant Director, he felt the group was very weak and admitted he "wanted to raise the bar." Tr. Kreitman 7/17/2008 testimony at p. 69. Kreitman denied that he had temper tantrums, shouted or threw things at Aguirre in the office. Id. at p. 70. He stated that he did not think he was an abusive manager or made unreasonable demands on people. Id. He denied that there was a favored group and an unfavored group, stating that he "paid a lot of attention to avoiding favoritism." Id. He also denied acting in a retaliatory manner toward anyone, and specifically denied acting in a disrespectful manner toward [redacted]. Id. at p. 71. Kreitman also denied bragging about making life difficult for his employees. Tr. Kreitman Senate 11/15/2006 testimony at p. 41.

Kreitman did acknowledge that he thought he had been "more aggressive than is appropriate on some occasions with opposing counsel," specifically recalling the incident where opposing counsel gave a Power Point presentation and acknowledged that he "was dismissive of it." Tr. Kreitman 7/17/2008 testimony at. p. 72. He further admitted that he told opposing counsel he was "not interested in seeing it and we're not going to sit through it." Id.

Kreitman also acknowledged that he heard from Berger about the complaints made by Smith from Berger. Tr. Kreitman Senate 11/15/2006 testimony at p. 34.[79] Kreitman discussed the e-mail response he prepared for Berger about Smith's complaint, which, according to the metadata, was drafted on August 1, 2005 (the same day as the supplemental evaluations of Aguirre and Smith) and stated as follows:

> Paul – Though I emphasize that I don't discount, indeed welcome, constructive criticism, regardless of the source, my inquiries of Bob [Hanson] and Dave [Fiedler] concerning their sense of the morale of the group lead me to believe that it continues to be strong, with the obvious exception of [Smith] and Gary [Aguirre], and to a lesser extent [redacted] who is having trouble with productivity. The excerpt below from an email [Smith] sent Dave [Fielder] July 21 may shed some light on his complaint:
>
> [redacted] Aguirre and perhaps, have all become disturbed at their treatment. E-mail to Paul Berger (in draft) attached hereto as Appendix 222.

Kreitman stated that he was trying to convey in the e-mail that while obviously Aguirre and Smith did not were not happy in this group, the others, with the possible exception of Davis, had a strong and positive morale. Tr. Kreitman 11/15/06 Senate testimony at p. 36. Kreitman stated that at that time, he was pressuring Davis to increase his productivity. Id. at p. 37. Kreitman also noted that Smith's attempt to bolster his complaint about Kreitman by referencing other employees did not in fact bolster his complaints if one looked at the individual cases of the employees Smith referenced, with Sullivan retiring because of his age, Anderson never progressing beyond staff attorney status, and [redacted] having been demoted and suffering medical problems. Id. at p. 39.

3. Management Style and Conduct of Robert Hanson

a. Statements by Current and Former Enforcement Attorneys

There were also significant concerns expressed about Hanson's management style and the lack of feedback he provided to his subordinates.

Senior Counsel [redacted] who worked for Hanson for approximately two years, characterized Hanson's management behavior as "abusive." Tr. [redacted] 4/18/2008 testimony at p. 46. She also described Hanson's management style as insecure and said he tried to control everything about your case, trying to not allow you to do anything on your own. Id. at p. 31. [redacted] said Hanson would dictate whom she could call and not call on a case. Id. at p. 32. She described how Hanson would request such a detailed

[79] There is also documentary evidence that Branch Chief Dave Fielder forwarded Kreitman the text of Smith's e-mail complaint. E-mail dated August 1, 2005 at 3:42 pm from Dave Fielder to Kreitman attached hereto as Appendix 203.

outline for testimony that it would end up being 50-100 pages long and, thus, not usable in testimony because it had to be scripted in such detail in advance. Id. at p. 33. [redacted] said Hanson actually made her edit the outline to such a degree that she was instructed to take out the word "please" in a sentence saying, "Would you please state your name for the record?" Id. at pgs. 33-34.

[redacted] said certain attorneys were favored by Kreitman and Hanson, which manifested itself into Hanson and Kreitman sitting in on the less favored group's testimony, and more closely reviewing their documents. Id. at p. 24. She said it was determined in an arbitrary way, noting that the favored group consisted of white men in their late 20s or 30s. Id. at pgs. 25; 35. She said she sat in testimony with several attorneys who were great but not treated well, and with others whose behavior was not acceptable and Hanson did not intervene. Id. at p. 36. She said Hanson intervened often in testimony taken by attorneys who were not favored, including her, and actually objected to one of her questions in testimony. Id. at p. 37. [redacted] said if you were not favored, your documents would also be re-edited over and over again by Hanson. Id. at p. 26. She said on one occasion, she gave Hanson a memorandum that Hanson had previously edited and did not actually make any changes, so Hanson just edited over his own edits. Id. [redacted] stated she felt she got "punitive assignments" from Hanson, including one four-hour assignment to research the issue of "whether pink sheets should be capitalized or not." Id. at p. 27.

[redacted] said initially both Aguirre and Smith were well favored but, by the end, were not in the favored group. Id. at p. 25. [redacted] said Hanson provided very little guidance to her or younger lawyers. Id. at p. 70. She said she did not know of any other staff attorneys who enjoyed working for Hanson. Id. at p. 72.

[redacted] also said she had a pre-existing medical condition that was exacerbated by her constant interactions and run-ins with Hanson and her stress level as well as her personal problems. Id. at p. 52. She said she absolutely believed her medical condition was exacerbated by the treatment from Kreitman and Hanson and it led to her taking a leave of absence from the SEC. Id

A staff attorney who worked for Hanson for nearly two years said she never got a sense of how Hanson felt her work was going even though she often asked. Tr. Witness 9 4/2008 testimony at p. 31. Witness 9 said she tried to get feedback from Hanson after she took testimony and only got vague responses. Id. at p. 32. Witness 9 further said Hanson was disingenuous in that he would give you the impression that you were doing okay and then you would only get a one-step increase. Id. pgs. 32-33. According to witness 9, others felt the same way as they did not know where they stood in terms of their performance when it came to Hanson, who was not very forthright, forthcoming, or honest about how people were doing. Id. at p. 32.

Witness 9 said Hanson was not a very good manager. Id. at p. 9. She said he was not comfortable with having to teach to somebody who was brand new, and she found

this very frustrating because she wanted to know so much and had so much enthusiasm. Id. at p. 10. After a few months, she felt uncomfortable asking him questions, so she kind of stopped and lost a little bit of the enthusiasm and excitement about the job that she had when she first started through working with him. Id.

Witness 9 said she asked Hanson for guidance all the time, and there were times he just would not give it to her. Id. at p. 11. She said it was difficult for her to learn and do a better job because she was not getting the necessary guidance from her supervisor. Id. at p. 12. Witness 9 said she felt she was being held accountable for things, but was unable to perform them as well as she would have liked, since she was not given guidance by her supervisor. Id. at p. 13.

Nonetheless, in other ways, according to witness 9, Hanson was a micro-manager in that he would assign her a project to be done by Friday and, by Wednesday, would come to her office and ask how the project going to a point where she would say, "Look you have to stop harassing me." Id. at p. 14. Witness 9 said Hanson would not give her big picture guidance that required a lot of thought and knowledge, but he was very into reminding her about little tasks, like returning a phone call. Id.

Witness 9 characterized the atmosphere under Hanson and Kreitman as "unpleasant," and noted that "all those who worked for Hanson had the sense that he was watching their time and it was not a pleasant way to work." Id. at pgs. 14, 44. She said that, other than one person, she did not get the impression that anyone in the Hanson/Kreitman group was happy. Id. at pgs. 15-16.

Another staff attorney who worked for Hanson for two and a half years, described Hanson's management style as micro-managing, i.e., being very into the small details of investigations or supervision. Tr. Witness 5 4/2008 testimony at pgs. 8-9; 11. She said that Hanson was so focused on the minutia, there was little substance or looking at global issues. Id. at p. 11. Witness 5 said working for Hanson was a pretty frustrating experience, and she did not grow or learn from him. Id. at p. 12.

Witness 5 said she left the SEC because of her increasing frustration at working with Hanson. Id. at p. 17. She said he had been editing an action memorandum over and over again, and it was an increasingly frustrating experience, and she realized she had a fairly large amount of savings in her bank account and she "didn't have to take it anymore." Id. Witness 5 said she never complained and had the impression that if she had complained to those above Hanson, nothing would have been done about it. Id. at p. 19.

Another former subordinate of Hanson said working for Hanson was the "worst supervisor experience I ever had." Tr. Witness 3 4/2008 testimony at p. 34. He said communication was stilted, stunted, and spun a different way whenever Hanson and Kreitman were alone, and he got little if any direction from Hanson or advice from him. Id. Witness 3 said Hanson was insensitive, and there were hardly any times when he felt

comfortable talking to him about anything, noting there always seemed to be another agenda. Id. at p. 35. When asked if any other lawyers who worked for Hanson had concerns and issues with him, Witness 3 responded, "anyone who has worked with Hanson." Id. at pgs. 37-38.

Another former staff attorney said Hanson was not particularly good at being a manager. Tr. Witness 1 4/2008 testimony at p. 28. He said it was not pleasant working for Hanson, who was not particularly open to conversation. Id. at p. 29. Another current enforcement attorney said Hanson has not provided much guidance to him. Tr. Witness 2 4/2008 testimony at p. 40. This witness also mentioned several attorneys who have expressed frustration with both Hanson and Kreitman in terms of lack of guidance from them. Id. at pgs. 42-44.

Another current enforcement attorney said Hanson does not provide a lot of guidance to any attorneys. Tr. Witness 4 4/2008 testimony at pgs. 49-50. He also vouched for Witness 9, whom he considered a smart, energetic and capable lawyer and who was frustrated working with Hanson. Id. at p. 51. Finally, a former enforcement attorney said Hanson's style was to act friendly to the staff attorney, but not give him or her any sort of meaningful guidance, and to act like everything is fine, and they are great. Tr. Witness 6 4/2008 testimony at p. 37. He also mentioned Witness 9 as having had a lot of promise as a staff attorney and really wanting to work in Enforcement, but quitting because of Hanson. Id. at p. 34.

b. Statements by Gary Aguirre

Aguirre indicated that he felt Hanson did not give him a lot of guidance and sometimes would be give him advice that would turn out to be dead wrong, citing as an example a situation when Hanson had given him a subpoena form that did not effectively deal with the issue Aguirre needed. Tr. Aguirre 4/29/2008 testimony at p. 58. Aguirre also said he heard his colleagues complain about Hanson as a supervisor. Id. at p. 59.

c. Robert Hanson's Response

Hanson acknowledged that, if he had more time, he would have given more feedback to [redacted] and that she felt like he micromanaged her. Tr. Hanson 7/15/20087 testimony at p. 102. He said he probably tended to micromanage subordinates, although he said he did not know if he would use that phrase, since it has a "pejorative" aspect to it. Id. He denied ever acting in an abusive or disrespectful manner toward [redacted] or other employees, with the exception of a secretary, with whom he said he was very upset with on occasion. Id. at p. 103.

d. Statements by Mark Kreitman and Linda Thomsen

When asked about claims that Hanson does not give his subordinates much guidance or feedback, Kreitman said the contrary is true and noted that he had

recommended Hanson for supervisory excellence awards. Tr. Kreitman 7/17/2008 testimony at p. 72. Kreitman said he did not believe that Hanson micromanages people and the only person from whom he heard complaints about Hanson's management style was Aguirre. Id.

Linda Thomsen stated that when she served as both Enforcement Deputy Director and Director in Enforcement, she never heard any complaints about Hanson's management. Tr. Thomsen 4/28/2008 testimony at p. 19.

J. Reason For Aguirre's Termination

1. Aguirre's Contentions

Aguirre claimed that his termination from the SEC was directly related to his communications with Paul Berger and his other supervisors regarding his concern that political considerations were blocking him from taking John Mack's testimony. Supplement G to Testimony of Gary Aguirre before SEC IG on April 29, 2008 at p. 1 attached hereto as Appendix 223.

Aguirre noted that his evaluations were all positive until he questioned Mack's favored treatment. Testimony of Gary Aguirre before U.S. Senate Committee on the Judiciary, Part III dated December 5, 2006 at p. 6, excerpted page attached hereto as Appendix 176. Specifically, Aguirre identified positive feedback he received about the Pequot case from Kreitman on June 28 and 29 (statement by Hanson that "Aguirre makes contributions of high value"); the June 1, 2005 evaluation; the June 14 "Perry Mason" award; and the fact that at a bagel meeting on June 16, 2005, Kreitman spoke highly about Aguirre's success the day before when he made a presentation to the FBI and U.S. Attorney. Supplement G to Testimony of Gary Aguirre before SEC IG on April 29, 2008 at p. 1.[80] He also noted that the completed Form 50-B (personnel action) recorded the SEC's decision effective August 21, 2005, to raise his merit rating (pay scale) two steps based on his performance, and that Linda Thomsen's notice of September 1, 2005 terminated his employment 11 days later. Id. Aguirre further noted that he was on vacation between those dates, and stated that the SEC has offered no explanation for why his performance warranted a two-step increase and then resulted in him being fired. Id.

Aguirre claimed that since July 2005, the SEC used one charade after another to cover up the fact that senior Enforcement officials gave favored treatment to Mack. Id. at p. 9. At that point, according to Aguirre, after Mack returned as Morgan Stanley's CEO on June 30, 2005, his supervisors were left with the problem of how to block the Mack testimony in the face of compelling evidence it should be taken. Id.

[80] Aguirre also stated that he had positive interactions with Hanson and Kreitman on both personal and professional levels prior to his raising his concerns about preferential treatment for Mack, noting several friendly exchanges with Hanson in the period from March through July 2005, and Kreitman's comment in January 2005 that he and Aguirre would be "partners" in their working relationship, and in May 2005 that Aguirre was the "best investigator" in the unit. Tr. Aguirre 8/26/2008 testimony at pgs. 133-136.

Aguirre pointed to the fact that prior to his raising the issue of preferential treatment for Mack, his supervisors' conduct and statements positively reflected his performance while, after he raised the issue, actions were taken that led to his termination. Chronology of Events in Chart Form as Prepared by Gary Aguirre attached hereto as Appendix 224. According to Aguirre's chronology, each entry of which is supported by documents, in June 2005, he received a positive evaluation, gave a presentation to his supervisors on the Pequot investigation in preparation for his meeting with the FBI and U.S. Attorney's office, received a motivational award from Kreitman, and was praised by Hanson in a written recommendation on Aguirre's behalf to the Compensation Committee. Id. Aguirre's chronology further showed that on July 18, 2005, the Compensation Committee approved his merit step increase. Id. Aguirre then noted that after he made verbal disclosures at a meeting on July 22, 2007, and written disclosures by e-mail dated July 27, 2005, about his concerns about preferential treatment for Mack, on August 1, 2005, Berger "direct[ed] [his] supervisors to do a phony evaluation." Id. Aguirre's chronology also showed that although the Chairman and OHR were approving his merit step increase in mid-August, Kreitman was reset[ing] the 9' bar for [the] Mack subpoena" and, on September 1, 2005, Aguirre was terminated. Id.

Aguirre claimed that the statements made in the September 1, 2005 notice of termination were mere pretexts. Tr. Aguirre 4/29/208 testimony at p. 106. Aguirre stated that he believed that Enforcement's decision to fire him developed from his questioning the decision to give Mack preferential treatment. Id. at p. 107. He indicated that the evidence has pinpointed that the precise event that triggered his termination was his July 27th communication with Paul Berger, claiming that the Pequot investigation had been halted for political reasons. Id.; e-mail dated July 27, 2005 from Aguirre to Berger and Kreitman that specifically referenced that Hanson told Aguirre, "it would be an uphill battle [to take Mack's testimony] because Mack had powerful political connections," attached hereto as Appendix 118. He stated that it was this July 27, 2005 e-mail that triggered the August 1, 2005 effort to intercept his two-step merit pay increase, as well as his termination. Supplement G to Testimony of Gary Aguirre before SEC IG on April 29, 2008 at p. 1.

Aguirre stated that after Berger failed to take any action in response to his July 25, 2005 e-mail, Aguirre sent his next e-mail to Thomsen on August 4, 2005. Id.; e-mail dated August 4, 2005 from Aguirre to Thomsen, attached hereto as Appendix 121. Aguirre claims that although Hanson told him the Mack testimony issue would be reconsidered when he got back from vacation, his supervisors did not intend to reconsider the Mack subpoena decision after he returned from vacation in September 2005. Id. Aguirre stated that he believes his July 27 e-mail recounting Hanson's statement that Mack had powerful political connections was the triggering event for his termination, and he suspects that the motives for his firing were in part anger for raising Hanson's statement and in part to stop him from going any higher. Id. at p. 2.

