Judiciary Committee Hearing: Illegal Insider Trading: How Widespread is the Problem and is there Adequate Criminal Enforcement?
Responses by Gary Aguirre for the Hearing Record
to Questions from Senator Grassley:

For Mr. Gary Aguirre
Former Senior Attorney
U.S Securities and Exchange Commission

(1) At the Judiciary Hearing, your former supervisors from the SEC had a lot of negative things to say about you and your performance while employed as a Senior Attorney at the SEC. For instance, your Branch Chief, Robert Hanson said you were disrespectful and abusive to other attorneys, you misrepresented Commission policy to outside counsel, and that your files were disorganized and incomprehensible.

These complaints can be summed up in the following list. Please provide a detailed response (including relevant documents where available) to the following allegations that were presented against you at the December 5, 2006, hearing.

I appreciate the opportunity to respond to each of the false and groundless accusations by Linda Thomsen (Thomsen), Paul Berger (Berger), Mark Kreitman (Kreitman) and Robert Hanson (Hanson) attacking my performance as an SEC attorney. The purpose and available time at the December 5, 2006, hearing permitted only the briefest response to these accusations.[1]

Thomsen, Berger, Kreitman, and Hanson (collectively "the Four") employed a classic strategy to obfuscate their misdeeds—an *ad hominem* attack on the messenger. It took two different forms. Much of their attack was pure fiction. No contemporaneous documents support any of these factual allegations for a simple reason: they did not happen. But the Four also sprinkled in a few half truths. These accusations fictionalize real events. The part that is true finds support in contemporaneous documents, but those same documents refute the part that is fiction.

The Four spent much time wrapping themselves in the SEC flag, as if this mantle would somehow give their testimony the appearance of truth. But it would fail them. Their evasive answers, half truths and flat lies only proved your Committee would have to look elsewhere for the truth. Their testimony brought no honor to an agency whose mission—to protect investors and maintain the integrity of the capital markets—demands that its leadership be forthright. In truth, they were just four individuals who had abused the power entrusted to them under law, four individuals willing to say anything—true or false—to conceal their abuse of power, four individuals willing to cross the line marking the boundary of perjury.

[1] "I have not seen a single piece of paper backing anything that they have said through my history with the SEC, and I have been trying to get them through FOIA and Privacy Acts." *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006), Court reporter hearing transcript (Hereinafter "Hearing RT") p. 36, l. 23 through p. 37, l. 1.

The Four's personal attacks share a common feature, which undermines their credibility. None found its way into any performance evaluation—that is until I questioned Mack's special treatment. Until then, every link in my chain of command found my performance warranted a two-step merit pay raise. On June 1, 2005, Kreitman certified my job performance satisfied every applicable SEC standard.[2] On June 29, Hanson forwarded his evaluation of my performance stating that I made "contributions of high quality" and that I "went the extra mile and then some."[3] On July 18, the compensation committee, with Berger as a member, decided my performance warranted a two-step merit increase. By July 27, Thomsen had reviewed and approved my two-step increase.

But all this would quickly change in late July 2005 when I spoke to Berger about Mack's favored treatment and followed up on July 27 with my email saying the same.[4] Less than three days later, Berger, Kreitman and Hanson decided to reevaluate my 2004-2005 performance.[5] Their "reevaluation" described someone who clearly had no future at the SEC.[6] One month later, the Four carried out the "reevaluation" by terminating my employment.[7]

So how did the Four try to reconcile their uniformly positive evaluations of my performance with their decision to fire me? This assignment went to Kreitman; he took two bites at this apple. His first theory employed this syllogism: Aguirre's performance failures with one exception (my judgment failure in seeking to subpoena Mack) were all conduct-related; the SEC formal evaluation process did not concern itself with an employee's conduct, only his professional judgments; therefore, Aguirre got through the evaluation process with his two-step merit pay increase.[8] The syllogism fails if either of its premises is false. In this case, both premises are false.

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[2] See SEC Form 2494, Ex. 1.

[3] See Robert Hanson's June 2005 evaluation of Gary Aguirre's performance and transmittal sheet, Ex. 2.

[4] See July 27, 2005, email from Aguirre to Berger and Kreitman, Ex. 59.

[5] Hearing RT, p. 53, l. 19 through p. 54, l. 4; and *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Mark Kreitman, Assistant Director Division of Enforcement U.S. Securities and Exchange Commission Washington, D.C.). (Hereinafter "Kreitman's Written Testimony").

[6] See August 1, 2005, "reevaluation" of Gary Aguirre, Ex. 95.

[7] See September 1, 2005, termination notice, Ex. 96.

[8] This first theory emerged during questioning by Senator Specter of Kreitman. The transcript reads:

> Chairman Specter. Well, what was the change that moved from "acceptable" in all categories to "unacceptable"?...and where Mr. Hanson says his immediate supervisor, "Made Contributions of High Quality". Suddenly there is a change and he is fired?

Hearing RT, p. 92, ll. 1-11.

> Mr. Kreitman. Senator, the only respect in which Mr. Aguirre's professional judgment received disfavor by any of his supervisors was, as Mr. Berger indicated, with respect to the timing of the testimony of Mr. Mack.
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> However, it was Mr. Aguirre's behavior and conduct, the contemptuous way in which he treated his colleagues, the unprofessional way he dealt with opposing counsel, his refusal to accept any kind of directional supervision, that led to his termination.

Hearing RT, p. 92, ll. 12-20.

The first premise was express: that my alleged deficiencies were all conduct related with one exception.[9] That factual theory cannot be squared with the Four's testimony before you Committee. Collectively, the Four testified my performance was deficient in twenty-three particulars. Their accusations were not limited to conduct-related deficiencies. The Four disparaged every aspect of my substantive work: to communicate with other staff,[10] to plan and organize an investigation,[11] to correctly issue a subpoena,[12] to use the subpoena power reasonably,[13] to distinguish speculation from fact,[14] to weigh evidence,[15] to take testimony,[16] to understand Commission policy,[17] and to record and document the investigative progress.[18] All of these allegations involve professional judgment, which according to Kreitman should have been tagged during the evaluation process. Yet, the Four's evaluations of my performance omitted any mention of these flaws. Once again, the key question, the one Senator Specter posed to Kreitman, still searches for an answer: why did none of my alleged deficiencies appear on any of my evaluations?

Kreitman's second premise—that the evaluation process tracks professional competence but not conduct-related deficiencies—is equally flawed. Indeed, it is absurd. It suggests the SEC could be in the process of firing someone for accepting a bribe, while awarding the miscreant a three-step pay increase so long as his work product was superior.

The SEC's evaluation process is not so flawed. It clearly encompasses conduct. In this regard, Kreitman certified on SEC Form 2494 that my "oral and written communications further agency objectives and, with few exceptions, are ...appropriate for the intended audience." He also certified that my "required personal interactions with internal and external constituencies/counterparts are generally responsive to the needs of these individuals or entities."[19] How could my interactions with others—both "internal and external"—be "appropriate" and "generally responsive" to their "needs," as Kreitman has certified,[20] if, I had hung up on opposing counsel, abused fellow staff attorneys, refused to share information, thrown tantrums or engaged in any of the other alleged misconduct, as Kreitman now testifies?[21] So which is true: Kreitman's certification on June 1, 2005, when his job demanded an honest assessment, or his testimony on December 5, 2005, when his own conduct was under scrutiny?