Aguirre also stated that the Office of General Counsel (OGC) investigation of him was another factor in his termination, and that he suspects some combination of OGC attorneys Richard Humes, Juanita Hernandez, Melinda Hardy and perhaps others were actively seeking grounds to fire him. Id. Aguirre claimed that his termination solved a problem of the OGC in that Aguirre's EEO case (alleging age discrimination in connection with Aguirre's failed attempts to initially obtain a position with the Commission) would become moot if he were fired. Id. Aguirre further stated as follows:

> [M]y personnel records suggested –at least to me- that my supervisors acted alone. Over the past year, however, I have obtained access to records that indicated Richard Humes, Juanita Hernandez, Melinda Hardy and others within the SEC's office of General Counsel were actively involved in my termination. Other evidence indicates a key document in my EEO case vanished from my OPF after Ms. Hernandez took possession of it in October 2005. Further, for and for reasons which I do not understand [the Office of General Counsel] was investigating me at the time of my discharge. All of this again raises the issue of the role of Mr. Humes and his subordinates in my firing. . . . Letter dated May 13, 2008 from Gary Aguirre to H. David Kotz at p. 3 attached hereto as Appendix 90.

Aguirre referenced a statement that Director Thomsen's Counsel, Donna Norman, made to him in a discussion with her about Aguirre moving out of Charles Cain's group as part of a resolution of his EEO case that if he were to drop the EEO case, he would move "mountains" or "hills out of [his] way." Tr. Aguirre 4/29/2008 testimony at pgs. 41-42. He also noted that the OGC used lawyers from Enforcement's trial unit to represent management in his EEO case and, in fact, even though he objected in writing to this practice, one of the lawyers (Kevin O'Rourke) who worked with him on the Pequot case had represented management in his EEO case and kept it a secret from Aguirre. Tr. Aguirre 8/26/2008 testimony at pgs. 26-27. Aguirre stated that he believes that there was an undercurrent of reprisal for his EEO case[81] and that this was a "contributing cause" to his termination. Id. at p. 45.

Aguirre also stated that although a probationary employee may be discharged more easily, the SEC cannot do so in a way that violates antidiscrimination statutes or constitutes reprisal for whistleblowing. Supplement H to Testimony of Gary Aguirre before SEC IG on April 29, 2008 at p. 1 attached hereto as Appendix 225. Accordingly, Aguirre surmised that the OGC needed to come up with a plausible theory for his termination and therefore, participated in putting a phony record in his personnel file [i.e., the supplement evaluation] to establish the theory. Id. at p. 2.

Finally, Aguirre stated that he believes the evidence against him has been "choreographed" and is "very, very, very little of anything concrete. . . ." Tr. Aguirre

[81] According to Aguirre, Kreitman told him he thought that age discrimination was a factor in Aguirre not initially being hired by the SEC. Tr. Aguirre 8/26/2008 testimony at p. 42.

8/26/2008 testimony at p. 255. He said, "we are dealing with very interested parties" Id. at p. 256. He also noted as follows with respect to the SEC's contentions of appropriate bases for his termination:

> We're dealing with multiple iterations of a story that starts off with a small story, and then goes through story inflation. And story revision as on theory of why I was discharged is disproved, another one will come up in its place or it will be revised in a certain different way. Id. at p. 256.

2. Response by Aguirre's Supervisors

Aguirre's supervisors all deny that the decision to terminate Aguirre was related to Aguirre seeking to take Mack's testimony.

Hanson said when he left for vacation on August 5, 2005, he was not aware that Aguirre was going to be fired. Tr. Hanson 9/5/2006 Senate testimony at p. 51. Hanson stated that after he returned from vacation during the week of August 21, 2005, he recommended that Aguirre be terminated. Id. at p. 52. Hanson said the reasons he gave for recommending Aguirre's termination were those articulated in the August 1, 2005 supplemental evaluation, particularly Aguirre's inability to work with others. Id. Hanson said he then spoke to Charles Cain, Aguirre's first supervisor to obtain his views, and Cain said Hanson should terminate Aguirre. Id. at p. 53. Hanson explained that Cain validated a lot of the things that he was thinking and, at that point, Hanson concluded that Aguirre "was a negative to the division." Tr. Hanson 7/15/2008 testimony at p. 105.[82]

Hanson described the thinking that led to the final decision to terminate Aguirre was "sort of enough was enough." Id. at p. 104. Specifically, Hanson noted that the following factors: Aguirre had quit so many times; he was going around Hanson to Kreitman; Eichner was not getting along with Aguirre; Aguirre was creating chaos with counsel; he did not seem to be organized; and he was sometimes in tears and sometimes angry. Id. Hanson said it was a culmination of things, and he was particularly concerned about Eichner and wanting Eichner to enjoy his work. Id.

Hanson said conversations took place between Enforcement management and OHR, and he understood that a memorandum proposing termination had to be drafted. Tr. Hanson 9/5/2006 Senate testimony at pgs. 57-59. After the memorandum was drafted, Hanson said there was a meeting with Linda Thomsen, in which they discussed termination. Id. at pgs. 59-61. Hanson said Kreitman, Berger and he were also at the meeting. Id. at p. 61. Hanson said he recalled saying at the meeting that he thought Aguirre was "the proverbial loose cannon" and "a net negative for the Commission." Id. at p. 60. Hanson also recalled that Thomsen said at the meeting that she had received an e-mail from Aguirre about the testimony of Mack. Id. Hanson said Thomsen asked if it made sense to take Mack's testimony at this point and Hanson responded that it would be

[82] Charles Cain said he recalled telling Hanson that he shared his views about Aguirre. Tr. Cain 8/29/2008 testimony at p. 25.

a pretty short session, since there would not be much to ask Mack nor anything with which to confront him. Id. Hanson said Berger mentioned that the trading occurred in 2000 or 2001, so it was not like it happened last week, and they could call in a bunch of people and put them on the record. Id. Hanson added that Kreitman said they had no information suggesting Mack had the information to pass onto Samberg. Id. at pgs. 60-61. Hanson confirmed that, to his recollection, this conversation about Mack was at the same time as the discussion about Aguirre's performance. Id. at p. 61. Hanson said at this meeting, Thomsen stated that she agreed with the decision to terminate Aguirre. Id. at p. 73.

Hanson recalled that at the time Aguirre was terminated, Hanson did not know if he had heard that Aguirre had complained to Chairman Cox about preferential treatment for Mack, and was not aware of complaints Aguirre made to the OIG or OSC. Id. at pgs. 105-106. Hanson also noted that Aguirre's firing did not render him unable to complain about allegations of preferential treatment and, actually, firing Aguirre led him to file more complaints about Hanson. Id. at pgs. 106-107. Hanson also acknowledged that the firing of Aguirre per se did not specifically cause Mack's testimony not to be taken, as Mack's testimony would not have been taken anyway because Aguirre's superiors did not want it to be taken. Id. at p. 106.

Kreitman stated the decision to terminate Aguirre was made in a meeting with Linda Thomsen, as the decision could not have been made without Thomsen's approval. Tr. Kreitman 9/6/2006 Senate testimony at p. 102. Kreitman stated that in this meeting, Berger said that Aguirre had been unable to get along with his colleagues; that he was unwilling to commit to write up his investigation; that he was resistant to any direction, which also had been the case with his previous supervisor, Cain, as well; and that his resignations created a very difficult personnel management situation. Id. at p. 103.

Kreitman stated that he did not believe that he knew about Aguirre's complaint to the Chairman prior to Aguirre being terminated; nor was he aware of any external complaints Aguirre made to the OSC before he was terminated. Tr. Kreitman 7/17/2008 testimony at p. 73.

Berger stated he was notified that Aguirre's probationary period was going to end, and he contacted Kreitman and said Hanson and he needed to make a decision about what they wanted to do. Tr. Berger 11/2/2006 Senate testimony at pgs. 254-255. Berger said Kreitman told him that Hanson and he would discuss the issue and get back to him. Id. at p. 255. Berger said after a short time frame, Kreitman and Hanson came to him and told him they wanted to terminate Aguirre. Id. Berger said he instructed them to speak to OGC and OHR, and they said they would set up a meeting with Linda Thomsen. Id. at p. 256.

Berger said they had the conversation with Thomsen in which they talked about the fact that Aguirre did not work out in Grime's group, and did not work in Kreitman's group as well. Id. Berger explained that the issue was not about Aguirre's ability as a

lawyer, but about "his ability to work in a reliable fashion, representing the Commission with other people." Berger recalled Hanson saying that Aguirre "was a net negative for the Commission." Tr. Berger 11/7/2006 Senate testimony at p. 95. Berger said Kreitman supported everything that Hanson had said about Aguirre. Id. at pgs. 95-96.

Berger said in the meeting, they also discussed moving Aguirre to another office, but concluded they would not be able to recommend to another office or division that he was someone they thought should be hired. Tr. Berger 11/2/2006 Senate testimony at pgs. 256-257. At that point, according to Berger, Thomsen said, "Let's finish the process and terminate, and give him an opportunity to resign." Id. at p. 257. Berger stated that he did not remember if the issue of taking Mack's testimony came up in the meeting to discuss Aguirre's termination. Id. at p. 258.

Berger denied that the taking of Mack's testimony factored into the decision to terminate Aguirre, saying "the decision was based on the fact that Gary was an extremely difficult individual to work with, both inside the building and outside the building, and that he was not being productive in terms of what the mission of the Commission was." Id. at pgs. 257-258. Berger added that "the question was, on a probationary status, should we take the chance and keep him or should we terminate?" Id. at p. 258. When asked directly if Aguirre's repeated insistence upon taking Mack's testimony played a role in the decision to terminate him, Berger replied as follows:

> I think that his inability to listen to his supervisors and, you know, make decisions 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. It wasn't, you know, whether he was--whether we were going to take Mack's testimony or not, because we had pretty much decided we were going to take the testimony, so it wasn't the issue. The issue was 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. Tr. Berger 11/7/2006 Senate testimony at pgs. 97-98.

Linda Thomsen stated that Aguirre was fired for the reasons outlined in the termination notice, specifically referencing the fact that "he did not work well with supervisors," and "he didn't work well with others." Tr. Thomsen 9/8/2006 Senate testimony at p. 54. Thomsen said it was a unanimous recommendation on the part of his supervisors that they terminate Aguirre in his probationary period because he "had demonstrated inability to work within the management structure [and] to work with peers." Id. at p. 56. Thomsen acknowledged that they were all aware it might appear that Aguirre's termination was related to or in reprisal for his being adamant on taking Mack's testimony. Id. at p. 55.

Thomsen said it was she who ultimately made the decision to terminate Aguirre. Id. at p. 116. She described her meeting with Berger, Kreitman and Hanson, and said all three indicated in their collective judgment that Aguirre should no longer be employed by the agency. Id. at p. 117. Thomsen said they spoke about the fact that the timing was not ideal and discussed the possibility of extending the probationary period to afford Aguirre an opportunity to get back from vacation, but understood an extension of the probationary period to be "a non starter." Id. at pgs. 117-118. She said they all expected the decision to be potentially litigious given the facts that Aguirre had been litigating with them before and was unhappy about the Mack testimony issue. Id. at p. 118.

Thomsen said the tipping point for her was that the difficulties that presented themselves throughout Aguirre's tenure had not been resolved, and she noted that the termination notice was meant to summarize the issues that had occurred, and is consistent with the reasons for termination, but was not meant to include every point. Tr. Thomsen 4/28/2008 testimony at pgs. 12, 15-16.

In her Senate testimony, Thomsen was shown an August 24, 2005 e-mail string that originated with Aguirre providing his justification to Berger as to why Mack's testimony should be taken, which was forwarded to Kreitman who responded to Berger with a copy to Hanson, stating, in pertinent part as follows:

> Long meeting on Pequot yesterday with Bob, Jim and Liban to discuss existing dynamics, transition planning, certain discrete issues, raised, inter alia, by Samberg transcript. Bottom line is that Gary is making life impossible for Jim and Liban. Refuses to treat them as equal partners, is reluctant (or unable) to seriously involve them in strategic/tactical planning, instigates personal feuds. I've also spoken at length privately with Jim; am convinced that he can take over and manage Pequot with Liban more efficiently and effectively than Gary. Bob has the same sense, and has conferred with Joe Cella to be sure Market Surveillance would be OK with a transition. Feedback I get from opposing counsel (taking into account their obvious self-interest) suggests Gary's approach with them is not productive. And I fear Gary's view of things is not a healthy element for the group. Bob and I both feel that it may be appropriate at this juncture, before Gary's probationary period elapses, to consider his termination. I am willing to speak with him friend to friend to see if he would resign voluntarily, in the interest of the Agency's mission to which he is dedicated. Would appreciate your view upon your return. E-mail string dated August 24, 2005 between Berger and Thomsen attached hereto as Appendix 226.

In this e-mail string, Berger forwarded Kreitman's e-mail quoted above to Thomsen, saying, "Sorry to bother you with this, but in light of your earlier email I thought I should send this along. Oy!" Id.

p. 39. Witness 1 never heard of a supplemental evaluation or an evaluation given after the formal process. Tr. Witness 1 4/2008 testimony at pgs. 33-34. Witness 2 was not familiar with a supplemental evaluation or any evaluation that was added or supplemented after the initial evaluation was given. Tr. Witness 2 4/2008 testimony at p. 18. Witness 3 said he has never heard of a supplemental evaluation. Tr. Witness 3 4/2008 testimony at p. 20. Witness 8 said he has never seen a supplemental evaluation other than for Aguirre. Tr. Witness 8 4/2008 testimony at p. 47. Witness 5 was not familiar with nor had ever seen a supplemental evaluation or any evaluation after the regular process. Tr. Witness 5 4/2008 testimony at p. 31.

7. Aguirre's Supervisors' Explanation of His Evaluation Process

Aguirre's supervisors were questioned as to why his initial and supplemental evaluations were so different, and how during the same period of time in which they provided Aguirre with a negative supplemental evaluation, he was being a two-step merit pay increase. Hanson noted that it was Kreitman, not he, who in June 2005, signed the initial evaluation for Aguirre in which all four boxes of acceptable for "knowledge of field or occupation," "planning and organizing work," "execution of duties," and "communication" were checked. Tr. Hanson Senate 9/5/2006 testimony at pgs. 29-30. Hanson also noted that as of June 2005, while Aguirre was "difficult," Hanson "had hopes, expectations that it would work itself out." Tr. Hanson 7/15/2008 testimony at p. 45.

When asked about the supervisory comment Hanson prepared for Aguirre on June 29, 2005, and specifically why he did not include negative information about Aguirre's subpoenas in that evaluation document, Hanson replied that "it was sort of an evolving process with Gary." Id. at p. 32. Hanson further stated that the June 29, 2005 supervisory comment on Aguirre's performance was intended to cover the period until April 30, 2005 because the evaluation period ran from May 1, 2004 to April 30, 2005. Id. at pgs. 33-34. He further stated that when he checked the box of "made contributions of high quality" on June 29, 2005, which recommended that Aguirre receive a two-step merit pay increase, he was basing his recommendation on the period up to April 30, 2005. Id. at pgs. 34-35.

Hanson also explained that he "tried to give Gary the most generous evaluation" he could covering the period through April 30, 2005. Transcript of Testimony of Robert Hanson before Senate Committee on November 9, 2006 (hereinafter, "Tr. Hanson Senate 11/9/2006 testimony") at p. 88. Hanson stated that Aguirre "worked very hard while he was in my group." Id. Hanson stated that he should have discussed Aguirre's performance with the group he was in prior to coming to his group. Id. Hanson said at the time he wrote the supervisory comment, "it preceded the time when [Hanson] got more involved with [Aguirre's] work because [Hanson] was tied up on two [other] cases that consumed most of [his] time." Id. Hanson said at the time he wrote the comment, he had concerns about Aguirre's performance or conduct, but did not convey them in the

document, saying, "I'm pretty generous with respect to these things . . . it's money, it's [a] little money." Tr. Hanson 7/15/2008 testimony at p. 48.

Hanson said he became more aware of Aguirre's behavior and professional dealings after he wrote the evaluation, and noted that, on August 1st, he wrote a supplemental evaluation that that articulated some of the issues they were having with Aguirre. Id. Hanson admitted, though, that he never made any effort to prevent Aguirre from getting his two-step merit pay increase. Id. at p. 89.

Kreitman acknowledged that in June 2005, he completed and signed the evaluation for Aguirre, in which he rated Aguirre satisfactory on all elements. Tr. Kreitman Senate 9/6/2006 testimony at pgs. 97-98. Kreitman stated that he specifically did not have any discussions with Charles Cain, Aguirre's former supervisor, when he signed Aguirre's evaluation because he had promised Aguirre a "fresh start," and said he was going to evaluate Aguirre on the basis of what he did in Kreitman's group. Tr. Kreitman Senate 11/15/2006 testimony at pgs. 118-119. Kreitman said he did not want to be prejudiced by getting into details about problems that Aguirre had elsewhere. Id. at p. 119. Kreitman stated that at the time he prepared Aguirre's performance evaluation in June 2005, he had concerns about Aguirre's work product and behavior, but he did not choose to reflect those concerns in Aguirre's performance assessment. Id. at p. 121. Kreitman explained that because the only choices were "acceptable" and "unacceptable" and there are immediate and very serious consequences if one is rated "unacceptable," he was not prepared to take that step with respect to a new employee who had been in his group for only four months. Id. at pgs. 121-122.

Kreitman acknowledged that he was consulted on, and approved all the recommendations for, step increases for those in his group, including Aguirre. Tr. Kreitman 7/17/2008 testimony at p. 58. Kreitman also admitted that, at the time, he had "pretty serious reservations" about Aguirre, yet approved the two-step increase, explaining he felt his staff was underpaid and wanted them to get what money was available. Id. at p. 59. He also noted that at that time, he "still wanted to keep Gary." Id.

Berger stated that the pay increase that Aguirre received was a reward for his "hard work," noting that Berger's view of the pay increases considered the fact that the people working at the SEC worked very hard and did not make a lot of money compared to the private sector, explaining that "Gary was a hard worker and was dedicated to his investigation, and so he was being rewarded for his hard work." Tr. Berger Senate 11/2/2006 testimony at p. 156. Berger stated that he "was not uncomfortable" with the fact that Aguirre was rated "acceptable" in all four categories in June 2005, stating that, in his view, the evaluation related to "the performance area as opposed to the general conduct area." Id. at p. 178. Berger stated that when he reviewed the recommendation to give Aguirre a two-step increase, he asked:

> [A]re you comfortable with this number? And for Gary, it was a two. And they said, yeah. I said, in light of everything else? And they said, yeah, we want to reward him for his hard work. And I said, fine. Id. at p. 247.

Berger also stated that while officially the rating period ended on April 30, 2005, in his mind was the fact that a lot of time had passed since the end of April, and they should at least, as supervisors, address anything outstanding that had happened between April and June. Id. at p. 249.

Thomsen stated that she did not consider the merit increase that Aguirre received "a significant raise." Tr. Thomsen 9/8/2006 Senate testimony at p. 127. She said that two steps "was sort of midpoint." Id. Thomsen stated that the "process was designed exclusively to recognize contributions, and no one to this day disputes that Mr. Aguirre worked hard" and was "extremely diligent about pursuing an investigation." Id. When asked why if there were issues with Aguirre's performance during the time of the award, a performance improvement plan not considered, Thomsen replied that they understood he was resigning and, therefore, a performance improvement plan would not be necessary. Id. at pgs. 128-129.

8. Aguirre's Explanation of His Evaluation Process

Aguirre pointed out that the supplemental evaluation was a process rarely, if ever, used at the SEC, and noted the significance of the series of events that occurred immediately prior to the preparation of the document. Aguirre Responses to Questions from Senator Grassley at p. 28. Aguirre noted that he met with Berger on July 21 or 22, 2005, and informed him about Hanson's decision blocking the Mack subpoena and Hanson's statement attributing that decision to Mack's political influence. Id. In addition, Aguirre noted that on July 27, 2005, he sent an e-mail to Berger that contained references to Hanson's comments about Mack's political influence and, three days later, on August 1, 2005, Berger, Kreitman and Hanson collaborated to create the supplemental evaluation. Id.; e-mail dated July 27, 2005 from Aguirre to Kreitman and Berger attached hereto as Appendix 218.

According to Aguirre, the supplemental evaluation described a person who had no future at the SEC. Aguirre Responses to Questions from Senator Grassley at p. 28. It contained negative feedback regarding conflicts with other staff, complaints from opposing counsel, issuance of subpoenas that violated the privacy laws, refusal to share information, and resistance to supervision, and was equivalent to an "unacceptable" rating in each of the four categories on Aguirre's original evaluation. Id. Aguirre also indicated that the supplemental evaluation was a three-level drop from what Berger approved less than two weeks earlier at the compensation committee meeting [i.e., from level 2 (contributions of high quality) to a level of unacceptable, which would be lower than level 4 (no significant contribution beyond an acceptable level of performance.)] Id.

Aguirre also noted that during the period between July 18, 2005, when the compensation committee met, and the August 1, 2005 supplemental evaluation, he was out of the office on official leave for most of that time and, therefore, nothing could have happened during that time that would have triggered the supplemental evaluation. Id. at p. 29. Aguirre also questioned why the supplemental evaluation was never placed in his personnel file. Id. at p. 30. He further noted that the SEC's explanation that the supplemental evaluation was just mistakenly not sent to the compensation committee is not believable and evidences a cover-up. Aguirre 4/6/2006 Response to Wheeler at p. 15.

Aguirre concluded that the August 1, 2005 supplemental evaluation was the first step to terminating him, but since it came too late to intercept his two-step merit pay increase, which had been approved two weeks before, the "SEC needed a little time to dilute the obvious causal connection between [his] July 27 email and the August 1" supplemental evaluation and his termination approximately one month later. Id.

H. Reactions to Aguirre's Firing and Evidence Concerning Other Terminations in the Enforcement Division

Numerous employees in Enforcement stated that they were surprised when they heard about Aguirre's firing. Senior Counsel **Liban Jama** stated that he knew there were disagreements between Aguirre and Eichner and there were tensions, but he was surprised that Aguirre had been terminated. Tr. Jama 10/11/2006 Senate testimony at p. 42. **Jama** said he was particularly surprised that Aguirre was fired because, at the time, he had the impression that Aguirre's supervisors thought the Pequot case was fantastic and was going to be a good case. Tr. **Jama** 4/24/2008 testimony at p. 63. **Jama** noted that there was a change in tone later about the Pequot matter from the case being viewed as "promising" to the feeling that they did not have "the goods" with respect to Mack. Id. at p. 64. **Jama** said, even with the disagreements Aguirre was having with others, he did not have the sense that Aguirre thought there were any severe ramifications in terms of his performance and ever had a sense of worry about his position at the SEC. Id. at p. 59.

Branch Chief Eric Ribelin stated that he learned of Aguirre's termination when Aguirre called him from California and told him he had been fired. Notes of OIG Interview with Eric Ribelin of August 3, 2006 (hereinafter, "Ribelin 8/3/2006 Interview Notes") at p. 7. Ribelin said he was both surprised and upset. Id. Ribelin explained that he felt that, with Aguirre's termination, folks were "putting the kibosh" on the case. Id. at p. 8. He also said he thought Aguirre's firing was "outrageous" and said, in his experience, no one of Aguirre's competence and intelligence and experience who was moving his case forward had been fired before his first year was over, calling it "unbelievable." Tr. Ribelin 11/9/2007 testimony at p. 48. Ribelin said he was so upset that he wanted to distance himself from the Pequot case, and felt that working on the case would not be a productive use of his time. Ribelin 8/3/2006 Interview Notes at p. 8.

However, Ribelin said that Cella and Kreitman asked for his continued assistance in the investigation and he agreed to continue to work on the case. Id.[77]

Similarly, Market Surveillance Specialist Thomas Conroy stated that he was surprised at Aguirre's termination because his overall impression was that Aguirre was doing a good job. Conroy 11/16/2006 Interview Notes at p. 8.

Eichner, to the contrary, stated that he was not surprised to learn Aguirre had been fired because that possibility had been discussed with him previously in a private meeting with Mark Kreitman on August 24, 2005. Eichner 9/27/2006 Interview Notes at p. 5. Eichner also noted that Aguirre's firing made more sense to him when it was mentioned to him that Aguirre was a probationary employee. Id.

Numerous other Enforcement employees stated that they were surprised about Aguirre's termination because, in their experience, terminations were very rare in the SEC and in Enforcement. Joseph Cella, the Chief of OMS, said when Aguirre was terminated, it somewhat surprised him, because they did not tend to have a lot of people get fired at the SEC. Tr. Cella 9/7/2006 Senate testimony at p. 49. Cella said he was not aware of any other terminations of investigators or attorneys in his history at the SEC. Id. at pgs. 49-50. Enforcement Branch Chief Lawrence Renbaum stated he was only aware of one other case of a termination involving an employee who got into a dispute about whether he was properly barred or practicing law without a license. Tr. Renbaum 11/1/2006 Senate testimony at p. 48.

Chief Accountant **Susan Markel** noted that although an employee can be removed more easily during the first year of employment, this does not happen all that often. **Markel** 4/16/2007 Interview Notes at p. 4. Margaret Cain, an attorney in Enforcement, stated that she was surprised by the Aguirre firing because it does not happen very often that people get fired from the government. Tr. M. Cain Senate 10/13/2006 testimony at p. 14. **Robert Bayless,** who worked as the Associate Chief Accountant in Enforcement for several years, stated he did not know of a situation where an individual was terminated in Enforcement, either within his or her probationary period or after. Tr. **Bayless** 4/24/2008 testimony at pgs. 17-18. Former Enforcement Senior Counsel **Jacqueline Eggert** said she was surprised to hear that Aguirre had been fired, and that she was not aware of anyone else having been terminated, even in his or her probationary period. Tr. **Eggert** 4/18/2008 testimony at pgs. 18-19, 65.

Furthermore, several other current and former Enforcement attorneys, who requested confidentiality, some of whom had worked for numerous years in Enforcement, stated that there were aware of very few instances, if any, of employees in Enforcement being fired. Witness 9 expressed surprise that Aguirre was fired because she never got the impression Enforcement management would fire anybody. Tr. Witness 9 4/2008 testimony at p. 30. Witness 1 was surprised to hear Aguirre was terminated because he

[77] In fact, Ribelin stated that Cella's reaction to him not wishing to continue to work on the Pequot matter was that "not working the case was not an option." Ribelin 8/3/2006 Interview Notes at p. 8.

only knew of two or three instances in 37 years when someone was fired from the SEC. Tr. Witness 1 4/2008 testimony at p. 14. Witness 2 was perplexed upon hearing Aguirre had been fired, and did not know of any attorneys in seven years who were fired from Enforcement, even in their probationary period. Tr. Witness 2 4/2008 testimony at pgs. 12; 19. Witness 3 said he was surprised to hear about Aguirre's termination because he did not know of any other attorneys who were fired while he worked in Enforcement. Tr. Witness 3 4/2008 testimony at p. 11. Witness 8 was surprised to hear that Aguirre was terminated because virtually no one gets terminated. Tr. Witness 8 4/2008 testimony at p. 46. Witness 6 stated the only person he can remember being fired in Enforcement was a paralegal; he did not know of any lawyers being fired. Tr. Witness 6 4/2008 testimony at p. 18.

Bob Hanson also acknowledged that he had not heard of any other performance or misconduct terminations of attorneys or investigators in his eight years at the SEC. Tr. Hanson Senate 9/5/2006 testimony at pgs. 166-167. Paul Berger also admitted that he never fired an attorney other than Aguirre, although he said he fired a paralegal. Tr. Berger Senate 11/2/2006 testimony at p. 214.

Linda Thomsen stated that, in addition to Aguirre, there have been a few circumstances involving probationary employees who were terminated, or resigned after being told they would be terminated, including at least one attorney. Tr. Thomsen 9/8/2006 Senate testimony at p. 15. She also recalled three instances of proposed terminations involving attorneys who were not in their probationary periods, and she thought, in at least two of those cases, they ultimately resigned. Id. at p. 17. Specifically, Thomsen identified one attorney who resigned before the end of the probationary period, in lieu of being terminated for "not working hard enough and making enough progress and just not getting it." Tr. Thomsen 4/28/2008 testimony at p. 23. She also identified another person who resigned after being caught taking notes in an investigation when it was agreed no notes would be taken, and then lied about taking notes. Id. at p. 24.

Thomsen observed that, in the government, you can terminate someone for any reason as long, as it is not a bad reason, in the probationary period and, after the probationary period, the process is much longer, with lots more involvement from OHR. Id. at p. 24. She did, acknowledge, however, that the rate of probationary employees who become non-probationary employees is 90 percent or higher. Tr. Thomsen 9/8/2006 Senate testimony at p. 18.

OHR records show that five Enforcement employees, including Aguirre, were either terminated, or resigned after notice of proposed termination, in the years 2005 and 2006. E-mail from OHR Employee Relations Branch Chief, David Cunningham dated February 21, 2008 attached hereto as Appendix 219. Four of these employees, including Aguirre, were within their probationary period of employment. Id.

I. Atmosphere in Office Environment Where Aguirre Worked

1. Lack of Feedback and Abusive Environment

The OIG investigation uncovered substantial evidence concerning the management styles and abilities of Aguirre's primary supervisors during his tenure with the Commission. The evidence showed a pattern of little or no feedback provided to staff attorneys working for Branch Chief Hanson and Assistant Director Kreitman, as well as an atmosphere of "abuse" and "unfairness" that pervaded the office environment in which Aguirre worked.

Numerous employees in Enforcement who worked with Kreitman and Hanson indicated they felt their treatment by both Hanson and Kreitman was often inappropriate in nature and at times punitive or retaliatory. Nearly of all the employees who agreed to speak with the OIG about these issues requested confidentiality because of their concern about possible retaliation for providing information to the OIG. For this reason, their names and identities will not be divulged in this report.

2. Mark Kreitman's Supervisory Conduct

a.. Statements of Current and Former Attorneys Who Worked for Kreitman

A former staff attorney in Mark Kreitman's group who requested confidentiality,[78] stated that Mark Kreitman "was abusive to him" and "had a habit of retaliating against people." Notes of OIG Investigator Interview with Witness Smith of September 14, 2006 (hereinafter, "Smith 9/14/2006 Interview Notes") at p. 1-2. This attorney gave an example of one occasion, when he was on the phone with a former SEC attorney and Kreitman came by and pointed to Kreitman's office with an angry, contorted face, whereupon Smith pointed to his phone and shrugged. Notes of OIG Investigator Interview with Witness Smith of October 3, 2006 (hereinafter, "Witness Smith 10/3/2006 Interview Notes") at p. 2. According to Smith, Kreitman came back two to three minutes later, pointed to his office again and indicated for Smith to put the phone down. Id. Smith then went into Kreitman's office, and Kreitman yelled at him about something and, according to Smith, had the facts completely wrong. Id. Smith stated that he had 20 or 25 very similar inappropriate interactions with Kreitman within a one-year period.

Smith described Kreitman's management skills as "abysmal." Id. He reported that Kreitman said to him with some "glee" that he had gotten two other senior attorneys to retire and that the front office was pleased he had managed to do so. Id. Smith added that Kreitman indicated that he kept "raising the bar" on these two senior attorneys. Id. He stated that after the two senior staff attorneys retired, Kreitman began making

[78] Several individuals who no longer work for Enforcement or the Commission nonetheless requested confidentiality in this investigation because they were in positions where they may have continued interactions with Enforcement, including Hanson and Kreitman.

unreasonable demands on another Enforcement attorney who worked for him, which resulted in this attorney having medical problems. Witness Smith 10/16/2006 Interview Notes at p. 3. Smith stated that "when Kreitman gets upset with someone, he rides them until they leave." Id. at p. 4.