As a fallback, Kreitman tried to peddle a second theory—that my behavior fell off after April 30, 2005. He put it this way:

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[9] The one "professional judgment" which received my supervisors' disfavor, according to Kreitman, was decision to issue a subpoena to John Mack. *Id.*, ll. 12-15.
[10] Aguirre "has difficulty explaining the significance of evidence in a linear fashion."
[11] Aguirre's "PCM investigation was poorly thought out [and] disorganized."
[12] Aguirre "sent out several subpoenas violated privacy law."
[13] Aguirre "sent out too many subpoenas" and he "subpoenaed too many emails, over 19 million."
[14] Aguirre "made factual statements that turned out to be mere speculation."
[15] Aguirre was "unable to fairly and impartially balance evidence."
[16] Aguirre "was disorganized and unprofessional during Samberg's June testimony."
[17] Aguirre "misrepresented Commission policy to opposing counsel."
[18] "Aguirre's records and files were disorganized and sloppy."
[19] See SEC form 2494, Ex. 1.
[20] *Id.*
[21] Kreitman's Written Testimony.

I've heard—and read—a good deal about the two step increase we recommended for Mr. Aguirre which became effective shortly before his termination. That recommendation covered the rating period that ended April 30, some four months prior...Mr. Aguirre's *subsequent* behavior however so far exceeded the bounds of acceptable professional conduct that it was incumbent on me and his other super-visors (sic) to supplement his overly generous evaluation. A copy of our supplemental evaluation, prepared on August 1, 2005, which accurately described concerns we had about Mr. Aguirre's conduct, is attached (emphasis added).[22]

But this *factual* theory (Aguirre's *subsequent* behavior fell off) clashes with the *factual* theory stated in the SEC's official termination notice. The notice suggests that my conduct was sub par from the outset, but improved towards the end. It reads: "Since those meetings, your conduct has not improved to the level that warrants retention beyond your trial period."[23] So again, which is it? Was my performance solid for most of the year, but fell off at the end? Or was my performance sub par for most of the year, but my *improvement* inadequate at the end? The SEC has offered your Committee both conflicting theories. Neither is true.

The truth may be stated simply. My evaluations were all positive until I questioned the Four's decision to give Mack special treatment. Then within three days, three of the Four rewrote my employment history with their phony "reevaluation," a process otherwise unknown at the SEC.[24] That "reevaluation" was never shown to me.[25] It never found its way into my personnel file. No one ever discussed it with me. All of this violates established SEC protocol.

But the Four's handling of my performance evaluations is just one fact that undermines their credibility. My supervisors never mentioned any of the twenty-three alleged deficiencies in any written or oral communication to me. Nor has any email surfaced—to the best of my knowledge—in which my supervisors mention any of these alleged deficiencies. Few appear in my termination notice, even though the law required the SEC to state them there.[26]

No evidence links my performance to my firing because it was not the cause. The Four fired me because I questioned their decision to give Mack special treatment. When two Senate committees put the high beam on that decision, the SEC reopened the Mack investigation. But the Four also handled the reopened investigation; it was therefore just as much a sham as its closing a year earlier.

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[22] *Id.*

[23] See termination notice, Ex. 96.

[24] Hearing RT, p. 86, l. 20 through p. 89, l. 1.

[25] *Id.*, p. 89, l. 2 through p. 90, l. 5.

[26] See termination notice, Ex. 96. Section 315.804(a) of Title 5 provides:

> When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

The Four's mentality in conducting the reopened investigation was best expressed by Hanson during questioning by Senator Specter. Hanson well understood that other staff and I believed that Mack may have learned about the pending merger during his negotiations with Credit Suisse (CS) or Credit Suisse First Boston (CSFB) in late June and then passed that tip along to Samberg during a phone call on June 29. During questioning by Senator Specter, Hanson *flatly* denied Mack met with CSFB employees in late June 2001,[27] contrary to information a CSFB attorney had provided to me.[28] But Hanson's answers whether Mack met with Credit Suisse executives in late June 2001 were evasive. Still, his responses impliedly conceded that Mack had met with Credit Suisse executives at the critical time.[29] On this point, the transcript reads:

> Mr. Aguirre. And I think, more importantly, the question is, what did Mr. Mack say about his meetings with Credit Suisse during the 27, 28 and 29 of June?...
>
> Chairman Specter. Was Mr. Mack questioned about that, Mr. Hanson?
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> Mr. Hanson. Of course.
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> Chairman Specter. And what did he say?
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> Mr. Hanson. That the information that Mr. Aguirre alleged or speculated that Mr. Mack may have had was so far down in the weeds for Mr. Mack.[30]

The only reason that Mack would have discussed what was said during meetings in late June 2001 with Credit Suisse is if they had in fact taken place. Hanson's reference to what "Mr. Aguirre alleged or speculated" was of course reference to my and other staff's belief that Mack may have learned about GE's pending acquisition of Heller during these meetings.

Then this remarkable exchange took place:

> Chairman Specter. So far down in the weeds?
>
> Mr. Hanson. It was so far removed from what he was doing with respect to negotiating with CS First Boston *that it had no relevance to him* (emphasis added)...[31]

A little perspective on Hanson's comment may be helpful. The SEC never took the testimony of the Credit Suisse officials that met with Mack in late June 2001,[32] just before he

[27] Hearing RT, p. 80, l. 15-19.
[28] *Id.*, p. 80, l. 22 to p. 81, l. 1.
[29] *Id.*. p. 82, ll. 10-12.
[30] *Id.*, p. 82, l. 1-12.
[31] *Id.* p. 82, ll. 13-20. Hanson Not only that, but the people from CS First Boston that we talked to and received the e-mails from said that there is no possible way that they had the information, let alone passed it on to Mr. Mack.
[32] The SEC's Case Closing Recommendation, Ex. 115, only states that the SEC took the testimony of the CSFB employees who, according to Hanson, did not meet with Mack in late June 2001.

spoke with Samberg on June 29. The critical statute of limitations had already expired by the time the SEC learned of those meetings during Mack's testimony. But had the SEC questioned the Credit Suisse executives who met with Mack and had those executives testified that the pending acquisition was discussed during their meetings with Mack, Hanson had a ready answer. It was "so far down in the weeds" that it would have "had no relevance to [Mack]." The relevance to Mack was of course not the issue. *What about the relevance to Hanson?*

I submit that such a disclosure by Credit Suisse executives to Mack in late June would have had considerable relevance to any government investigator conducting a legitimate investigation of Pequot Capital Management's (PCM) trading in GE and Heller. Had Mack learned about the pending acquisition on June 27 or 28, the time period covered by Senator Specter's question to Hanson, Mack would have known that fact on June 29 when he spoke with Samberg. Samberg's heavy trading of Heller on the next trading day would be circumstantial evidence that Mack communicated the tip to him.[33] It would explain why PCM arranged for Mack to get a $5 million piece of Fresh Start, which tripled in value eight months after Mack put up his cash.[34]

Further, this piece of information—whether Mack learned about the pending acquisition during his meetings with CS or CSFB—was the "prerequisite" to take his testimony, according to Kreitman. Yet, even if I had found some way to establish this fact to Kreitman's satisfaction, it would still have "had no relevance" to Mack, according to Hanson, and therefore apparently none to Hanson either. I submit these are not the words of an investigator conducting a real investigation. Rather, they are the words of someone so caught up in a cover up that he fails to recognize the absurdity of his own words.

I now turn to the specific attacks on my performance.

Mark Kreitman

1) **Mr. Aguirre refused to share with them [SEC colleagues] details, strategy or tactics about the investigation.**

As Kreitman must know, his testimony was false. I freely told my supervisors and other staff of evidentiary developments, as well as my views on new tactics or strategies to advance the PCM investigation. This was done through emails, team conferences, smaller meetings, and phone calls. I have included typical emails recording this practice from my first month to my last month with the SEC.[35] None of my supervisors ever suggested or implied that I kept

[33] United States v. Larrabee, 240 F.3d 18, 21 (1st Cir. 2001).