Smith indicated that when he would complain about Kreitman to Berger, Berger would immediately go straight to Kreitman, who would then blow up at Smith about something else. Witness Smith 3/26/2007 Interview Notes at p. 1. Smith stated that on one occasion, he asked Paul Berger why he had told Kreitman about Smith's complaint about him and, according to Smith, Berger replied, "I was just trying to help you, by making things better." Redacted e-mail from Smith to Inspector General David Kotz dated July 31, 2008 attached hereto as Appendix 154

Another former Enforcement staff attorney who worked for Hanson and Kreitman and requested confidentiality said Kreitman had a very short temper with outsiders and remembered being on conference calls with outside counsel and Kreitman being very short with them. Tr. Witness 9 4/2008 testimony at pgs. 16-17. Witness 9 felt Kreitman was disrespectful with outside counsel, and said there were times when they were on conference calls with Kreitman and would be compelled to call opposing counsel back afterward and apologize because they were so embarrassed after Kreitman hung up them, or after a face-to-face meeting where Kreitman banged on the table. Id. at p. 17. Witness 9 said Kreitman has an "abrasive personality," the way he spoke to people was very short, and people were offended by the tone he would use. Id. at p. 18. Witness 9 said Kreitman's behavior made people "very very uncomfortable and very unhappy." Id. This staff attorney said she heard him yell at people from time to time even with the door closed and, on one or two occasions, recalled behavior that would be considered "abusive." Id.

Witness 9 said staff discussed the possibility of complaining about Kreitman since numerous people were unhappy, but they thought they would not get certain assignments if they complained, and feared there would be some kind of retaliation. Id. at p. 20. Witness 9 said there was talk about going above Kreitman's head with complaints, but people knew that they still had to work for him and thought he might take it out on them and might make the work environment even worse and even more uncomfortable. Id. at p. 21. Witness 9, who had a distinguished educational and work background, decided to leave the SEC after a few years because of the atmosphere in Kreitman's group. Id. at p. 25.

Senior Counsel Jacqueline Eggert, who worked for both Hanson and Kreitman for approximately two years, described Kreitman's supervisor manner as "haphazard," and said he had "temper tantrums quite often" and used profane language. Tr. Eggert 4/18/2008 testimony at pgs. 19-20. She also stated Kreitman acted in a disrespectful way toward a colleague or subordinate, for example, by speaking with Hanson in front of her about another attorney's performance problems. Id. at pgs. 20-21. Eggert said she saw Kreitman lecture an attorney in a staff meeting, and create a situation that was

uncomfortable or even humiliating for that individual. Id. at p. 23. She said Kreitman singled out certain attorneys for praise, and he stated that they were the only ones who were performing well. Id. Eggert said Kreitman's style was to cross-examine or speak harshly to attorneys. Id. at p. 24.

Eggert said she had the impression that three senior attorneys had been pushed out, and that Aguirre was falling into that category as well for whatever reason. Id. at p. 56. Eggert said Kreitman was gleeful that a senior staff attorney who Kreitman referred to as an "old horse" was leaving. Id. at p. 54.

Eggert said she had a pre-existing medical condition that was exacerbated by her treatment in the office and her stress level, as well as her other personal issues in her life. Id. at p. 52. Eggert stated that she absolutely believed that her medical condition was exacerbated by the treatment she received from Kreitman and Hanson and eventually led to her need to take a leave of absence from the Commission. Id. Eggert stated that while she was going through medical difficulties, she expressed her problems to Kreitman, and asked to be removed from Hanson's group and to be transferred to a different office for a disability accommodation. Id. at p. 75. Eggert said Kreitman replied that she needed a thicker skin, had to suck it up, and really just needed more work. Id. She said when her efforts to transfer failed, she had no choice but to leave, and even noted that, at one point, her doctor called the Agency's disability office and said, "she needs to leave." Id. at p. 77.

Eggert said before she left the SEC, she contacted Donna Norman, Linda Thomsen's Counsel, to express concerns about things that were going on in the group, and then saw Donna Norman immediately in a meeting with Kreitman, and the next day she received a call from Kreitman saying, "I heard you don't like me, I heard you don't like working in our group." Id. at pgs. 22-23. Eggert said there were attorneys who wanted to complain about Kreitman and Hanson, but were scared about retaliation, and thought that complaints about Kreitman and Hanson could definitely move someone from the favored to disfavored list or, even if an attorney was already on the disfavored list, complaining would impact the assignments the attorney would be given. Id. at p. 59. Eggert said she did not know of any other attorneys who enjoyed working for Kreitman, except for Hanson. Id. at p. 72.

Another former senior attorney who worked for Kreitman and Hanson and requested confidentiality stated that employees who worked for Kreitman often spoke about the atmosphere under him, saying, "all of us felt that Kreitman was overpowering, and dictatorial and arbitrary." Tr. Witness 1 4/2008 testimony at p. 15. Witness 1 stated that "Kreitman is brash, both internally and externally and somewhat volatile." Id. at p. 16. This witness said Kreitman yelled, and was emotional and excitable. Id. at p. 17. Witness 1 stated that he did not feel Kreitman treated him fairly and that was why he left the Commission. Id. at p. 18.

Witness 1 stated that a colleague of his who worked for Kreitman was a very competent, trained lawyer for whom Kreitman seemed to have a dislike. Id. at p. 19. The witness said Kreitman was disrespectful to the staff attorneys and was dictatorial and arbitrary. Id. at p. 24. Witness 1 stated that he found an interaction between Kreitman and outside counsel to be offensive in that Kreitman acted "so holier than thou" and "autocratic" toward them. Id. at p. 43.

Another Enforcement attorney who worked for Hanson and Kreitman, and requested confidentiality, stated that he saw Kreitman "engage in an abusive manner not infrequently." Tr. Witness 3 4/2008 testimony at p. 25. Witness 3 said he heard Kreitman engage in inappropriate gender, ethnic-based remarks, including a comment that was demeaning to homosexuals. Id. at p. 26. This witness said anybody whom Kreitman did not think was following, or would question, his directional advice would be subject to his wrath. Id. at pgs. 26-27.

Witness 3 recalled a meeting with an outside accountant's lawyers, where Kreitman was getting exercised, and both of the associate directors present at the meeting invited him to calm down and relax, but he did not do so until Deputy Director Ricciardi literally turned to him and said, "Stop." Id. at p. 29. The witness said on that day and others, he was embarrassed on behalf of the SEC because of Kreitman's actions. Id. at p. 30. Witness 3 described another situation in which he and two other attorneys were in a meeting in Kreitman's office, in which Kreitman was animated, angered and speaking in harsh tones, and characterized this conduct as Kreitman acted in an "abusive" manner. Id. at pgs. 24-25.

Witness 3 said he believed Kreitman's treatment of two particular senior-level attorneys was "abusive," and that they both felt he was trying to force them out. Id. at p. 27. He said he felt Kreitman acted toward another staff attorney in an "abusive" way. Id. at p. 28. He identified another attorney, of whom he noted that it would be difficult to find a harder-working person in the SEC, and yet stated that Kreitman acted toward him in an "abusive" way. Id.

Witness 3 stated that Kreitman berated or lectured certain attorneys more than others. Id. at p. 26. He said there were certain people who Kreitman liked without any particular justification and certain people he did not like. Id at p. 54. According to this witness, Kreitman was favorable to the people he liked, and "abusive" or difficult to the people he did not like. Id. at p. 54.

Witness 3 said he himself complained about Kreitman to the new Associate Director Christopher Conti (who replaced Paul Berger), but his response was non-committal, and he did not take any action to address the complaint. Id. at p. 31. In addition, Witness 3 stated that the information about his complaining got back to Kreitman. Id. at p. 32. He said a number of folks have discussed their concerns about Kreitman and complaining about him, but "everyone's too fearful" to complain. Id. at p. 51. He said when a complaint was made, the information would get back to Kreitman,

and Kreitman would go to his superiors in an attempt to smear the people who complained. Id. at p. 55.

Witness 3 said he was and is concerned every day about retaliation on the part of Kreitman. Id. at p. 31. When asked if Kreitman has engaged in retaliation in the past, Witness 3 said, "Well, Gary [Aguirre]'s not here." Id. at p. 33. He also said "[Smith's] not working here anymore." Id.

Witness 3 said he did not know anybody who worked for Kreitman who felt he was a good supervisor. Id. at p. 44. He said Kreitman created an atmosphere such that Smith felt he needed to leave, but there was no talk about firing him. Id. Witness 3 said every day is tough to come to work, noting "it's never ever, ever, ever been like this for me at any other job." Id. at p. 56.

Another former Enforcement attorney who worked for Kreitman, and requested confidentiality, stated that Kreitman's style and personality can be very difficult. Tr. Witness 6 4/2008 testimony at p. 20. Witness 6 said Kreitman can be erratic, has mood swings, and he has seen him be "abusive" (verbally) to people. Id. at pgs. 20; 25. Witness 6 gave an example of a staff attorney who was working on a case and was scheduled to provide Kreitman a status report, and prepared a very detailed outline to brief Kreitman, but Kreitman never gave him a chance. Id. at p. 27. According to the witness, for 30 minutes, Kreitman unleashed on the attorney "the worst verbal abuse [Witness 6] had ever seen in the job place." Id. at pgs. 27-28. Witness 6 gave another example of a staff meeting in which Kreitman was "abusive" to a staff attorney, with everyone present in an inappropriate and disrespectful way. Id. at pgs. 28-29. Witness 6 said Kreitman threw tantrums and yelled for no reason. Id. at p. 29. This witness also stated that he personally had been berated many times by Kreitman. Id. at p. 31.

Witness 6 gave another example at a meeting with a company that had been cooperative in an investigation, whose representatives were coming in to make a preliminary presentation. Id. at p. 42. He said there were seven or eight people at the meeting, including an Assistant U.S. Attorney from New York. Id. Witness 6 noted that the meeting was supposed to start at 10 a.m., but it was changed to 11 a.m., in that because of Kreitman's [late morning work] schedule, they could not schedule any meetings before 11 a.m. Id. Witness 6 stated that at about 11:15 a.m., Kreitman had not arrived and they began the meeting without him. Id. at p. 43. Witness 6 said the company representatives had put together two three-ring binders of "hot documents," and a copy of a Power Point presentation that they were going to make at the meeting. Id. According to Witness 6, Kreitman came in 20 minutes late very noisily, slammed the door opened and sat down, opened the 3-ring binder very loudly, smacked it against the deck and started flipping through the pages. Id. Witness 6 said after about three minutes, Kreitman pushed the binder across the table and said, "This is bullshit, This isn't helpful." Id. at pgs. 43-44. Witness 6 said for the next 27 minutes, Kreitman berated the individual who was trying to make the presentation. Id. at p. 44. (The witness said he

knew it was 27 minutes exactly because he kept looking at his watch, thinking, "how long is this going to go on?" Id.).

Witness 6 said in a telephone call with a lawyer for Morgan Stanley with whom the SEC was in advanced settlement negotiations, the Morgan Stanley attorney started a brief introduction, and began making her case and arguments in favor of her client. Id. at p. 48. Witness 6 said Kreitman cut her off and said, "where are you with our settlement offer." Id. At that point, the Morgan Stanley attorney started to lay out her case again and, after about 15 seconds, Kreitman said "Well we've looked at it and we don't think there's anything to your points" and said "see ya" and hung up the phone on her. Id. at pgs. 48-49. Witness 6 said he immediately called back the Morgan Stanley attorney back and said, "on behalf of the SEC, I apologize," to which she responded that she had never been treated so rudely in her life. Id. at p. 48.

Witness 6 stated that Kreitman seemed always to need to have one staff attorney who was targeted and really ridden. Id. at p. 20. He said Kreitman talked openly about a staff attorney whom he was trying to convince to leave by making his life miserable. Id. Witness 6 said Kreitman treated people differently, in that there were some people in the group who were allowed to do nothing and were not criticized, and there were other people who were working very hard, but maybe were not perfect and were ridden unmercilessly. Id. at p. 22. Witness 6 said there were times when Kreitman came to the office and fixated on certain people, not caring what anyone else was doing, but finding out what they were doing wrong and yelling at them about it. Id. at p. 23. According to Witness 6, when Kreitman is going to ride you about something, he will go through a list of 15 things until he finds something that you have not yet done, and then all of a sudden no matter how absurd that one thing is, that should have been the priority. Id. at p. 28.

Witness 6 said Kreitman could turn on a dime on people and cases. Id. at p. 22. He said the Pequot case went from Kreitman commenting about it being the greatest case in the world, to, "what a piece of crap." Id. Witness 6 said the same was true with individuals; they can be golden and they can then be someone that has to be ridden out of the SEC. Id. at p. 23. Witness 6 said Aguirre and Kreitman were a bad mixture, with Aguirre being difficult to supervise, and Kreitman's having a poor management style, which contributed to the mismanagement of the case and the Aguirre matter. Id. at pgs. 24-25. Witness 6 noted that Kreitman's personal feelings about a particular staff member had an impact on how he dealt with the case that staff member was bringing. Id. at p. 59. The witness gave an example of the Gabelli case, which was Smith's main case, and said that, when it came to Smith's case, you could not talk to Kreitman reasonably or objectively because of his dislike for Smith. Id. at p. 60.

Witness 6 said there were several cases concerning which he told Kreitman, "this is a dog of a case," and Kreitman insisted on bringing them, only to be shot down by the Commission. Id. at p. 54. The witness noted that Kreitman is the only person to whom this happened. Id.

Witness 6 said many attorneys have complained privately about Kreitman and they would all like to leave the group. Id. at p. 33. He said the group is beaten down and believes that the front office does not care, so there is no point to raise concerns. Id. Witness 6 related that after Smith complained to Berger on a few occasions, immediately after Smith left Berger's office, Berger would be standing in Kreitman's office telling him that Smith had complained about him and, for the next week or two, Kreitman would be even harder on Smith. Id. at p. 30. Witness 6 said, "If you got on [Kreitman's] bad side, you paid a price." Id. Witness 6 said he was so concerned about Smith's treatment, he went to Kreitman's superiors to complain, but nothing changed. Id. at pgs. 38-49.

Another senior-level Enforcement attorney who worked for Kreitman stated he felt Kreitman treated a fellow Enforcement attorney unfairly. Tr. Witness 7 4/2008 testimony at p. 18. Witness 7 stated that on one occasion, Kreitman gave this staff attorney a thick transcript to read and, roughly 10 to 15 minutes later, Kreitman asked him what it said. Id. Witness 7 stated that Kreitman asked him to put a negative statement in this staff attorney's evaluation that was unfair and equally applied to others, but did not have him put this kind of statement in the evaluations of others in the group. Id. at p. 19. Witness 7 said he had the impression that Kreitman wanted to push this staff attorney out, noting that Kreitman "was always on top of him, riding him." Id. at p. 19.

Witness 7 also said he saw Kreitman act in a disrespectful way to opposing counsel in settlement discussions in a case involving Vaso Active, stating that Kreitman was very confrontational, and it was unlike any meeting he has ever attended at the SEC. Id. at p. 20. Witness 7 said he thought it was "personal, not professional." Id. Witness 7 said Kreitman told him that he wanted two senior attorneys to retire, at one point saying to the witness, "tell [this staff attorney] it's time to retire." Id. at p. 21.

Witness 7 said he left Enforcement under pressure from Mark Kreitman. Id. at p. 9. Witness 7 reported that at one point in the fall of 2004, Kreitman came to his office and said, "You've got to go." Id. Witness 7 noted that he had never received a bad performance rating, but only outstanding ratings. Id. Witness 7 said he decided to leave, explaining that he did not want to make the situation unnecessarily confrontational and stating, "If the man wants me to leave, I've got to leave, right." Id. at p. 18. When asked if there were performance based or other actions taken against him, Witness 7 replied, "We are all smart enough to leave before actions are taken against us." Id. at p. 21.

Witness 7 called Smith a brave person for complaining, saying, "I would not want to incur the wrath of Mark Kreitman by complaining." Id. at p. 29.

Witness 7 said he believed that if you asked people anonymously, a very clear majority, if not virtually everyone, would want to leave Kreitman's group. Id. at p. 30. This witness noted that he did not know of anyone who was happy working with Kreitman, perhaps with the exception of Hanson. Id. at p. 34.

Another staff attorney who worked for Kreitman and requested confidentiality, stated that Kreitman is a "very arrogant person," and "not personally fit to manage other people." Tr. Witness 8 4/2008 testimony at p. 11. Witness 8 said Kreitman was not genuine or sincere, that he has almost a Jekyll and Hyde personality at times, and can suddenly become very angry. Id. at p. 12. Witness 8 said he would characterize Kreitman's actions as "disrespectful . . . all the time." Id. at p. 13. He gave an example of Kreitman "exploding" at him after he was summoned to his office, saying, according to witness 8, "I'm tired of being angry with [you], I'm tired of having to tell you stuff 100 times over." Id. at pgs. 12-13.