[34] See Aguirre written testimony, footnote 116.

[35] For example, see the following emails: See September 22, 2004, email from Aguirre to Cain, Ex. 3; October 6, 2004, email from Aguirre to Cain, Ex. 4; October 8, 2004, email from Aguirre to Grime and Cain, Ex. 5; October 13, 2004, email from Aguirre to Cain, Ex. 6; October 14, 2004, email from Aguirre to Grime and Cain, Ex. 7; November 3, 2004, email from Aguirre to Grime, Cain and Foster, Ex. 8; December 6, 2004, from Aguirre to Foster, Ex. 9; December 8, 2004, email from Foster to Aguirre, Ex. 10; December 9, 2004, email from Aguirre to Foster, Ex. 11; December 10, 2004, email from Aguirre to Foster, Ex. 12; January 10, 2005, email from Aguirre to Grime and Cain, Ex. 13; January 10, 2005, email from Aguirre to Cain, Ex. 14; January 24, 2005, email from Aguirre to Kreitman, Ex. 15; January 25, 2005, email from Aguirre to Hanson, Ex. 16; February 3, 2005, email from Kreitman

investigative developments to myself. Nor has the SEC pointed to a scrap of paper to support this theory.

I updated Hanson and, when appropriate or requested, Kreitman on all developments of the PCM investigation. Shortly after my transfer to Kreitman's group and Hanson's branch, I updated both on the investigative plan, which Kreitman thought was just fine.[36] As discussed below, I updated them on revisions to the plan and proposed new strategies and tactics from time to time as they occurred.[37] Again, from the outset, I passed along to my supervisors significant input from staff assigned to the PCM investigation by other SEC offices or divisions.[38] I also notified both Hanson and Kreitman of the initial examination schedule[39] and other significant decisions regarding the issuance of subpoenas.[40]

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to Hanson and Aguirre, Ex. 18; February 4, 2005, email from Aguirre to Kreitman, Ex. 19; February 8, 2005, email from Aguirre to Kreitman and Hanson, Ex. 20; February 14, 2005, email from Kreitman to Hanson and Aguirre, Ex. 21; February 16, 2005, email from Hanson to Aguirre, Ex. 22; February 16, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Ivarone, Plimpton, and Snively, Ex. 23; February 18, 2005, email from Aguirre to Hanson, Ex. 24; February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 25; February 22, 2005, email from Aguirre to Hanson, Kreitman, Foster, and Ribelin, Ex. 26; February 23, 2005, email from Kreitman to Hanson, Foster, Ribelin and Aguirre, Ex. 27; February 25, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 28; March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 29; March 9, 2005, email from Aguirre to Hanson and Kreitman, Ex. 30; March 10, 2005, email from Aguirre to Berger, Kreitman and Hanson, Ex. 31; March 15, 2005, email from Aguirre to Hanson, Kreitman, Ribelin, Conroy, Glascoe, and Foster, Ex. 32; March 16, 2005, email from Aguirre to Hanson, Foster, Ribelin, Conroy, Ivarone, and Plimpton, Ex. 33; March 16, 2005, email from Aguirre to Kreitman, Hanson, Plimpton, Ivartone, Foster, Conroy and Ribelin, Ex. 34; March 18, 2005, email from Aguirre to Hanson and Kreitman; Ex. 35; March 29, 2005, email from Aguirre to Hanson and Ribelin, Ex. 36; April 13, 2005, email from Aguirre to Hanson, Ex. 37; April 18, 2005, email from Aguirre to Hanson, Ex. 38; April 22, 2005, email from Aguirre to Hanson and Kreitman, Ex. 39; April 29, 2005, email from Aguirre to Hanson, Ex. 40; May 6, 2005, email from Aguirre to Hanson, Ex. 41; May 9, 2005, email from Aguirre to Florschutz, Kreitman and Hanson, Ex. 42; May 10, 2005, email from Aguirre to Kreitman and Hanson, Ex. 43; May 18, 2005, email from Aguirre to Hanson, Ex. 44; May 20, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Eichner and Conroy, Ex. 45; May 24, 2005, email from Aguirre to Hanson, Foster, Ribelin, Eichner, O'Rourke, Ivarone and Kreitman, Ex. 46; May 24, 2005, email from Aguirre to Hanson, Ex. 47; May 25, 2005, email from Aguirre to Hanson, Ex. 48; June 3, 2005, email from Aguirre to Ribelin, Foster, Eichner, Conroy, Glascoe, Miller, Hanson and Kreitman, Ex. 49; June 2, 2005, email from Aguirre to Kreitman, Ex. 50; June 12, 2005, email from Aguirre to Hanson, Ex. 51; June 10, 2005, email from Aguirre to Ribelin, Hilton, Conroy, Glascoe, Eichner, Miller, Kreitman, Hanson, and O'Rourke, Ex. 52; June 12, 2005, email from Aguirre to Hanson, Ex. 53; June 20, 2005, email from Aguirre to Hanson, Ex. 54; June 27, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 55; June 28, 2005, email from Aguirre to Hanson, Kreitman, and Ribelin, Ex. 56; June 29, 2005, email from Aguirre to Kreitman, Ex. 57; July 29, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Eichner and Jama, Ex. 58; July 27, 2005, email from Aguirre to Berger and Kreitman, Ex. 59; August 24, 2005, email from Aguirre to Berger; and August 4, 2005, email from Aguirre to Hanson, Ex. 60.

[36] See February 2, 2005, email from Aguirre to Kreitman and Hanson at 5:16 pm, Ex. 18; and February 3, 2005, email from Kreitman to Aguirre and Hanson at 12:44 pm, Ex. 18.

[37] See, for example, March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 29.

[38] See for example February 8, 2005, email from Aguirre forwarding to Kreitman and Hanson an email from Snively of OCIE, Ex. 20, and February 23, 2005, email chain between Aguirre, Kreitman Hanson, Foster and Ribelin, Ex. 27.

[39] See February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 24.

[40] April 11, 2005, email from Aguirre to Hanson, Ex. 38; May 24, 2005, email from Aguirre to Hanson, Ex. 47; February 14, 2005, email from Aguirre to Foster, Ex. 82; Early May email chain between Kreitman, Hanson and Aguirre, Ex. 89; May 4, 2005, email from Ribelin to Hanson and Kreitman, 103; August 26, 2005, email from Aguirre to Kreitman, Hanson, Eichner, Ribelin, and Jama, Ex. 119; May 24, 2005, email exchange between Aguirre and Hanson, Ex. 124; Chain of emails in late August 2005, Ex. 133; June 2, 2005, email from Aguirre to Kreitman

I also notified both Kreitman and Hanson of the first PCM staff meeting, after my transfer to Kreitman's group, which included staff from other SEC divisions or offices.[41] The email to Kreitman and Hanson incorporated my email to other staff setting up the meeting and its proposed agenda. It read:

> Pequot Team:
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> We are entering a critical stage of this investigation in March, when we take the examinations of the Pequot execs who made the trading decisions that are the subject of this investigation, as well as some of the issuers employees suspected of being tippers. So that we can discuss what needs to be done between now and then, I have reserved Room 8120 for Wednesday at 2:15 pm.
>
> Here are some of the matters we need to discuss:
> 1) Getting incoming CDs with email and other electronic data on Iconnect or the J-Drive;
> 2) Searching through the trading data for individuals who may have been trading in parallel with Pequot;
> 3) Getting the telephone records organized for quick and easy access;
> 4) One of Eric favorites: could Boston office conduct exam of Pequot to force them to cough e-mails and other records?
> 5) Andy: Have you been able to tweak your software to adjust to the Pequot trading profile?
> 6) Reviewing emails: all help appreciated. Tom has been looking at Blue Coat
>
> I will circulate a more complete agenda before the meeting.
>
> Look forward to seeing all of you.[42]

Kreitman delegated the matter to Hanson and Hanson authorized me to handle the meeting without his presence.[43]

With this history likely in mind, on June 1, 2005, Kreitman certified my performance met the following standards:

> **Communication**—oral and written communications, further agency objectives, and, with few exceptions, are clear, concise, well-organized, accurate, grammatically correct, and appropriate for the intended audience. Required personal interactions with internal and external constituencies/counterparts are generally responsive to the needs of these individuals or entities. Keeps these

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Ex. 140; June 3, 2005, email from Aguirre to Hanson, Ex. 141; June 3, 2005, email from Eichner to Kreitman, Hanson, and Aguirre, Ex. 142; June 6, 2005 email from Kreitman, to Eichner, Hanson and Aguirre, Ex. 143; August 24, 2005, email from Kreitman, to Aguirre and Hanson, Ex. 145. See also supplement to this footnote.

[41] February 14, 2005, email from Aguirre to Kreitman and Hanson, Ex. 21.

[42] February 14, 2005, email from Aguirre to Kreitman and Hanson, Ex. 21.

[43] *Id.* See also Hanson's February 16, 2005, email to Aguirre, Ex. 22.

entities and management appraised or relevant issues, changes, and problems as directed.[44]

Nor was there ever a complaint that I was withholding any information from anyone. Indeed, if true, this charge could be easily proved. Emails to me inquiring how the Samberg testimony went, whether there was a viable legal theory supporting the wash trades violations or any of a hundred other subjects could be matched with my failure or refusal to reply. But there is no such evidence. Instead, Kreitman—an official whose job is to enforce truth in our capital markets—tells another lie as a strand in a larger web.

2) The investigation was poorly thought out, disorganized and sloppily documented.

This allegation disparages my work product on the PCM investigation for my entire tenure with the SEC.[45] It once again raises the obvious question why was this alleged deficiency not reflected in any of my evaluations, the "reevaluation," or even in the termination notice? How did it go undetected until the two Senate committees began their investigation?

To begin with, this accusation overlooks the fact that I did not create the investigative plan by myself. The plan, its revisions and its organization were the subject of numerous emails to my supervisors throughout the year.[46] It incorporated input from other staff members with varied expertise.

To begin with, in October 2004, Grime and Cain instructed me to develop the investigative plan with Foster, who had almost thirty years experience as an Enforcement investigator at that time. Grime's and Cain's decision followed my email of October 8, 2004, which read in part as follows:

> At yesterday's training session, Laura Joseph [she directed Enforcement training at that time] introduced Hilton Foster as the most knowledgeable person on insider trading at Commission. He lived up to his billing. I discussed the Pequot case with him yesterday afternoon. Cutting to the chase: he considers Arthur Samburg and Pequot to be "serial inside traders." He tried to make a case against them a decade ago, but failed. He says our case will be extremely difficult, but it must be brought. He has agreed to work with me on the case, subject to your approval.[47]

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[44] See the SEC form 2494, Ex. 1.

[45] The document organization is discussed below in response to a separate Committee question. See *infra*, Hanson's allegation 4, p. 42-43.

[46] See September 22, 2004, email from Aguirre to Cain, Ex. 3; November 3, 2004, email from Aguirre to Grime, Cain and Foster, Ex. 8; February 3, 2005, email from Aguirre to Hanson and Kreitman at 10:00 am, Ex. 18; March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 85; the April 22, 2005, chain of emails between Aguirre Hanson and Kreitman, Ex. 39; the June 20, 2005, chain of emails between Hanson and Aguirre, Ex. 54; June 28, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 56; and August 4, 2005, email from Aguirre to Hanson, Ex. 60.

[47] See October 8, 2004, email from Aguirre to Richard Grime and Cain, Ex. 5.

My October 14, 2004, email to Grime and Cain ("First cut at Pequot Investigation Outline") confirmed Foster's participation in the development of the investigative plan:

> The attached is a work in progress and is only intended as a general overview. I have not as yet asked Hilton Foster for his input. When approved, as is or as modified, I will schedule a meeting with Hilton, to include Charles if he wishes. I will then begin to work on the subpoenas, chrono requests, and name recognition letters, which I would expect to all go out at about the same time.[48]

The meeting mentioned in the above email took place on November 3, 2004, among Foster, Grime, Cain and me. My email to the meeting participants confirmed the consensus reached at that meeting regarding the short term investigative plan.[49]

During the period that the original investigative plan was developed, from October through early February, Foster and I had exchanged over 150 emails relating to the PCM investigation.[50] We had countless one-on-one meetings to discuss how to conduct the investigation. Foster was present and participated in the examinations of all witnesses. He continued to actively participate in the investigation until he left the commission on June 30, 2005.

But Foster was not the only staff person whose guidance I sought and obtained in formulating the investigative plan. By the time I presented the plan to Kreitman and Hanson, I was getting almost daily input on the PCM investigation from Ribelin,[51] a branch chief with Market Surveillance, who had seventeen years experience with the SEC Enforcement Division. Additionally, as discussed below, I had sought and obtained input from staff with special expertise from multiple offices and divisions of the SEC.[52]

I first presented the investigative plan to Kreitman and Hanson by my email of February 2, 2005, shortly after my transfer to Kreitman's group and Hanson's branch.[53] Kreitman's response offered no hint that the plan was "poorly thought out." Instead, his email read: "Gary – All this looks good."[54]

That plan encountered an impasse in the spring of 2005, when PCM's attorneys failed to comply with the SEC subpoenas and earlier written requests for information.[55] Accordingly, with

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[48] See October 14, 2004, email from Aguirre to Grime and Cain, Ex 7.

[49] See November 3, 2004, email from Aguirre to Grime, Cain and Hilton Foster, Ex.8.

[50] See for example, Exhibits 8 through12. See also the supplement to this footnote.

[51] Regarding Ribelin's participation in the investigation, see, for example, the December 2, 2004, email from Ribelin to David Wiederkehr, Stephen Glascoe, and Aguirre, Ex. 61; and December 7, 2004, email from Ribelin to Joseph Cella, Foster, Glascoe, and Aguirre Ex. 63. See also supplement to this footnote.

[52] See *infra*, Hanson's allegation 2, pp. 26-27.

[53] See February 2, 2005, email from Aguirre to Kreitman and Hanson, Ex. 18.

[54] See February 3, 2005, email from Kreitman, to Aguirre and Hanson, Ex 18.