Witness 8 said he never got substantive feedback from Kreitman about his work performance and was not aware of any reason why Kreitman was so angry with him. Id. at p. 15. He described the office environment as "terrified," saying Kreitman is "mercurial," and "plays a lot of games." Id. at p. 15. Witness 8 stated that Kreitman would come into a meeting with a notebook and tell him, you have to do three things, and would ask him if he could complete those items. Id. at p. 15. Later, according to Witness 8, Kreitman would ask for a progress report, say what about the two other things (in addition to the first three items) that I asked you to do, why did not you do those as well. Id. at pgs. 15-16. Witness 8 said Kreitman would give you a list of things to do and you would never succeed, and he would always lift the bar and every time you came back to him and reported, you would find the bar is higher than it was set before. Id. at p. 18.

Witness 8 said he saw a senior attorney crying and he understood he had just come from Kreitman's office. Id. at p. 55. Witness 8 said this attorney worked very hard and tried to meet the obligations, but had the bar raised and was scolded for not fulfilling his tasks, and was sort of crushed by the pressures placed on him. Id. Witness 8 also noted that Kreitman was overbearing with outside counsel. Id. at p. 34.

Witness 8 said Kreitman "always had a target" and drove five men out of his group. Id. at p. 17. He said the target went from one senior staff attorney to a second senior staff attorney, to the witness, to Aguirre, and then to Smith, just like clockwork. Id.

Witness 8 said at one point, a Branch Chief told him that "Kreitman wanted [the witness] eliminated from his group," although in the witness's view, there was nothing he did to precipitate this. Id. at p. 15.

Witness 8 said he went to Linda Thomsen, stating that he had been with the Commission for 20 years, that he had been in an untenable situation for the past year, and that Kreitman's management was impeding his ability to produce and strongly affecting his health. Id. at p. 22. Witness 8 noted that his blood pressure was up around 160 over 100, and then it went up to 170 over 110. Id. He said his cardiologist told him his health problems were work-induced and that he needed to leave his job. Witness 8 said he doubled the medication and his blood pressure went up to 180 over 120, and his doctor said to him, "You have [a] family history of stroke, and if you can't follow my advice

[and leave], find another doctor." Id. at 22. Witness 8 said that as his blood pressure got worse and worse, Kreitman actually escalated the tone of meetings, which started getting "hostile." Id. at p. 24. Witness 8 said he would describe the environment as "abusive." Id. at p. 25. Witness 8 also said he ended up severely depressed and went to a psychiatrist, and was told he needed to be medicated. Id. At that point, according to Witness 8, after he described to his doctor Kreitman's behavior, his doctor told him, "As a clinical matter, the behavior of your supervisor is sadistic." Id.

Witness 8 said there was much discussion about complaining to higher-ups about Kreitman, and Smith eventually did. Id. at p. 27. When asked what the result of Smith's complaint, Witness 8 said "the result was [Smith] went to [another regional office.]" Id. Witness 8 said there was fear or trepidation on the part of staff attorneys under Kreitman to complain about him, and concerns about Kreitman retaliating against them. Id. at pgs. 27-28. Witness 8 said Kreitman made Smith's life miserable, and Smith complained a lot but got no satisfaction. Id. at p. 36.

Witness 8 said he spoke with then Associate Director Peter Bresnan, and told him about the problems he had with Kreitman, specifically noting that Kreitman treated him with contempt. Id. at p. 57. According to Witness 8, Bresnan responded that he had supervised Kreitman, and Kreitman had treated him with contempt so he understood what Witness 8 was talking about. Id.

Witness 8 said he saw situations where if Kreitman did not like a particular attorney, anything that attorney did was wrong. Id. at p. 42. He noted that if Kreitman found out that an employee like Aguirre was complaining about him, "he'd put it down in any manner possible." Id. at p. 36. Witness 8 said he was surprised to hear that Aguirre was terminated because virtually no one gets terminated, but he noted that "Kreitman manages to push people out without terminating them." Id. at p. 46. Witness 8 said he did not really know anybody in the group who did not have those kinds of concerns about Kreitman. Id. at p. 35.

Another Enforcement attorney who currently works for Kreitman stated that Kreitman was "unfairly disapproving of him" and did not treat him the same as he treated other attorneys in the group. Tr. Witness 2 4/2008 testimony at pgs. 22; 28. He described a situation at a staff meeting where Kreitman made him feel embarrassed in front of his colleagues. Id. at pgs. 31-32.

Another attorney who works for Kreitman said he would characterize Kreitman's approach as "harsh" when he questions subordinates. Tr. Witness 4 4/2008 testimony at pgs. 28, 36. Witness 4 said he agreed with some of the complaints made about Kreitman, although he thinks management is well aware of the deficiencies, but has no desire to make any changes. Id. at p. 43. Witness 4 also said that he was concerned when complaints are made because management, instead of asking the complainant about the complaint, asked the supervisor against whom the complaint was made about it. Id. at p.

44. Another enforcement lawyer who used to work for Kreitman said that "Kreitman has a very abrasive personality." Tr. Witness 5 4/2008 testimony at p. 32.

b. Statements by Gary Aguirre on Kreitman's Conduct

Gary Aguirre reported some of the same concerns about Kreitman's behavior that were expressed by others who worked for him. He noted that Kreitman shouted and once threw one of the Pequot case spreadsheets at him. Tr. Aguirre 4/29/2008 testimony at p. 60. He also said Kreitman displayed anger when Aguirre was discussing bringing Mack in for testimony. Id. at p. 62. Aguirre described a tantrum of Kreitman, at approximately 4:30 p.m. on June 29, 2005, following a meeting between them in his office, when, according to Aguirre, Kreitman followed him and screamed, "Let's go see Paul," after Aguirre tried to discuss with him evidence against Mack. Aguirre Responses to Questions from Senator Grassley at p. 16.

Aguirre also said that Kreitman used strong language in his communications with outside counsel, and that he saw Kreitman "highly agitated and angry" in a conversation with outside counsel in the Pequot matter, Audrey Strauss, saying "Mark lost it in this conversation with Audrey." Tr. Aguirre 4/29/2008 testimony at p. 62.

Aguirre also said he believed that Kreitman found out about Aguirre's complaint to Thomsen about Kreitman, and took it personally. Id. at p. 93. An e-mail dated August 23, 2005 from Aguirre to Thomsen, stated as follows:

> Linda:
>
> Over the past four months five staff members left Mark Kreitman's group: three Senior Attorneys and two persons of color. Others are thinking about leaving. Still others share the same view, but cannot afford to leave of fear speaking out.
>
> I suggest that you speak with those who have left and current members regarding their views of the working environment in Mark Kreitman's group. E-mail from Aguirre to Thomsen dated August 23, 2005 attached hereto as Appendix 220.

Aguirre said he thought this complaint could have turned Kreitman against him. Id. at p. 94. He further noted that there was a very significant concern in the office that Kreitman and Hanson would engage in reprisal against those who complained, and view those who complained as traitors and punish them. Id. at p. 95. Aguirre said Hanson protected Kreitman, and there were concerns among the staff about Aguirre and Smith bringing these complaints against Kreitman, which would also reflect poorly on Hanson. Id. at p. 96.

c. Statements by Hanson, Berger and Thomsen on Kreitman's Conduct

Hanson stated that "Mark has a temper, no doubt." Tr. Hanson 7/15/2008 testimony at p. 99. When asked if he had ever seen Kreitman engage in inappropriate behavior with opposing counsel by being overly critical of opposing counsel or almost humiliating them, Hanson answered, "I would say yes." Id. at p. 100. He also acknowledged that he had seen Kreitman act in a disrespectful manner towards opposing counsel on more than one occasion. Id. at pgs. 100, 101. Hanson further admitted that, on a few occasions, he has seen Kreitman act towards somebody in a way that he would characterize as abusive. Id. at p. 101. Hanson denied that there was a "favorite" and "unfavorite" group working under Kreitman, and stated he never saw Kreitman act in a disrespectful manner toward Jacqueline Eggert. Id. at pgs. 101-102.

Associate Director Berger stated that he recalled both Aguirre and Smith complaining about the quality of management in Kreitman's group. Tr. Berger Senate 11/2/2006 testimony at p. 185. Berger said Smith complained that Kreitman was a difficult manager and was constantly editing his work and making corrections. Id. at p. 186. Berger said Smith told him that people were bristling under Kreitman's leadership. Id. Berger said he talked to Kreitman about Smith's complaint and some of the staff as well. Id. Berger said at one point he went into Hanson's office to ask him about concerns expressed about Kreitman's management, although he expressed it in terms of asking about lots of people and eventually asked about Kreitman. Id. at p. 191. Berger said the feedback he was getting was that people really liked Kreitman, and liked working with him. Id. at p. 192.

Director Thomsen described Kreitman as a very, very tough and tenacious investigator, who has a blunt style. Tr. Thomsen 9/8/2006 Senate testimony at p. 106. In September 2006, Thomsen said she believed that Kreitman had risen to management challenges pretty effectively. Id. at p. 107. Thomsen said she did not believe there were any complaints about Kreitman's management style, and that, while people left the group, no complaints got to her. Id. Thomsen said the general view is that in the category of managers, Kreitman was not necessarily the best, but certainly not the worst. Id.

When asked about Aguirre's August 23, 2005 e-mail to her about attorneys leaving Kreitman's group and asking her to speak to current and former employees about the work environment, Thomsen admitted that she did not speak with those who have left and current members of Kreitman's group, as Aguirre requested. Id. at p. 140. Thomsen also said she did not ask Berger to do this either. Id. Thomsen did forward Aguirre's August 23, 2005 e-mail to Berger, saying "Fyi-let's discuss when you get back. I'll make a few calls to personnel types in the meantime and hope you're (otherwise) having a great vacation." E-mail string from Berger to Thomsen dated August 24, 2005 attached hereto as Appendix 221. Berger responded to Thomsen in pertinent part: "Keep in mind the source. I'm sure you're aware of the circumstances under which most of the personnel

left (2 retirees, [redacted] and [redacted] (medical))." Id. Thomsen then responded by saying, "I agree –but I want to protect us and him (and has [Besse] actually left?). Id. Thomsen explained that the "him" she was trying to protect was Kreitman and stated that by "protect" us and him, she meant following up on complaints and taking the steps to make sure what they did was appropriate. Tr. Thomsen 9/8/2006 Senate testimony at p. 137.

In April 2008, Thomsen said in recent months she had heard complaints about Kreitman, that "they were of increasing frequency of late," and that they were "currently in the process of thinking through what, if any, action to be taken." Tr. Thomsen 4/28/2008 testimony at p. 20.

d. Kreitman's Description of His Own Supervisory Conduct

Kreitman acknowledged there were situations when employees working for him were encouraged to leave or transfer to another group. Tr. Kreitman 7/17/2008 testimony at p. 68. He mentioned a Branch Chief who was "not up to the job" and volunteered to go to another division, and two elderly gentlemen who had been staff attorneys since the 1960's who decided they did not want to make the move to a new building and he did not discourage them from leaving. Id. Kreitman also referenced Smith, saying that he was transferred to a regional office at his request and Kreitman advised the front office that he no longer wanted Smith in his group. Tr. Kreitman Senate 11/15/2006 testimony at p. 43. Kreitman described an incident when Smith flew into a rage after Kreitman asked to him to get some documents from his office. Id. at pgs. 43-44. Kreitman said this was the last of a significant number of similar acts of inappropriate conduct on Smith's part. Id. at p. 44.

Kreitman said when he became an Assistant Director, he felt the group was very weak and admitted he "wanted to raise the bar." Tr. Kreitman 7/17/2008 testimony at p. 69. Kreitman denied that he had temper tantrums, shouted or threw things at Aguirre in the office. Id. at p. 70. He stated that he did not think he was an abusive manager or made unreasonable demands on people. Id. He denied that there was a favored group and an unfavored group, stating that he "paid a lot of attention to avoiding favoritism." Id. He also denied acting in a retaliatory manner toward anyone, and specifically denied acting in a disrespectful manner toward Jacqueline Eggert. Id. at p. 71. Kreitman also denied bragging about making life difficult for his employees. Tr. Kreitman Senate 11/15/2006 testimony at p. 41.

Kreitman did acknowledge that he thought he had been "more aggressive than is appropriate on some occasions with opposing counsel," specifically recalling the incident where opposing counsel gave a Power Point presentation and acknowledged that he "was dismissive of it." Tr. Kreitman 7/17/2008 testimony at. p. 72. He further admitted that he told opposing counsel he was "not interested in seeing it and we're not going to sit through it." Id.

Kreitman also acknowledged that he heard from Berger about the complaints made by Smith from Berger. Tr. Kreitman Senate 11/15/2006 testimony at p. 34.[79] Kreitman discussed the e-mail response he prepared for Berger about Smith's complaint, which, according to the metadata, was drafted on August 1, 2005 (the same day as the supplemental evaluations of Aguirre and Smith) and stated as follows:

> Paul – Though I emphasize that I don't discount, indeed welcome, constructive criticism, regardless of the source, my inquiries of Bob [Hanson] and Dave [Fiedler] concerning their sense of the morale of the group lead me to believe that it continues to be strong, with the obvious exception of [Smith] and Gary [Aguirre], and to a lesser extent **Charles [Davis]**, who is having trouble with productivity. The excerpt below from an email [Smith] sent Dave [Fielder] July 21 may shed some light on his complaint:
>
> **Sullivan, Anderson, Besse**, Aguirre and perhaps, have all become disturbed at their treatment. E-mail to Paul Berger (in draft) attached hereto as Appendix 222.

Kreitman stated that he was trying to convey in the e-mail that while obviously Aguirre and Smith did not were not happy in this group, the others, with the possible exception of Davis, had a strong and positive morale. Tr. Kreitman 11/15/06 Senate testimony at p. 36. Kreitman stated that at that time, he was pressuring Davis to increase his productivity. Id. at p. 37. Kreitman also noted that Smith's attempt to bolster his complaint about Kreitman by referencing other employees did not in fact bolster his complaints if one looked at the individual cases of the employees Smith referenced, with Sullivan retiring because of his age, Anderson never progressing beyond staff attorney status, and Besse having been demoted and suffering medical problems. Id. at p. 39.

3. Management Style and Conduct of Robert Hanson

a. Statements by Current and Former Enforcement Attorneys

There were also significant concerns expressed about Hanson's management style and the lack of feedback he provided to his subordinates.

Senior Counsel **Jacqueline Eggert**, who worked for Hanson for approximately two years, characterized Hanson's management behavior as "abusive." Tr. Eggert 4/18/2008 testimony at p. 46. She also described Hanson's management style as insecure and said he tried to control everything about your case, trying to not allow you to do anything on your own. Id. at p. 31. Eggert said Hanson would dictate whom she could call and not call on a case. Id. at p. 32. She described how Hanson would request such a detailed

[79] There is also documentary evidence that Branch Chief Dave Fielder forwarded Kreitman the text of Smith's e-mail complaint. E-mail dated August 1, 2005 at 3:42 pm from Dave Fielder to Kreitman attached hereto as Appendix 203.

outline for testimony that it would end up being 50-100 pages long and, thus, not usable in testimony because it had to be scripted in such detail in advance. Id. at p. 33. Eggert said Hanson actually made her edit the outline to such a degree that she was instructed to take out the word "please" in a sentence saying, "Would you please state your name for the record?" Id. at pgs. 33-34.

Eggert said certain attorneys were favored by Kreitman and Hanson, which manifested itself into Hanson and Kreitman sitting in on the less favored group's testimony, and more closely reviewing their documents. Id. at p. 24. She said it was determined in an arbitrary way, noting that the favored group consisted of white men in their late 20s or 30s. Id. at pgs. 25; 35. She said she sat in testimony with several attorneys who were great but not treated well, and with others whose behavior was not acceptable and Hanson did not intervene. Id. at p. 36. She said Hanson intervened often in testimony taken by attorneys who were not favored, including her, and actually objected to one of her questions in testimony. Id. at p. 37. Eggert said if you were not favored, your documents would also be re-edited over and over again by Hanson. Id. at p. 26. She said on one occasion, she gave Hanson a memorandum that Hanson had previously edited and did not actually make any changes, so Hanson just edited over his own edits. Id. Eggert stated she felt she got "punitive assignments" from Hanson, including one four-hour assignment to research the issue of "whether pink sheets should be capitalized or not." Id. at p. 27.

Eggert said initially both Aguirre and Smith were well favored but, by the end, were not in the favored group. Id. at p. 25. Eggert said Hanson provided very little guidance to her or younger lawyers. Id. at p. 70. She said she did not know of any other staff attorneys who enjoyed working for Hanson. Id. at p. 72.