[55] See February 27, 2005, email from Kreitman to Hanson, Ribelin, and Aguirre; Ex. 66. See February 23, 2005, email from Kreitman to Hanson, Foster, Ribelin, and Aguirre, Ex. 67.

my supervisors' approval, I revised the plan several times in the spring of 2005 to overcome the lack of cooperation by PCM's attorneys.[56]

In early May, I proposed another strategy to get the relevant PCM emails. It developed out of a letter from PCM's counsel.[57] I circulated an email summarizing the proposed objectives for the strategy and refined it with my supervisors.[58] When it succeeded, Kreitman circulated an email on May 25, 2005, to Berger, Hanson, Ribelin, Foster, James Eichner (Eichner), Thomas Conroy, and me, which read: "Sounds like Gary's strategy outsmarted (or terrified) Audrey and is resulting in real progress. Excellent!"[59] I believe Hanson had this strategy in mind when he wrote in his June 29 evaluation of my performance: "He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation."[60]

On June 14, 2005, Hanson and Kreitman again recognized that my investigative plan was working. On that day, I presented them with evidence suggesting that PCM had traded on illegal tips when it made an $18 million profit on its trading in the common stocks of General Electric and Heller Financial. I also showed Hanson and Kreitman incriminating emails, which I had found, to and from PCM's CEO relating to Microsoft at time when the CEO made a $12 million profit trading Microsoft options. Following that presentation, Kreitman gave me his "Perry Mason" award and both Kreitman and Hanson authorized me to make the same presentation to FBI special agents and an Assistant US Attorney the next day. After the meeting with the US Attorney and the FBI, both would open their own investigations.

That step would satisfy a Kreitman objective for the PCM investigation which he set in February 2005. On February 22, 2005, Kreitman circulated an email to staff working on the PCM investigation in which he stated that "interesting" the US Attorney's office for the Southern District of New York in the PCM insider trading investigation was a "very high priority."[61]

Kreitman's written testimony that the investigation was poorly planned and organized cannot be reconciled with his own evaluation of my performance on June 1, 2005. Both Hanson and Kreitman knew about the investigative plan, since it had been presented to them by my email of February 3, 2005.[62] Both knew that its short term focus on obtaining emails had been successful.[63] Logically, Kreitman would have had these events in mind when he certified my performance met the following standards:

> **Planning and Organizing Work**—With few exceptions recognizes and solves problems, meets objectives and considers priorities when planning work

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[56] See March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 29; March 9, 2005, email from Aguirre to Hanson and Kreitman, Ex. 30; March 10, 2005, email from Aguirre to Berger, Kreitman and Hanson, Ex. 31; April 11, 2005, email from Aguirre to Hanson, Ex 38, May 1, and May 2, 2005, email exchange between Kreitman and Aguirre, Ex 89; and May 20, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, James Eichner and Conroy, Ex 45.

[57] See email chain ending with May 2, 2005, email from Kreitman to Aguirre and Hanson, Ex. 89.

[58] See May 10, 2005, email chain between Kreitman, Hanson, Eichner and Aguirre, Ex. 43.

[59] See May 20, 2005, email from Kreitman to Berger, Hanson, Ribelin, Foster, Eichner, Conroy, and Aguirre, Ex. 45.

[60] See Robert Hanson's undated evaluation of Gary Aguirre's work, Ex. 2.

[61] See February 22, 2005 email from Kreitman to Foster, Ribelin, Hanson, and Aguirre, Ex. 97.

[62] See February 3, 2005, email from Aguirre to Kreitman, Ex. 18.

[63] May 20, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, James Eichner and Conroy, Ex. 45.

assignments. Efficiently uses time and resources to produce a quality product with appropriate guidance and completes assignments within agreed upon timeframes.

> **Execution of Duties**—With few exceptions thoroughly and carefully analyzes and researches assignment. Effectively applies necessary knowledge and technical skills in order to perform duties of the position in an acceptable manner. Final work products meet established need, reflect appropriate attention to detail, and are well organized.[64]

Likewise, Kreitman's testimony cannot be reconciled with Hanson's June 29 evaluation of my work. It read in part as follows:

> [Gary's] efforts have uncovered evidence of potential insider trading and possible manipulative trading by the fund and its principals. He has been able to overcome a number of obstacles opposing counsel put in his path on the investigation. Gary worked closely with the Office of Compliance, Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads. He has gone the extra mile, and then some.[65]

How could this progress occur with an investigation that was so poorly thought out and organized?

Further, Kreitman's written testimony on this point cannot be squared with his testimony at the hearing. When questioned by Senator Specter, Kreitman testified: "Senator, the only respect in which Mr. Aguirre's professional judgment received disfavor by any of his supervisors was, as Mr. Berger indicated, with respect to the timing of the testimony of Mr. Mack."[66] This means my planning and organization of the PCM investigation, which clearly involved "professional judgment," did not receive the "disfavor" of my supervisors. Yet, according to Kreitman, both "were poorly thought out." Both statements cannot be true.

This allegation also has no roots in any evidence. The Four cited no supporting evidence in their testimony, other than Kreitman's reference to the "reevaluation." The SEC produced none in response to my FOIA and Privacy Act requests. The Four also forgot to mention this alleged deficiency in the termination notice, which they prepared.[67] Again, federal regulations required the SEC to state the reasons for its decision in that notice.[68] The only statement in the termination notice remotely relevant to this subject read: "While your substantive work generally has been good, the problems that have occurred in other areas…"[69]

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[64] See SEC form 2494, Ex. 1.
[65] See Robert Hanson's undated evaluation of Gary Aguirre's work, Ex. 2.
[66] Hearing RT, p. 92, ll. 12-15.
[67] See termination notice, Ex. 96.
[68] 5 C.F.R. § 315.804(a).
[69] See termination notice, Ex. 96.

3) Mr. Aguirre was unable to fairly and impartially balance evidence.

This is another broad attack on both my work product and my professional integrity. If true, it describes a flaw that would have existed from my first day at the SEC. It is a disability that would have affected my work for my entire professional life. How could anyone conduct any investigation or have had even modest success as a trial attorney if he was "unable to fairly and impartially balance evidence"?

Once again, no SEC evaluation hints that my supervisors held this view during my employment, not even the "reevaluation." Nor does this allegation find support in the termination notice, which only states that my substantive work was generally good.[70] The SEC has pointed to no supporting emails or other documents. To the contrary, my supervisor's conclusion that I made "contributions of high quality" implies that I was able to "balance the evidence."[71] Likewise, Kreitman's oral testimony—that I had only one failure of professional judgment—would seem to contradict this allegation.[72] The inability to balance the evidence, if true, should have affected many of my "professional judgments." Certainly, Kreitman's June 1, 2005, certification that I possessed all of the essential skills for my job refutes this allegation. In addition, I believe my response to Kreitman allegation 2 is equally applicable to this one.

4) Mr. Aguirre refused to write up results of investigation.

With this accusation, the Four crossed the perjury line. They did not merely espouse a baseless opinion or use vague hyperbole to describe my character and performance. The Four testified to a false statement of a material and concrete fact.

Once again, there is not a scrap of paper supporting this accusation. No one even thought to include this allegation in the Berger-Kreitman-Hanson phony "reevaluation,"[73] by itself a startling omission. Why would not Hanson, Kreitman, or Berger think to mention it there if it were true?

Even more extraordinary, the Four failed to mention this alleged fact in their termination notice. Further, it could have been easily stated in that notice with language like this: "Even worse, the employee refused to write up his investigation." Instead, that notice—initialed by Berger himself—belies his sworn testimony to your Committee. On this point, the notice reads: "and [you] indicated that you were uninterested in the preparation of your primary case assignment *beyond its investigatory stage* (emphasis added), which, incidentally, was also false."[74] That investigatory phase includes by definition whatever write ups are necessary to

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[70] *Id.*

[71] Robert Hanson's June 2005 evaluation of Gary Aguirre's performance and transmittal sheet, Ex. 2.

[72] Hearing RT p. 92, ll. 12-15.

[73] See August 1, 2005, "reevaluation" of Gary Aguirre, Ex. 95.