Eggert also said she had a pre-existing medical condition that was exacerbated by her constant interactions and run-ins with Hanson and her stress level as well as her personal problems. Id. at p. 52. She said she absolutely believed her medical condition was exacerbated by the treatment from Kreitman and Hanson and it led to her taking a leave of absence from the SEC. Id

A staff attorney who worked for Hanson for nearly two years said she never got a sense of how Hanson felt her work was going even though she often asked. Tr. Witness 9 4/2008 testimony at p. 31. Witness 9 said she tried to get feedback from Hanson after she took testimony and only got vague responses. Id. at p. 32. Witness 9 further said Hanson was disingenuous in that he would give you the impression that you were doing okay and then you would only get a one-step increase. Id. pgs. 32-33. According to witness 9, others felt the same way as they did not know where they stood in terms of their performance when it came to Hanson, who was not very forthright, forthcoming, or honest about how people were doing. Id. at p. 32.

Witness 9 said Hanson was not a very good manager. Id. at p. 9. She said he was not comfortable with having to teach to somebody who was brand new, and she found

this very frustrating because she wanted to know so much and had so much enthusiasm. Id. at p. 10. After a few months, she felt uncomfortable asking him questions, so she kind of stopped and lost a little bit of the enthusiasm and excitement about the job that she had when she first started through working with him. Id.

Witness 9 said she asked Hanson for guidance all the time, and there were times he just would not give it to her. Id. at p. 11. She said it was difficult for her to learn and do a better job because she was not getting the necessary guidance from her supervisor. Id. at p. 12. Witness 9 said she felt she was being held accountable for things, but was unable to perform them as well as she would have liked, since she was not given guidance by her supervisor. Id. at p. 13.

Nonetheless, in other ways, according to witness 9, Hanson was a micro-manager in that he would assign her a project to be done by Friday and, by Wednesday, would come to her office and ask how the project going to a point where she would say, "Look you have to stop harassing me." Id. at p. 14. Witness 9 said Hanson would not give her big picture guidance that required a lot of thought and knowledge, but he was very into reminding her about little tasks, like returning a phone call. Id.

Witness 9 characterized the atmosphere under Hanson and Kreitman as "unpleasant," and noted that "all those who worked for Hanson had the sense that he was watching their time and it was not a pleasant way to work." Id. at pgs. 14, 44. She said that, other than one person, she did not get the impression that anyone in the Hanson/Kreitman group was happy. Id. at pgs. 15-16.

Another staff attorney who worked for Hanson for two and a half years, described Hanson's management style as micro-managing, i.e., being very into the small details of investigations or supervision. Tr. Witness 5 4/2008 testimony at pgs. 8-9; 11. She said that Hanson was so focused on the minutia, there was little substance or looking at global issues. Id. at p. 11. Witness 5 said working for Hanson was a pretty frustrating experience, and she did not grow or learn from him. Id. at p. 12.

Witness 5 said she left the SEC because of her increasing frustration at working with Hanson. Id. at p. 17. She said he had been editing an action memorandum over and over again, and it was an increasingly frustrating experience, and she realized she had a fairly large amount of savings in her bank account and she "didn't have to take it anymore." Id. Witness 5 said she never complained and had the impression that if she had complained to those above Hanson, nothing would have been done about it. Id. at p. 19.

Another former subordinate of Hanson said working for Hanson was the "worst supervisor experience I ever had." Tr. Witness 3 4/2008 testimony at p. 34. He said communication was stilted, stunted, and spun a different way whenever Hanson and Kreitman were alone, and he got little if any direction from Hanson or advice from him. Id. Witness 3 said Hanson was insensitive, and there were hardly any times when he felt

comfortable talking to him about anything, noting there always seemed to be another agenda. Id. at p. 35. When asked if any other lawyers who worked for Hanson had concerns and issues with him, Witness 3 responded, "anyone who has worked with Hanson." Id. at pgs. 37-38.

Another former staff attorney said Hanson was not particularly good at being a manager. Tr. Witness 1 4/2008 testimony at p. 28. He said it was not pleasant working for Hanson, who was not particularly open to conversation. Id. at p. 29. Another current enforcement attorney said Hanson has not provided much guidance to him. Tr. Witness 2 4/2008 testimony at p. 40. This witness also mentioned several attorneys who have expressed frustration with both Hanson and Kreitman in terms of lack of guidance from them. Id. at pgs. 42-44.

Another current enforcement attorney said Hanson does not provide a lot of guidance to any attorneys. Tr. Witness 4 4/2008 testimony at pgs. 49-50. He also vouched for Witness 9, whom he considered a smart, energetic and capable lawyer and who was frustrated working with Hanson. Id. at p. 51. Finally, a former enforcement attorney said Hanson's style was to act friendly to the staff attorney, but not give him or her any sort of meaningful guidance, and to act like everything is fine, and they are great. Tr. Witness 6 4/2008 testimony at p. 37. He also mentioned Witness 9 as having had a lot of promise as a staff attorney and really wanting to work in Enforcement, but quitting because of Hanson. Id. at p. 34.

b. Statements by Gary Aguirre

Aguirre indicated that he felt Hanson did not give him a lot of guidance and sometimes would be give him advice that would turn out to be dead wrong, citing as an example a situation when Hanson had given him a subpoena form that did not effectively deal with the issue Aguirre needed. Tr. Aguirre 4/29/2008 testimony at p. 58. Aguirre also said he heard his colleagues complain about Hanson as a supervisor. Id. at p. 59.

c. Robert Hanson's Response

Hanson acknowledged that, if he had more time, he would have given more feedback to Eggert, and that she felt like he micromanaged her. Tr. Hanson 7/15/20087 testimony at p. 102. He said he probably tended to micromanage subordinates, although he said he did not know if he would use that phrase, since it has a "pejorative" aspect to it. Id. He denied ever acting in an abusive or disrespectful manner toward Eggert or other employees, with the exception of a secretary, with whom he said he was very upset with on occasion. Id. at p. 103.

d. Statements by Mark Kreitman and Linda Thomsen

When asked about claims that Hanson does not give his subordinates much guidance or feedback, Kreitman said the contrary is true and noted that he had

recommended Hanson for supervisory excellence awards. Tr. Kreitman 7/17/2008 testimony at p. 72. Kreitman said he did not believe that Hanson micromanages people and the only person from whom he heard complaints about Hanson's management style was Aguirre. Id.

Linda Thomsen stated that when she served as both Enforcement Deputy Director and Director in Enforcement, she never heard any complaints about Hanson's management. Tr. Thomsen 4/28/2008 testimony at p. 19.

J. Reason For Aguirre's Termination

1. Aguirre's Contentions

Aguirre claimed that his termination from the SEC was directly related to his communications with Paul Berger and his other supervisors regarding his concern that political considerations were blocking him from taking John Mack's testimony. Supplement G to Testimony of Gary Aguirre before SEC IG on April 29, 2008 at p. 1 attached hereto as Appendix 223.

Aguirre noted that his evaluations were all positive until he questioned Mack's favored treatment. Testimony of Gary Aguirre before U.S. Senate Committee on the Judiciary, Part III dated December 5, 2006 at p. 6, excerpted page attached hereto as Appendix 176. Specifically, Aguirre identified positive feedback he received about the Pequot case from Kreitman on June 28 and 29 (statement by Hanson that "Aguirre makes contributions of high value"); the June 1, 2005 evaluation; the June 14 "Perry Mason" award; and the fact that at a bagel meeting on June 16, 2005, Kreitman spoke highly about Aguirre's success the day before when he made a presentation to the FBI and U.S. Attorney. Supplement G to Testimony of Gary Aguirre before SEC IG on April 29, 2008 at p. 1.[80] He also noted that the completed Form 50-B (personnel action) recorded the SEC's decision effective August 21, 2005, to raise his merit rating (pay scale) two steps based on his performance, and that Linda Thomsen's notice of September 1, 2005 terminated his employment 11 days later. Id. Aguirre further noted that he was on vacation between those dates, and stated that the SEC has offered no explanation for why his performance warranted a two-step increase and then resulted in him being fired. Id.

Aguirre claimed that since July 2005, the SEC used one charade after another to cover up the fact that senior Enforcement officials gave favored treatment to Mack. Id. at p. 9. At that point, according to Aguirre, after Mack returned as Morgan Stanley's CEO on June 30, 2005, his supervisors were left with the problem of how to block the Mack testimony in the face of compelling evidence it should be taken. Id.

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[80] Aguirre also stated that he had positive interactions with Hanson and Kreitman on both personal and professional levels prior to his raising his concerns about preferential treatment for Mack, noting several friendly exchanges with Hanson in the period from March through July 2005, and Kreitman's comment in January 2005 that he and Aguirre would be "partners" in their working relationship, and in May 2005 that Aguirre was the "best investigator" in the unit. Tr. Aguirre 8/26/2008 testimony at pgs. 133-136.

Aguirre pointed to the fact that prior to his raising the issue of preferential treatment for Mack, his supervisors' conduct and statements positively reflected his performance while, after he raised the issue, actions were taken that led to his termination. Chronology of Events in Chart Form as Prepared by Gary Aguirre attached hereto as Appendix 224. According to Aguirre's chronology, each entry of which is supported by documents, in June 2005, he received a positive evaluation, gave a presentation to his supervisors on the Pequot investigation in preparation for his meeting with the FBI and U.S. Attorney's office, received a motivational award from Kreitman, and was praised by Hanson in a written recommendation on Aguirre's behalf to the Compensation Committee. Id. Aguirre's chronology further showed that on July 18, 2005, the Compensation Committee approved his merit step increase. Id. Aguirre then noted that after he made verbal disclosures at a meeting on July 22, 2007, and written disclosures by e-mail dated July 27, 2005, about his concerns about preferential treatment for Mack, on August 1, 2005, Berger "direct[ed] [his] supervisors to do a phony evaluation." Id. Aguirre's chronology also showed that although the Chairman and OHR were approving his merit step increase in mid-August, Kreitman was reset[ing] the 9' bar for [the] Mack subpoena" and, on September 1, 2005, Aguirre was terminated. Id.

Aguirre claimed that the statements made in the September 1, 2005 notice of termination were mere pretexts. Tr. Aguirre 4/29/208 testimony at p. 106. Aguirre stated that he believed that Enforcement's decision to fire him developed from his questioning the decision to give Mack preferential treatment. Id. at p. 107. He indicated that the evidence has pinpointed that the precise event that triggered his termination was his July 27th communication with Paul Berger, claiming that the Pequot investigation had been halted for political reasons. Id.; e-mail dated July 27, 2005 from Aguirre to Berger and Kreitman that specifically referenced that Hanson told Aguirre, "it would be an uphill battle [to take Mack's testimony] because Mack had powerful political connections," attached hereto as Appendix 118. He stated that it was this July 27, 2005 e-mail that triggered the August 1, 2005 effort to intercept his two-step merit pay increase, as well as his termination. Supplement G to Testimony of Gary Aguirre before SEC IG on April 29, 2008 at p. 1.

Aguirre stated that after Berger failed to take any action in response to his July 25, 2005 e-mail, Aguirre sent his next e-mail to Thomsen on August 4, 2005. Id.; e-mail dated August 4, 2005 from Aguirre to Thomsen, attached hereto as Appendix 121. Aguirre claims that although Hanson told him the Mack testimony issue would be reconsidered when he got back from vacation, his supervisors did not intend to reconsider the Mack subpoena decision after he returned from vacation in September 2005. Id. Aguirre stated that he believes his July 27 e-mail recounting Hanson's statement that Mack had powerful political connections was the triggering event for his termination, and he suspects that the motives for his firing were in part anger for raising Hanson's statement and in part to stop him from going any higher. Id. at p. 2.

Aguirre also stated that the Office of General Counsel (OGC) investigation of him was another factor in his termination, and that he suspects some combination of OGC attorneys Richard Humes, Juanita Hernandez, Melinda Hardy and perhaps others were actively seeking grounds to fire him. Id. Aguirre claimed that his termination solved a problem of the OGC in that Aguirre's EEO case (alleging age discrimination in connection with Aguirre's failed attempts to initially obtain a position with the Commission) would become moot if he were fired. Id. Aguirre further stated as follows:

> [M]y personnel records suggested –at least to me- that my supervisors acted alone. Over the past year, however, I have obtained access to records that indicated Richard Humes, Juanita Hernandez, Melinda Hardy and others within the SEC's office of General Counsel were actively involved in my termination. Other evidence indicates a key document in my EEO case vanished from my OPF after Ms. Hernandez took possession of it in October 2005. Further, for and for reasons which I do not understand [the Office of General Counsel] was investigating me at the time of my discharge. All of this again raises the issue of the role of Mr. Humes and his subordinates in my firing. . . . Letter dated May 13, 2008 from Gary Aguirre to H. David Kotz at p. 3 attached hereto as Appendix 90.

Aguirre referenced a statement that Director Thomsen's Counsel, Donna Norman, made to him in a discussion with her about Aguirre moving out of Charles Cain's group as part of a resolution of his EEO case that if he were to drop the EEO case, he would move "mountains" or "hills out of [his] way." Tr. Aguirre 4/29/2008 testimony at pgs. 41-42. He also noted that the OGC used lawyers from Enforcement's trial unit to represent management in his EEO case and, in fact, even though he objected in writing to this practice, one of the lawyers (Kevin O'Rourke) who worked with him on the Pequot case had represented management in his EEO case and kept it a secret from Aguirre. Tr. Aguirre 8/26/2008 testimony at pgs. 26-27. Aguirre stated that he believes that there was an undercurrent of reprisal for his EEO case[81] and that this was a "contributing cause" to his termination. Id. at p. 45.

Aguirre also stated that although a probationary employee may be discharged more easily, the SEC cannot do so in a way that violates antidiscrimination statutes or constitutes reprisal for whistleblowing. Supplement H to Testimony of Gary Aguirre before SEC IG on April 29, 2008 at p. 1 attached hereto as Appendix 225. Accordingly, Aguirre surmised that the OGC needed to come up with a plausible theory for his termination and therefore, participated in putting a phony record in his personnel file [i.e., the supplement evaluation] to establish the theory. Id. at p. 2.

Finally, Aguirre stated that he believes the evidence against him has been "choreographed" and is "very, very, very little of anything concrete. . . ." Tr. Aguirre

[81] According to Aguirre, Kreitman told him he thought that age discrimination was a factor in Aguirre not initially being hired by the SEC. Tr. Aguirre 8/26/2008 testimony at p. 42.

8/26/2008 testimony at p. 255. He said, "we are dealing with very interested parties" Id. at p. 256. He also noted as follows with respect to the SEC's contentions of appropriate bases for his termination:

> We're dealing with multiple iterations of a story that starts off with a small story, and then goes through story inflation. And story revision as on theory of why I was discharged is disproved, another one will come up in its place or it will be revised in a certain different way. Id. at p. 256.

2. Response by Aguirre's Supervisors

Aguirre's supervisors all deny that the decision to terminate Aguirre was related to Aguirre seeking to take Mack's testimony.

Hanson said when he left for vacation on August 5, 2005, he was not aware that Aguirre was going to be fired. Tr. Hanson 9/5/2006 Senate testimony at p. 51. Hanson stated that after he returned from vacation during the week of August 21, 2005, he recommended that Aguirre be terminated. Id. at p. 52. Hanson said the reasons he gave for recommending Aguirre's termination were those articulated in the August 1, 2005 supplemental evaluation, particularly Aguirre's inability to work with others. Id. Hanson said he then spoke to Charles Cain, Aguirre's first supervisor to obtain his views, and Cain said Hanson should terminate Aguirre. Id. at p. 53. Hanson explained that Cain validated a lot of the things that he was thinking and, at that point, Hanson concluded that Aguirre "was a negative to the division." Tr. Hanson 7/15/2008 testimony at p. 105.[82]

Hanson described the thinking that led to the final decision to terminate Aguirre was "sort of enough was enough." Id. at p. 104. Specifically, Hanson noted that the following factors: Aguirre had quit so many times; he was going around Hanson to Kreitman; Eichner was not getting along with Aguirre; Aguirre was creating chaos with counsel; he did not seem to be organized; and he was sometimes in tears and sometimes angry. Id. Hanson said it was a culmination of things, and he was particularly concerned about Eichner and wanting Eichner to enjoy his work. Id.