[74] Incidentally, the statement that I told Berger or anyone that I was "uninterested" in the preparation of the case beyond its investigatory stage—is also false. My complaint to the Office of Special Counsel, previously provided to the Committee, accurately summarized my conversation with Berger on this point:

> Later on June 29, after the meeting with Kreitman, Complainant asked Associate Director Berger if it was ever necessary for senior staff to consider the political consequences of their decisions in

complete it, e.g., a closing memorandum, formal action memorandum. It would be superseded, if at all, when the Trial Unit stepped in to file an administrative proceeding or civil lawsuit.

The evidentiary support for this accusation comes to this: each SEC official telling this lie could point to three others doing the same. Whether the lie has one author or several, it is still the same: a lie.

5) **The supplemental "reevaluation" accurately described concerns about Gary's conduct.**

The issues raised by the "reevaluation" are specifically addressed in response to other specific Committee questions with the exception of the two below.

a) *He drew complaints from opposing counsel ... which raises a question because of their frequency and consistency.*

I was dealing with more than fifty defense attorneys and had more than a thousand phone contacts plus several hundred written communications. I know of only three attorneys who contacted my superiors or expressed a desire to do so. One attorney questioned my decision that her clients should come to Washington, DC, for their examinations. Both Hanson and Kreitman agreed with my decision.[75] The second involved a corporate attorney who was displeased when I issued a second subpoena to his client, GE Capital. The attorney contacted Hanson and he supported my position.[76]

The third occasion involved a telephone conversation with CSFB attorneys Patrick Patalino (Patalino) and Gary Lynch (Lynch), a former SEC Director of Enforcement, on approximately June 8, 2005.[77] As was the practice, I called Patalino to request that he agree to accept service of a subpoena on CSFB, which he did agree to do. During the call, I also requested Patalino to treat the issuance of the subpoena confidentially, as I had heard other staff do in similar situations before. Patalino replied that CSFB also desired that the matter be treated confidentially and then left the line for a moment. When he returned, Lynch was patched into the call. Lynch asked aggressively: Are you saying that I should keep this matter confidential from John Mack? I responded politely: "No, I am just requesting that you keep the matter confidential." Lynch asked the same question two more times and I gave the same answer. On

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ongoing investigations. Berger emphatically said "no" and offered several examples of influential individuals whose testimony had been taken in the past. Berger made no inquiry why Complainant had asked the question. Complainant then told Berger he was troubled with his supervisors' decisions relating to the Mack subpoenas and that he intended to resign, but would be willing to remain with the Commission until the investigatory phase of the PCM matter had been completed if this would be helpful. Berger told Complainant that he would prefer Complainant set a specific date for his departure, since this would help Berger plan staffing needs.

The next morning, I informed Berger that I would leave the SEC on September 30, 2005.

[75] See the February 9, 2005, chain of emails among Kreitman, Hanson, and Aguirre, Ex. 64.

[76] See May 20, 2005, chain of emails between Hanson and Aguirre, Ex. 65.

[77] This would have occurred on or shortly before June 8, 2005, when I faxed the subpoena and covering letter to Patalino acknowledging that he had agreed to accept service.

the fourth occasion that Lynch asked the same question, I replied: I have answered the question three times." Lynch promptly left the call.

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

At the time of the call, Mack was no longer with CSFB. Thus, Lynch's question—whether my request applied to Mack—seemed puzzling. A couple of weeks later, I learned more about the relationship between Lynch and Mack and what might have prompted Lynch's call to Berger. On this point, my June 20 email to Hanson read:

> Incidentally, the above [a summary of the evidence suggesting that Mack might have tipped Samberg] may also help explain Lynch's call to Paul. Incidentally, Lynch advised Mack on at least one Pequot deal. Mack wrote Samberg on 2/6/02 stating, "I have checked with Gary Lynch and he confirmed that there is no conflict for me as an original investor [in Pequot]." Mack also hired Lynch: Here's one newspaper account: "Mack hires include ***Gary Lynch***, a former enforcement chief at the Securities and Exchange Commission, who is a vice chairman in charge of stock research and legal compliance ."[78]

Lynch also followed Mack back to Morgan Stanley in 2005 for pay package of $13.2 million[79] and represented Mack, according to the media, when the SEC took his testimony.[80]

In sum, none of my superiors ever suggested that I had dealt improperly with opposing counsel. None suggested that I handle similar situations differently in the future. As with other allegations, this one finds no support in any document until my July 27 email triggered the August 1 "reevaluation."

I should also point out that dealing with some opposing counsel was at times challenging. Shortly after becoming involved in the PCM investigation, Kreitman took a no-nonsense tone in dealing with PCM's counsel. For example, on February 27, Kreitman circulated his draft of a proposed letter to Audrey Strauss, the lead attorney representing PCM. He wrote: "I hope you don't mean to suggest that your new demand is a tactical response which would, as I'm sure you agree, might possibly be construed as unprofessional, unethical, even potentially illegal obstruction of a federal investigation."[81] On another occasion, Kreitman emailed staff regarding the latest failure of PCM's counsel to cooperate: "We need to continue to document this pattern of behavior with a view to possible §17(b) [Exchange Act] charge *and perhaps some disciplinary*

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78 See June 20, 2005, email from Aguirre to Hanson at 10:18 am, Ex. 54.

79 Jed Horowitz, *Morgan Stanley Welcomes Attny Lynch With $13.2 Million,* October 19, 2005, DOW JONES NEWSWIRES.

80 Randall Smith, *Moving the Market: Morgan Stanley CEO Testifies In SEC Investigation of Pequot,* W. ST. J., August 3, 2006, at C4.

81 See February 27, 2005, email from Kreitman to Hanson, Ribelin, and Aguirre; Ex. 66.

action against the law firm. (emphasis added)"[82] On another occasion, in an email copied to other staff, Kreitman advised Ribelin (who was himself frustrated with the tactics of PCM's counsel): "Tough tone always appropriate to prosecutors, Eric."[83]

b) He has difficulty explaining the significance of evidence in a linear fashion.

You are in a position to form your own judgment on this issue. I would point out that Kreitman, the author of this comment, invited me in the spring of 2005, as a guest lecturer, to explain the significance of the Enron case to his Georgetown law school class.[84]

6) Mr. Aguirre threw tantrums.

This is false. The theory is also inconsistent with Kreitman's certification on June 1, 2005, that my oral communications were "appropriate for the intended audience" and my "required personal interactions with internal and external constituencies/counterparts [were] generally responsive to the needs of these individuals and entities."[85] Further, it would seem that throwing "tantrums" would generate at least one email from one of my supervisors to me or to another supervisor. Indeed, no other SEC witness spoke of any tantrums, not even Hanson who worked more closely with me than Kreitman. Once again, this ground was not asserted in either the termination notice or the "reevaluation." Finally, I understand that your Committee has received an email from another staff attorney who had the opportunity to observe my conduct quite closely. That attorney unequivocally disputes Kreitman's testimony.[86]

There was one tantrum, however, that I do recall. It was thrown by Kreitman at about 4:30 pm on June 29, 2005, following a meeting between the two of us in his office. I tried to discuss with him the evidence calling for the issuance of the Mack subpoena, but he would not listen and grew increasingly agitated. As I was leaving his office and walking down the hall, Kreitman followed me and screamed: "Let's go see Paul [Berger]! Let's go see Paul." It did not seem appropriate at the moment to cross the building to Berger's office, given Kreitman's behavior. So, I turned to him and said: I am returning to my office to send you an email about the decisions you just made. I then did exactly that.[87] Kreitman did not respond for almost four weeks.[88]

7) Mr. Aguirre submitted his resignation at least twice.