Hanson said conversations took place between Enforcement management and OHR, and he understood that a memorandum proposing termination had to be drafted. Tr. Hanson 9/5/2006 Senate testimony at pgs. 57-59. After the memorandum was drafted, Hanson said there was a meeting with Linda Thomsen, in which they discussed termination. Id. at pgs. 59-61. Hanson said Kreitman, Berger and he were also at the meeting. Id. at p. 61. Hanson said he recalled saying at the meeting that he thought Aguirre was "the proverbial loose cannon" and "a net negative for the Commission." Id. at p. 60. Hanson also recalled that Thomsen said at the meeting that she had received an e-mail from Aguirre about the testimony of Mack. Id. Hanson said Thomsen asked if it made sense to take Mack's testimony at this point and Hanson responded that it would be

[82] Charles Cain said he recalled telling Hanson that he shared his views about Aguirre. Tr. Cain 8/29/2008 testimony at p. 25.

a pretty short session, since there would not be much to ask Mack nor anything with which to confront him. Id. Hanson said Berger mentioned that the trading occurred in 2000 or 2001, so it was not like it happened last week, and they could call in a bunch of people and put them on the record. Id. Hanson added that Kreitman said they had no information suggesting Mack had the information to pass onto Samberg. Id. at pgs. 60-61. Hanson confirmed that, to his recollection, this conversation about Mack was at the same time as the discussion about Aguirre's performance. Id. at p. 61. Hanson said at this meeting, Thomsen stated that she agreed with the decision to terminate Aguirre. Id. at p. 73.

Hanson recalled that at the time Aguirre was terminated, Hanson did not know if he had heard that Aguirre had complained to Chairman Cox about preferential treatment for Mack, and was not aware of complaints Aguirre made to the OIG or OSC. Id. at pgs. 105-106. Hanson also noted that Aguirre's firing did not render him unable to complain about allegations of preferential treatment and, actually, firing Aguirre led him to file more complaints about Hanson. Id. at pgs. 106-107. Hanson also acknowledged that the firing of Aguirre per se did not specifically cause Mack's testimony not to be taken, as Mack's testimony would not have been taken anyway because Aguirre's superiors did not want it to be taken. Id. at p. 106.

Kreitman stated the decision to terminate Aguirre was made in a meeting with Linda Thomsen, as the decision could not have been made without Thomsen's approval. Tr. Kreitman 9/6/2006 Senate testimony at p. 102. Kreitman stated that in this meeting, Berger said that Aguirre had been unable to get along with his colleagues; that he was unwilling to commit to write up his investigation; that he was resistant to any direction, which also had been the case with his previous supervisor, Cain, as well; and that his resignations created a very difficult personnel management situation. Id. at p. 103.

Kreitman stated that he did not believe that he knew about Aguirre's complaint to the Chairman prior to Aguirre being terminated; nor was he aware of any external complaints Aguirre made to the OSC before he was terminated. Tr. Kreitman 7/17/2008 testimony at p. 73.

Berger stated he was notified that Aguirre's probationary period was going to end, and he contacted Kreitman and said Hanson and he needed to make a decision about what they wanted to do. Tr. Berger 11/2/2006 Senate testimony at pgs. 254-255. Berger said Kreitman told him that Hanson and he would discuss the issue and get back to him. Id. at p. 255. Berger said after a short time frame, Kreitman and Hanson came to him and told him they wanted to terminate Aguirre. Id. Berger said he instructed them to speak to OGC and OHR, and they said they would set up a meeting with Linda Thomsen. Id. at p. 256.

Berger said they had the conversation with Thomsen in which they talked about the fact that Aguirre did not work out in Grime's group, and did not work in Kreitman's group as well. Id. Berger explained that the issue was not about Aguirre's ability as a

lawyer, but about "his ability to work in a reliable fashion, representing the Commission with other people." Berger recalled Hanson saying that Aguirre "was a net negative for the Commission." Tr. Berger 11/7/2006 Senate testimony at p. 95. Berger said Kreitman supported everything that Hanson had said about Aguirre. Id. at pgs. 95-96.

Berger said in the meeting, they also discussed moving Aguirre to another office, but concluded they would not be able to recommend to another office or division that he was someone they thought should be hired. Tr. Berger 11/2/2006 Senate testimony at pgs. 256-257. At that point, according to Berger, Thomsen said, "Let's finish the process and terminate, and give him an opportunity to resign." Id. at p. 257. Berger stated that he did not remember if the issue of taking Mack's testimony came up in the meeting to discuss Aguirre's termination. Id. at p. 258.

Berger denied that the taking of Mack's testimony factored into the decision to terminate Aguirre, saying "the decision was based on the fact that Gary was an extremely difficult individual to work with, both inside the building and outside the building, and that he was not being productive in terms of what the mission of the Commission was." Id. at pgs. 257-258. Berger added that "the question was, on a probationary status, should we take the chance and keep him or should we terminate?" Id. at p. 258. When asked directly if Aguirre's repeated insistence upon taking Mack's testimony played a role in the decision to terminate him, Berger replied as follows:

> I think that his inability to listen to his supervisors and, you know, make decisions 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. It wasn't, you know, whether he was--whether we were going to take Mack's testimony or not, because we had pretty much decided we were going to take the testimony, so it wasn't the issue. The issue was 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. Tr. Berger 11/7/2006 Senate testimony at pgs. 97-98.

Linda Thomsen stated that Aguirre was fired for the reasons outlined in the termination notice, specifically referencing the fact that "he did not work well with supervisors," and "he didn't work well with others." Tr. Thomsen 9/8/2006 Senate testimony at p. 54. Thomsen said it was a unanimous recommendation on the part of his supervisors that they terminate Aguirre in his probationary period because he "had demonstrated inability to work within the management structure [and] to work with peers." Id. at p. 56. Thomsen acknowledged that they were all aware it might appear that Aguirre's termination was related to or in reprisal for his being adamant on taking Mack's testimony. Id. at p. 55.

Thomsen said it was she who ultimately made the decision to terminate Aguirre. Id. at p. 116. She described her meeting with Berger, Kreitman and Hanson, and said all three indicated in their collective judgment that Aguirre should no longer be employed by the agency. Id. at p. 117. Thomsen said they spoke about the fact that the timing was not ideal and discussed the possibility of extending the probationary period to afford Aguirre an opportunity to get back from vacation, but understood an extension of the probationary period to be "a non starter." Id. at pgs. 117-118. She said they all expected the decision to be potentially litigious given the facts that Aguirre had been litigating with them before and was unhappy about the Mack testimony issue. Id. at p. 118.

Thomsen said the tipping point for her was that the difficulties that presented themselves throughout Aguirre's tenure had not been resolved, and she noted that the termination notice was meant to summarize the issues that had occurred, and is consistent with the reasons for termination, but was not meant to include every point. Tr. Thomsen 4/28/2008 testimony at pgs. 12, 15-16.

In her Senate testimony, Thomsen was shown an August 24, 2005 e-mail string that originated with Aguirre providing his justification to Berger as to why Mack's testimony should be taken, which was forwarded to Kreitman who responded to Berger with a copy to Hanson, stating, in pertinent part as follows:

> Long meeting on Pequot yesterday with **Bob**, **Jim** and **Liban** to discuss existing dynamics, transition planning, certain discrete issues, raised, inter alia, by **Samberg** transcript. Bottom line is that Gary is making life impossible for **Jim** and **Liban**. Refuses to treat them as equal partners, is reluctant (or unable) to seriously involve them in strategic/tactical planning, instigates personal feuds. I've also spoken at length privately with **Jim**; am convinced that he can take over and manage Pequot with **Liban** more efficiently and effectively than Gary. **Bob** has the same sense, and has conferred with Joe Cella to be sure Market Surveillance would be OK with a transition. Feedback I get from opposing counsel (taking into account their obvious self-interest) suggests Gary's approach with them is not productive. And I fear Gary's view of things is not a healthy element for the group. **Bob** and I both feel that it may be appropriate at this juncture, before Gary's probationary period elapses, to consider his termination. I am willing to speak with him friend to friend to see if he would resign voluntarily, in the interest of the Agency's mission to which he is dedicated. Would appreciate your view upon your return. E-mail string dated August 24, 2005 between Berger and Thomsen attached hereto as Appendix 226.

In this e-mail string, Berger forwarded Kreitman's e-mail quoted above to Thomsen, saying, "Sorry to bother you with this, but in light of your earlier email I thought I should send this along. Oy!" Id.

Thomsen was asked about the fact that the e-mail that proposed Aguirre's termination directly followed an e-mail from Aguirre providing a justification for taking Mack's testimony, and whether she understood the e-mail string to mean that there was some relationship between Aguirre's view of whether or not Mack's testimony should be taken and the suggestion he be fired. Tr. Thomsen 9/8/2006 Senate testimony at p. 146. Thomsen was unable to explain the e-mail string, stating simply, "I have no recollection of this email or reading it or making that connection in my own mind that the termination was related to Mr. Mack's testimony." Id.

Thomsen said she did not know if, at the time Aguirre was terminated, she was aware that he had filed a complaint with Chairman Cox, or called the OSC. Id. at p. 16. Thomsen also said the act of firing Aguirre would not have caused the testimony of Mack to be taken or not taken; nor would it have stopped Aguirre's ability to complain about not taking Mack's testimony. Id. at pgs. 18-19.

K. Conclusion Regarding Reasons for Aguirre's Termination

Aguirre was purportedly terminated during his probationary or trial period because of his demonstrated inability to work effectively with other staff members and his unwillingness to operate within the SEC process. The termination notice issued by Director of Enforcement Linda Thomsen referred to conflicts he had with other Commission employees, his expressed dissatisfaction with the supervisory structure, his ignoring the chain of command, as well as his submitting his resignation and the fact he indicated that he was uninterested in participating in an assignment beyond the investigatory phase.

Aguirre, on the other hand, claimed that his termination was directly related to his communications with his supervisors regarding his concern that political considerations were blocking him from taking John Mack's testimony.

The investigation found that Aguirre was an enthusiastic and extremely hard-working staff attorney in Enforcement. By all accounts, Aguirre was very intelligent, thorough and focused, and tenaciously and aggressively conducted investigations on behalf of the Commission. Even his harshest detractors acknowledged that it was very rare to find someone who was willing to work so hard and be such a conscientious advocate for the Commission and the investing public.

While several witnesses expressed some concerns with Aguirre's work performance and organizational skills, the evidence did not show these issues to be determinative of his overall abilities and job performance. Several of his supervisors expressed concern that Aguirre jumped to conclusions too quickly, and had preconceived conclusions about his investigatory work, but there was little credible evidence to substantiate these assertions. Jim Eichner, the staff attorney who took over primary responsibility for the Pequot investigation after Aguirre was terminated, indicated that he had a difficult time organizing the Pequot matter after Aguirre left, and felt the case was

unfocussed. However, Liban Jama, another staff attorney who worked both with Aguirre and Eichner, stated that while there were problems locating some correspondence after Aguirre left, this was due to the fact that Aguirre was personally involved in every aspect of the case. Aguirre stated that all of his documents were organized in binders and in electronic folders in Enforcement's shared drive and noted that Eichner may not have been aware of the state of Aguirre's files.

The only specific and tangible example of a concern with Aguirre's work performance related to an incident in which Aguirre had to withdraw subpoenas that he had issued in potential violation of a privacy statute. Aguirre acknowledged that he erred in sending out the subpoenas, but explained that he had sent his direct supervisor a draft of the subpoenas and received no immediate response. Moreover, although Aguirre's supervisors indicated that they were unhappy about Aguirre having to withdraw the subpoenas that he improperly sent out, there is little evidence that the seriousness with which they stated they viewed the incident was conveyed to Aguirre at the time.

Aguirre's supervisors also complained that he resigned on more than one occasion and his immediate supervisor, Robert Hanson, noted that Aguirre left the office in the middle of the day. In addition, Aguirre's second and third-level supervisors stated that after he threatened to resign, he indicated that he would not draft an action memorandum for the Pequot investigation. Aguirre noted the "evolution" of the allegation about his resignations, pointing out that it was first described as occurring on a single occasion, and later claimed that he had resigned multiple times. Aguirre acknowledged that he did indicate in late June 2005, that he wished to resign, but agreed to work until the end of September, 2005, and eventually rescinded his resignation toward the end of July, 2005. He also categorically denied refusing to prepare the action memorandum for the Pequot case. In fact, there is documentary evidence of an e-mail that he sent around the time of his resignation providing assurances to his supervisors that "Pequot will get 110% between now and September 30." Moreover, several of Aguirre's co-workers, who worked closely with Aguirre on the Pequot investigation, were not even aware he had tendered his resignation, and there is no evidence that he failed to meet any of his responsibilities in connection with the Pequot matter after he indicated he wished to resign.

The evidence is more mixed regarding Aguirre's interpersonal skills and ability to get along with others. Aguirre's first and second-level supervisors throughout his tenure in the Commission, his first Branch Chief, Charles Cain, his first Assistant Director, Richard Grime, his second Branch Chief, Robert Hanson, and his second Assistant Director, Mark Kreitman, all indicated that Aguirre was difficult to manage and did not work well with others. Cain stated that Aguirre did not take direction well and went behind his back to Cain's supervisor, Grime. Cain also stated that Aguirre yelled and complained in meetings and lacked professionalism. Grime verified both that Aguirre came to his office and asked to report directly to him, rather than through Cain, and that Aguirre raised his voice.

Aguirre's second Branch Chief Hanson stated that Aguirre alienated his colleagues, and had difficulty communicating with numerous individuals in the office. Aguirre's second Assistant Director, Mark Kreitman, who initially welcomed Aguirre into his group, stated that Aguirre viewed all supervision as "unwarranted intrusion" and that Aguirre asked to report directly to Kreitman, rather than through Hanson.

In addition, several co-workers of Aguirre stated that they had conflicts with him. For example, Kevin O'Rourke, an attorney in the Enforcement's Trial Unit, stated that he was not comfortable with Aguirre's approach to certain matters and concluded that Aguirre was somewhat of a "loose cannon." Senior Counsel James Eichner also believed that Aguirre was prone to conflicts with his supervisors and colleagues and described in some detail his personal conflicts and frustrations with Aguirre. Hanson confirmed that Eichner would express to him that Aguirre did not appreciate Eichner being involved in the Pequot case.

Furthermore, there is evidence of conflicts Aguirre had with opposing counsel. Aguirre's relationships with opposing counsel or parties were described by one colleague as "unnecessarily contentious." Other co-workers described Aguirre as "inflexible" and noted that he became "agitated" and at certain points "lost his composure." In addition, Aguirre had a difficult telephone call with the Executive Vice President and Chief Legal Officer of Morgan Stanley Gary Lynch, leading Lynch to complain that Aguirre's demeanor during the conversation was "rude and unprofessional." Another participant on the call, a Managing Director for Morgan Stanley, Patrick Patalino, also stated that he felt Aguirre was "unprofessional" on the call, and described one comment made by Aguirre as "particularly rude."

Aguirre responded that he worked with over 20 SEC staff members and sought out assistance from five other offices or divisions, and all his relationships were cordial and productive. Aguirre acknowledged discussing with Grime the possibility of Aguirre reporting directly to him, but stated he only raised this issue after Linda Thomsen's counsel suggested he take this action. Aguirre denied that he requested to report directly to Kreitman. Aguirre also noted that he sought the approval of his superiors and followed their guidance on every significant aspect of the Pequot investigation and attached e-mails demonstrating that he agreed to follow their instructions.

In addition, although Aguirre admitted that there were unpleasant communications with other staff, he stated that he knew of no problem with any staff attorney that could have been a factor in his termination. Aguirre further admitted that he was critical of Eichner's handling of two matters and referenced an e-mail exchange with Eichner, in which Eichner suggested in a joking manner that Aguirre change his last name after Aguirre's brother had questioned the credentials of Chairman Cox.

With respect to his interactions with opposing counsel, Aguirre claimed that he was dealing with more than 50 defense attorneys and only knew of three attorneys with whom he had an issue. In the case of the conflict with Gary Lynch, Aguirre stated that there were actually two conversations with Lynch, with the second one being less cordial than the first. He indicated, however, that Lynch asked the same question several times, and his supervisors never mentioned that Aguirre mishandled the call in any way.

Notwithstanding the testimony provided by numerous individuals concerning Aguirre's difficulties in taking supervision and conflicts with colleagues and opposing counsel, until the very end of Aguirre's employment with the Commission, the record is nearly entirely devoid of any evidence of feedback given to Aguirre reflecting concerns about his work performance and/or conduct. Aguirre's first Branch Chief, Charles Cain, acknowledged that although he had concerns about Aguirre's work, he had no formal conversations with Aguirre about his work performance. There is also no evidence of any formal or even informal feedback given to Aguirre by his first Assistant Director, Richard Grime.