The evolution of this allegation illustrates just how the SEC can take a truth and rework it into a lie. The truth was stated in the termination notice: I resigned once and only once.[89] Hanson's written testimony is very close to the truth: "He tendered his resignation from the

[82] See February 23, 2005, email from Kreitman to Hanson, Foster, Ribelin, and Aguirre Ex. 67.
[83] See February 11, 2005, email from Kreitman to Ribelin, Hanson, and Aguirre, Ex. 68.
[84] See my CV, provided to the Judiciary Committee.
[85] See SEC form 2494, Ex. 1.
[86] I was asked by this staff person not to disclose his or her identity out of concern that the SEC may engage in some form of reprisal.
[87] See June 29, 2005, email from Aguirre to Kreitman, Ex. 57.
[88] See July 25, 2005, email from Kreitman to Hanson and Aguirre, Ex 98.
[89] See termination notice, Ex. 96.

Commission in July 2005. Some time thereafter he withdrew his resignation."[90] Only the date was a little wrong: I resigned on June 30.

But there is a problem for the SEC with the single resignation theory. My one and only resignation occurred immediately after both Kreitman and Berger refused to reverse or even discuss the decision giving Mack preferential treatment.[91] Such favoritism violates federal regulations directly applicable to the SEC.[92] My supervisors' decision left me with two options: (1) execute my supervisors' decision to give Mack special treatment and thereby join with them in the violation of the same federal regulations or (2) challenge their decision which would likely be, and in fact turned out to be, a career shortening decision. Facing this choice, I initially decided to leave the SEC with a positive record and move on with my life.[93]

The multiple resignation theory overcame this flaw: Aguirre did not resign because of an unlawful decision by his supervisors; he was just an unstable employee who habitually offered his resignation and withdrew it. But this new factual theory also had a flaw: it was a lie. Consequently, it was not documented in any official record, e.g., the termination notice, or even in an informal communication, e.g., an email. To the contrary, the termination notice stated: "on one occasion, you submitted (and later withdrew) your resignation to your Associate Director . . ."[94]

Still the lie would have had a fighting chance to sound like truth if it were said often enough and consistently. A lie by all four SEC officials sounds more convincing than a lie by only one. But alas, the four did not get their stories straight in their written testimonies. Both Hanson and Thomsen went with the single resignation theory,[95] while Kreitman and Berger were just as sure there were multiple resignations.[96] Berger told the smoothest version of the lie: "At one point, I learned that Mr. Aguirre purported to resign and then rescinded his resignation shortly thereafter. In the summer of 2005, he did it again, this time submitting his resignation to me."[97]

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90 *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Robert Hanson, Branch Chief Division of Enforcement U.S. Securities and Exchange Commission Washington, D.C.) (Hereinafter "Hanson's testimony").

91 *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Gary J. Aguirre, Former Investigator, U.S. Securities and Exchange Commission, Washington, DC, part II) (Hereinafter "Aguirre's testimony").

92 See 17 C.F.R. 200.55, 17 C.F.R. 200.58, 17 C.F.R. 200.61, 17 C.F.R. 200.64, 17 C.F.R. 200.735-2, and 17 C.F.R. 200.51.

93 My decision to leave the SEC and the factors that caused me to reevaluate that decision are stated in my written testimony.

94 See termination notice, Ex. 96.

95 See Hanson's testimony and *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006) (Statement of Linda C. Thomsen, Director of Enforcement, U.S. Securities and Exchange Commission, Washington, D.C.) (Hereinafter "Thomsen's testimony").

96 Kreitman's testimony; and *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity*: Hearing before the U.S. Senate Judiciary Committee, 109th Cong. (2006). (Statement of Paul Berger, Former Associate Director, Division of Enforcement U.S. Securities and Exchange Commission, Washington, D.C.). (Hereinafter "Berger's testimony").

97 *Id.*, Berger's testimony.

Of course, all of this created some unintended drama at the hearing. How would the four reconcile the Kreitman-Berger multiple resignation theory with the Thomsen-Hanson single resignation theory when they testified back to back? Obviously, both could not be true. And of course the questioning could get embarrassing.

To reconcile their testimony, the Four got creative. At the hearing, Thomsen would abstain; she would not even mention my resignation. Kreitman and Berger would both stick with the multiple resignation theory.[98] The tough assignment went to Hanson: he would have to bridge the gap between the single and multiple resignation theories at the hearing. How did he do that? At the hearing, Hanson testified that I resigned once, but he also speculated that I had thought about resigning on another occasion.[99]

Once again, there are no emails or other documents supporting any version of the multiple resignation theory for the same old reason: it did not happen. Incidentally, it would seem highly improbable that an SEC Senior Counsel would resign and neither he nor any of his supervisors would in any way document the resignation or the withdrawal of the resignation.

8) Supervisors pointed out premature testimony would be a fruitless exercise.

This is a new variant of the SEC's "ducks in line" theory, an SEC mantra at the hearing. Berger spent the most time articulating the theory. According to him, taking Mack's testimony would be the last duck to be aligned. The rest of investigation would be completed first.[100] In his testimony, Kreitman waxed eloquently regarding the "proper evidentiary foundation for the invocation of compulsory process." Curiously, the SEC failed to demonstrate that same reserve when it subpoenaed my communications with your Committee.

The "ducks in line" theory of course 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. I reminded my supervisors on at least two occasions that this classic principle required that Mack's testimony be taken early.[101] For example, my July 27 email to Kreitman and Berger observed:

> I also believe Mack's testimony should have been taken promptly for the same reason that staff normally takes early testimony of suspected participants in an insider trading investigation--to pin them down. This is particularly true here because CFSB and Morgan Stanley are still producing e-mails. Further Morgan Stanley will be friendly because Mack is now its CEO. CSFB will be friendly to Mack because Gary Lynch, who is going to Morgan Stanley in a couple of months to join Mack, controls the CSFB production responsive to our subpoena. Further delay allows Mack to concoct a story that is consistent with the

[98] See Berger and Kreitman's testimonies.
[99] Hearing RT, p. 40, ll. 17-24.
[100] *Id* ., p. 60, ll. 15-23.
[101] See my July 27, 2005, email to Berger and Kreitman, Ex. 59; my August 4, 2005, email to Hanson; and my August 24, 2005, email to Berger, Ex. 60.

information contained in the e-mails. On the other hand, if he did not provide information, that also may become clear.[102]

Berger's theory—complete the investigation before asking the tipper a question or getting his records—defies common sense. Evidence obtained from the tipper may complement or explain evidence obtained from the tippee. For example, suppose Mack's phone records for July 2001 showed he only made phone calls to Samberg on July 9 and July 24, the nights before Samberg made dramatic trading moves. Those *combined* facts—half from Mack, half from Samberg—would be circumstantial evidence, albeit not conclusive, that the tip flowed from Mack to Samberg.[103] On the other hand, if the phone records showed that Mack called Samberg every day, the calls on July 9 and July be probative that the tip flowed from Mack to Samberg.

Perhaps, the principle of collecting evidence from both sources was simply stated by David Becker (Becker), currently Berger's counsel. He served as the SEC General Counsel from 2000 to 2001. During a recent media interview, he explained the SEC's routine approach in conducting insider trading investigations. He put it this way: In insider trading cases, "you connect the dots not by simply going from one dot to another but by starting at both dots and working toward the middle."[104] When it came to investigating the GE- Heller, Berger only allowed the Samberg dot "to be worked." The Mack dot was off limits.