The first formal feedback on his performance Aguirre received was after he joined Mark Kreitman's group and it was entirely positive. On June 1, 2005, Kreitman conducted a formal performance assessment certifying Aguirre's performance as "acceptable" under each of the following four boxes: "knowledge of field or occupation," "planning and organizing work," "execution of duties," and "communication." A couple weeks later, Kreitman gave Aguirre an unofficial "Perry Mason" award, which, although tongue-in-cheek, reflected Kreitman's appreciation for Aguirre's work. On June 17, 2005, Aguirre submitted a self-evaluation or contribution statement, describing his own performance, to his first-level supervisor, Bob Hanson, thereby initiating the merit review process. Hanson then prepared a supervisory comment on Aguirre's performance, which was nearly entirely positive, and referenced Aguirre's "unmatched dedication to this case," and his ability to "overcome a number of obstacles opposing counsel put in his path on the investigation." The only negative part was as follows: "Gary can work on presenting information in a clearer and concise manner to enhance the effectiveness of his communications both to those he reports to and those he works with."

After Aguirre's initial evaluation, his contribution and the supervisory comment were prepared, on June 29, 2005, Hanson completed a merit pay form for Aguirre, on which he recommended Aguirre for a two-step pay increase, representing "contributions of high quality." The merit pay process occurred over the next several weeks, and on August 1, 2005, the final results of the merit pay determinations were forwarded to the OHR, and Aguirre's merit pay increase became effective on August 21, 2005.

While Aguirre's two-step increase was being processed, on August 1, 2005, Aguirre's supervisors prepared a supplemental evaluation that gave Aguirre credit for his long hours and dedication, but criticized him for being "resistant to supervision" and referenced complaints from opposing counsel as well as noting that he "expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success." The supplemental evaluation also mentioned the subpoenas Aguirre issued that required withdrawal.

The preparation and timing of the supplemental evaluation (which was also prepared for a colleague of Aguirre in Enforcement) was very curious. The document was not placed in Aguirre's personnel file, and the evidence suggests the substance of the supplemental evaluation may never have been conveyed to Aguirre. In addition, several other Enforcement lawyers, some of who had worked for many years in Enforcement, had never seen or even heard of a supplemental evaluation.

The evidence suggests that the supplemental evaluation was initially suggested by Associate Director Paul Berger, strangely, not after Berger heard complaints about Aguirre, but rather after Berger heard complaints about Mark Kreitman's management style from several of Kreitman's subordinates. There was also evidence that Hanson defended Kreitman in a meeting with Berger and told Berger to discount heavily any input from Aguirre and one of his colleagues because of their own performance issues. Berger asked Hanson what ratings these employees had been given, and Hanson responded they were both given two-step increases. Berger then recommended that supplemental feedback be provided for both employees because their evaluations had been inflated. Kreitman and Hanson then prepared the document containing the supplemental evaluations of Aguirre and his colleague. The documentary record also shows that the same day on which Kreitman was working on the supplemental evaluations, he was in communication with Berger, defending himself from criticism of his management style from his subordinates.

The evidence also demonstrates that the criticism of Kreitman's management style was warranted. During the course of the investigation, numerous current and former subordinates of Kreitman came forward, after requesting confidentiality to describe the atmosphere of "abuse" and "unfairness" that pervaded the office under Kreitman's leadership. Enforcement attorneys described Kreitman's management style as "abusive," "dictatorial," "arbitrary," and "autocratic." These employees gave examples of Kreitman berating both his subordinates and outside counsel on a fairly regular basis. They also described their intense fear of retaliation and gave accounts of how it was fruitless to complain about Kreitman since upper management would not take appropriate action. Many felt like Kreitman played favorites in the office and seemed always to need to have certain attorneys to target. There were also descriptions of how Kreitman was able to force subordinates to leave his group or the Commission by being abusive or difficult to employees he did not like. One Enforcement lawyer noted that Kreitman "could turn on a dime" on people and cases and often let his personal feelings toward an employee affect how he allowed an investigation to progress. He stated that

with respect to the Pequot investigation, the case went from being the greatest case in the world to being "a piece of crap," and noted that Aguirre and Kreitman were a "bad mixture," with Aguirre being difficult to supervise and Kreitman's management style contributing to the mismanagement of the case.

There were also significant concerns expressed about Bob Hanson's management style. He was described as a "micro-manager" who "harassed" subordinates, but gave little or no substantive feedback. In all, the atmosphere existing under Kreitman's and Hanson's leadership was described as "unpleasant" and "frustrating."

One month after the August 1, 2005 supplemental evaluation, on September 1, 2005, Aguirre was issued the notice of termination, just prior to the end of the probationary period and while he was out of the office on vacation. Even Aguirre's supervisors acknowledged that terminations were very rare in Enforcement, and numerous former and current Enforcement lawyers expressed surprise that Aguirre had been terminated as they were unaware of few, if any, terminations in their entire careers in Enforcement.

During the latter part of the summer, the record shows that Aguirre made numerous requests, and provided several justifications, to take the testimony of Mack, which his supervisors rebuffed.

Aguirre claims that statements made in the notice of termination were mere pretexts and the decision to fire him resulted from his questioning the decision to give Mack preferential treatment. According to Aguirre, the evidence has pinpointed that the precise events that triggered his termination was his July 27, 2005 communication with Berger, in which Aguirre claimed the Pequot investigation had been halted for political reasons. Aguirre noted that the feedback on his performance was all positive until he questioned Mack's favored treatment. Aguirre also stated that attorneys in OGC were actively seeking to terminate him in order to render his EEO litigation moot. He stated that the statements made by SEC employees describing his work performance in a negative manner were "choreographed" and contained "very little if anything concrete."

All of Aguirre's supervisors denied that the decision to terminate Aguirre was related to his efforts to take Mack's testimony. They noted that Aguirre did not work out in Richard Grime's group or Mark Kreitman's group. Hanson stated that toward the end of August, he spoke with Charles Cain, who validated Hanson's concerns about Aguirre and decided to recommend that Aguirre be terminated. Cain corroborated the conversation with Hanson. The evidence shows that Linda Thomsen made the final decision to terminate Aguirre in a meeting with Berger, Hanson and Kreitman, during which they all recommended Aguirre be terminated. Thomsen, Berger, Hanson and Kreitman all referenced Aguirre's inability to work well with others as being the primary reason for his termination.

Indeed, there is substantial evidence (albeit mostly testimonial) from numerous and varied sources of Aguirre's inability to work well with his supervisors, colleagues, and opposing counsel, and there is substantiated evidence of Aguirre's conflicts in the workplace. Although Aguirre claims all of this evidence has been orchestrated by "interested parties," the breadth of this evidence suggests that this is unlikely.

However, the record also shows that the issue of taking Mack's testimony was a matter Aguirre's supervisors were discussing around the same time period they decided to terminate him, and Hanson recalled that they discussed the issue of Aguirre seeking to take Mack's testimony at the meeting in which Thomsen made the decision to terminate Aguirre. In fact, the same e-mail that proposed Aguirre's termination directly followed an e-mail from Aguirre in which he provided a justification for taking Mack's testimony. Moreover, Berger acknowledged that "the fact that [Aguirre] simply wouldn't listen with respect to Mack must have played some part in Mark [Kreitman's] and Bob [Hanson's] assessment of his conduct."

Accordingly, the evidence does show that although Aguirre's supervisors may have had concerns about Aguirre's performance or conduct throughout his tenure with the Commission, he was not given negative feedback until he began pushing to take Mack's testimony. In fact, he had been recommended for a two-step merit increase just a few weeks earlier. Thus, in light of all the evidence, it is not credible to find that the termination decision was totally unrelated to Aguirre's efforts to take Mack's testimony, as Aguirre's supervisors claimed. In addition, the timing of the supplemental evaluation evidences that complaints made about Kreitman's management style also played a role in the decision to issue this unprecedented document to Aguirre.

Moreover, although there was evidence that Enforcement had a legitimate basis for terminating Aguirre in his probationary period, the evidence also shows that few employees in Enforcement, even in their probationary periods, have historically been terminated, and Enforcement management has tolerated much worse conduct on the part of Kreitman, and even Hanson.

Report's Conclusion and Recommendations

The OIG investigation found that Enforcement, and particularly Gary Aguirre's first and second-level supervisors, Hanson and Kreitman failed to fulfill their management responsibilities toward Aguirre and conducted themselves in a manner that raised serious questions about the impartiality and fairness of the Pequot investigation.

The OIG investigation also found that although Aguirre's supervisors expressed that they had significant concerns about Aguirre's performance and conduct throughout his tenure with the Commission, they failed to provide him with timely feedback of these concerns, denying him any ability to improve or change his behavior. In fact, the record demonstrates that Aguirre was not given any significant negative feedback until he began pushing to take the testimony of a prominent individual in the financial industry, John Mack.

Moreover, in conversations between Aguirre's direct supervisor, Hanson, and Aguirre about the taking of Mack's testimony, Hanson used the term "political clout" and referred to Mack's counsel as having "juice," thus conveying the impression that political clout was a factor in the decision to deny Aguirre the ability to take Mack's testimony. In addition, the record shows that the approach adopted by Hanson and Assistant Director Kreitman in connection with the Pequot investigation, and specifically the decision concerning the taking of Mack's testimony, was different from the approach utilized in other Enforcement cases.

In addition, even if one accepts Hanson's explanation that the "juice" he was referring to related to the ability to reach out to senior Enforcement officials, this "juice" did, in fact, materialize, as both Associate Director Paul Berger and Director Linda Thomsen were contacted by Morgan Stanley officials about the investigation as it pertained to Mack.

The record further shows that after the Morgan Stanley contacts were made, relevant information was imparted to representatives of Morgan Stanley by both Berger and Thomsen regarding the extent of evidence that Enforcement had against John Mack in connection with the Pequot investigation. Commission conduct regulations prohibit divulging confidential and non-public information in circumstances where the Commission has determined to accord such information confidential treatment. 17 CFR § 200.735-3(b)(7)(i). Information obtained by the Commission in the course of any investigation, unless made a matter of public record, is specifically deemed to be "non-public." 17 CFR § 203.2. According to Commission policy regarding disclosure of nonpublic information in connection with investigations, the prohibitions against use of nonpublic information without specific authorization or approval by the SEC does not apply to the use of such materials as necessary or appropriate by members of the staff in pursuing SEC investigations, or in the discharge of other official responsibilities. SECR 19-1.

Although Commission regulations do not define specifically in what circumstances nonpublic information may be disclosed, and Thomsen may have legitimately believed the information she provided was necessary in the discharge of her responsibilities, there are serious questions about the appropriateness of the information Thomsen and Berger provided to Morgan Stanley. First, there is clearly a disconnect within Enforcement about this issue. Second, the fact that both Berger and Thomsen

provided information without conferring with the attorney who had primary responsibility for the investigation is problematic, and created an appearance that they were providing Mack preferential treatment. Third, learning the extent of the information the Commission had against a potential target (i.e., that there was no "smoking gun" evidence in the hands of Enforcement), could prove very useful in preparing a defense. Fourth, the information was provided specifically because John Mack was being considered for a high-level position in a large investment bank, and would not be available to another potential target of lesser means or reputation.

In addition, there are serious questions about the appropriateness of the current common practice in Enforcement that allows outside counsel the opportunity to communicate with those above the line attorney level on behalf of their clients when they have issues or disagreements with the Enforcement lawyers with whom they have been dealing.

Nonetheless, the OIG investigation did find that Aguirre's supervisors' explanation of why they felt it appropriate to wait to take Mack's testimony was a plausible one. In addition, while several other individuals who worked with Aguirre on the Pequot investigation concurred with Aguirre's request to take Mack's testimony in July or August of 2005, they also generally indicated that it was not per se improper to wait to obtain more information before bringing in Mack. Moreover, the investigation did not find that Enforcement cases are generally affected by political decisions or the prominence of the defendants.

The investigation also found that although there is evidence that the Pequot investigation changed focus after Aguirre was terminated and Enforcement seems to have "gone through the motions" with respect to the taking of Mack's testimony, the evidence does not show that the Pequot investigation was abandoned. To the contrary, while there was a shift by Enforcement away from the John Mack aspect of the investigation based upon the belief that other aspects of the investigation were more promising, there is substantial evidence that the Pequot investigation continued to be aggressively pursued until it was closed in November 2006.

However, the OIG investigation finds that there was a connection between the decision to terminate Aguirre and his seeking to take Mack's testimony.

The record demonstrates that after the communications with Morgan Stanley, and while a two-step merit increase that had been recommended for Aguirre was being processed, Aguirre's supervisors prepared a supplemental evaluation, which criticized Aguirre for being "resistant to supervision" and referenced complaints from opposing counsel. It also noted that he "expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success."

The supplemental evaluation was not placed in Aguirre's personnel file, and the evidence suggests the substance of the supplemental evaluation may never have been conveyed to Aguirre. In addition, several other Enforcement lawyers, some of whom had worked for many years in the Enforcement Division, had never seen or even heard of a supplemental evaluation.

Within a short time period after the supplemental evaluation was prepared, while Aguirre was continuing to seek approval to take Mack's testimony, Director Thomsen made the decision to terminate Aguirre in a meeting with Berger, Hanson and Kreitman, during which they all recommended that Aguirre be terminated. Thomsen, Berger, Hanson and Kreitman all referenced Aguirre's inability to work well with others as the basis for Aguirre's termination and, in fact, there is substantial evidence of Aguirre's conflicts with co-workers, supervisors and opposing counsel.

However, the record also shows that Aguirre's supervisors were discussing the issue of taking John Mack's testimony around the same time period, perhaps, even in that meeting. In fact, the e-mail that proposed Aguirre's termination directly followed an e-mail from Aguirre in which he provided a justification for taking Mack's testimony. In addition, Berger acknowledged that "the fact that [Aguirre] simply wouldn't listen with respect to Mack must have played some part in Mark [Kreitman's] and Bob [Hanson's] assessment of his conduct." Accordingly, and in light of all the evidence, it is not credible to find that decision to terminate Aguirre was totally unrelated to Aguirre's efforts to take Mack's testimony.

In addition, the timing of the supplemental evaluation evidences that complaints made about Kreitman's management style also played a role in the decision to issue this unprecedented document to Aguirre.

Furthermore, although there was evidence that Enforcement had a legitimate basis for terminating Aguirre in his probationary period, the evidence also shows that few employees in Enforcement, even in their probationary periods, have historically been terminated, and Enforcement management has tolerated much worse conduct on the part of both Kreitman and Hanson.

During the course of the investigation, numerous former and current subordinates of Kreitman came forward, after requesting confidentiality, to describe the atmosphere of "abuse" and "unfairness" that pervaded the office under Kreitman's leadership. These Enforcement attorneys described Kreitman's management style as "abusive," "dictatorial," "arbitrary," and "autocratic." These employees gave examples of Kreitman berating both his subordinates and outside counsel on a fairly regular basis. They also described their intense fear of retaliation and gave accounts of how it was fruitless to complain about Kreitman since upper management would not take appropriate action.

There were also significant concerns expressed about Bob Hanson's management style. He was described as a "micro-manager" who "harassed" subordinates, but gave little or no substantive feedback. In all, the atmosphere under Kreitman and Hanson was described as "unpleasant" and "frustrating" and made it extremely difficult for Aguirre to succeed at his job.

Thus, the OIG investigation finds that Enforcement failed in numerous respects in how it managed Gary Aguirre and allowed inappropriate reasons to factor into its decision to terminate him. Accordingly, the Inspector General recommends that this report be provided to the Chairman, Chief of Staff, and Executive Director for actions consistent with the following recommendations:

1. Appropriate disciplinary and/or performance-based action against Mark Kreitman, including removal of his supervisory responsibilities;

2. Appropriate disciplinary and/or performance-based action against Robert Hanson, including removal of his supervisory responsibilities;

3. Appropriate disciplinary and/or performance-based action against Linda Thomsen;

4. Clarification of the Commission's policies on the disclosure of nonpublic information in the context of Enforcement investigations and training of Enforcement employees, with respect to, inter alia, the appropriateness of disclosing the extent of evidence against a person of interest in an ongoing investigation; and

5. Reassessment and clarification to staff of Enforcement's practice that allow outside counsel the opportunity to communicate with those above the line attorney level on behalf of their clients when they have issues or disagreements with the Enforcement lawyers with whom they have been dealing to ensure that such policy does not result in favorable treatment, or the appearance thereof, for prominent individuals and their counsel.

Submitted: _____ Date: Sept. 30, 2008
H. David Kotz, Inspector General