Shortly after the December 5, 2005, hearing, Hilton Foster, a former SEC insider trading expert, also weighed in on Berger's theory during a media interview. Dow Jones News quoted Foster:

> "Other people who haven't done as many of those types of investigations might approach it the same way they do a financial fraud case, which is totally different," said Foster, who trained SEC attorneys in how to handle insider-trading cases. "It's not necessarily wrong to wait until the end of an investigation to take someone's testimony, it's just that in an insider-trading case, it doesn't make much sense. "The bottom line is he should have been contacted sooner rather than later for his version of (what) had happened," Foster said.[105]

The "sooner rather than later" principle was how Foster taught me to conduct an insider trading investigation, when he lectured my incoming group of new investigators and countless times during the eight months he worked closely with me on the PCM investigation.[106] This

[102] See my July 27, 2005 email to Berger and Kreitman, Ex. 59.

[103] United States v. Larrabee, 240 F.3d 18, 21 (1st Cir. 2001).

[104] Jonathan M. Katz, Larry Margasak, *Frist Updated on Blind Trust Investments, Despite Denials,* ASSOCIATED PRESS, September 24, 2005.

[105] Siobhan Hughes, *Third Person Warns About SEC's Handling of Pequot Probe,* DOW JONES NEWSWIRES, December 11, 2006.

[106] See for example: November 3, 2004, email from Aguirre to Foster, Cain and Grime, Ex.8; October 13, 2004, email from Aguirre to Cain, Ex.6; October 26, 2004, email from Aguirre to Hilton, Ex. 69; November 18, 2004, email from Aguirre to Foster, Ex. 70; November 22, 2004, email from Aguirre to Foster, Grime and Cain, Ex. 71; November 24, 2004, email from Aguirre to Foster, Ex. 72; December 2, 2004, email from Aguirre to Foster, Ex. 73; December 6, 2004, email from Aguirre to Foster, Ex. 9; December 7 2004, email from Foster to Aguirre, Ex. 74; December 8, 2004, email from Foster to David Kornblau, Kreitman, Cain and Aguirre, Ex. 75; December 8,2004,

principle was repeatedly emphasized by both Hanson and Kreitman during the PCM investigation. It was applied to all suspected tippers and tippees, except Mack. I had never heard of 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 he and his superiors fired me.*[107]

But let us assume for a moment that Berger, Kreitman and Hanson actually believed their "ducks in line" strategy. As it turns out, the wisdom of the "sooner rather than later" strategy was once again proved by the SEC's handling of the Mack testimony. In particular, Hanson's testimony before your Committee demonstrated the flaw in the "ducks in line" theory. But his testimony must be carefully studied. Hanson labored to conceal these facts and he may have obstructed the investigation or committed perjury in the process.

Hanson testified that there were two people from whom Mack could have learned about the pending acquisition.[108] They were both employees of CSFB.[109] According to Hanson, the SEC took their testimony before the statute of limitations expired.[110] Again, according to Hanson, neither had knowledge of the acquisition and thus could not have told Mack about it.[111]

On this point, Hanson's testimony tracked similar factual statements in the SEC Case Closing Recommendation (CCR).[112] The CCR states that on July 27, 2006, the SEC "took the testimony of the 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 about it." That would seem to refute my theory that the CSFB CFO could have passed along information of the pending acquisition to Mack when the two met around June 28 or June 29, 2001. This timing was critical because Mack spoke with Samberg on the evening of June 29 and Samberg began trading the next trading day.

But later in his testimony, Hanson testified that CSFB's CFO had not spoken with Mack around June 28.[113] Thus, it was irrelevant whether the CFO knew about the pending acquisition. However, still later in his testimony, Hanson conceded that Mack had spoken with officials from CSFB's parent—CS—around June 28, 2001. The SEC makes no claim its staff ever interviewed the CS officials, the ones Mack actually met with just before his call to Samberg.[114] Thus, the SEC never asked these CS executives—the right ducks—whether they had discussed the pending GE-Heller acquisition with Mack.

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email from Aguirre to Foster, Ex. 76; December 9, 2004, email from Aguirre to Foster, Ex. 11; December 14, 2004, email from Aguirre to Foster, Ex. 77; January 18, 2005, email from Aguirre to Foster, Ex. 78; January 31, 2005, email from Aguirre to Foster, Ex. 79; February 7, 2005, email from Foster to Aguirre, Ex. 80; February 9, 2005, email from Aguirre to Foster, Ex. 81; February 14, 2005, email from Aguirre to Foster, Ex. 82; my February 14, 2005, email to Foster, Ex. 83; and February 18, 2005, email from Aguirre to Foster, Ex. 85.

[107] See August 24, 2005, email from Hanson to Aguirre, Ex 130.

[108] Hearing RT, p 73, ll. 3-11.

[109] *Id.*

[110] *Id.* p 72, ll. 4-6; p. 73, 1-16.

[111] *Id.* p 71, l. 23 through p. 72, l. 6.

[112] The CCR was attached as an exhibit to the Thomsen written testimony, Ex. 115.

[113] *Id.* p. 81, ll. 9-23

[114] The SEC CCR only states that it took the statements of the CFO and a company attorney. Ex. 115.

This became clear at the hearing when Senator Specter questioned Hanson whether Mack had testified about meeting with any Credit Suisse officials around June 28, 2001. Hanson's evasive answer conceded that Mack had testified such meetings had in fact taken place.[115] The key testimony reads:

> Chairman Specter. Was Mr. Mack questioned about that [about his meetings with Credit Suisse during the 27th, 28th, and 29th of June], Mr. Hanson?
>
> Mr. Hanson. Of course.
>
> Chairman Specter. And what did he say?
>
> Mr. Hanson. That the information that Mr. Aguirre alleged or speculated that Mr. Mack may have had was so far down in the weeds for Mr. Mack.
>
> Chairman Specter. So far down in the weeds?
>
> Mr. Hanson. It was so far removed from what he was doing with respect to negotiating with CS First Boston that it had no relevance to him. Not only that, but the people from CS First Boston that we talked to and received the e-mails from said that there is no possible way that they had the information, let alone passed it on to Mr. Mack.[116]

Hanson's evasive answers require translation. Mack met with Credit Suisse executives around June 28; any mention of the pending GE-Heller acquisition during those meetings "had no relevance" to Mack (it was just "so far down in the weeds"). The two CSFB employees the SEC interviewed—the imaginary ducks who knew nothing about the pending acquisition and did not meet with Mack in late June—speculated that the Credit Suisse executives—the real ducks who met with Mack at the critical time—did not know about the acquisition either.

Perhaps noteworthy, Hanson's "too far down in the weeds" testimony attributed a guiltless state of mind to a possible tipper in an insider trading investigation that Hanson himself was supervising. In effect, Branch Chief Hanson had become a character witness for the very person he was investigating. But this was not the only character reference this SEC branch chief gave Mack. Hanson also testified that—after meeting Mack—he (Hanson) had decided that Mack was not "a bad guy" after all.[117]

Hanson's statement that the two CSFB employees' testimony was taken before the statute of limitations is also misleading.[118] It omits a key fact: the date of their testimony, July 27, 2006,

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[115] Hearing RT. p. 82, ll. 10-12
[116] *Id.* p. 82, ll. 6-20.
[117] *Id.* p. 55, ll. 22-23.
[118] Hearing RT, p 72, ll. 4-6; p. 73, 1-16.

was exactly five years *to the day* from the date that PCM did its last trade before the announcement.[119] The five year limitations period expired that same day.

The SEC of course did not take Mack's testimony until August 2, 2006, five days after the key statute of limitations period had expired. Hence, the SEC did not learn until then that it had not interviewed the right ducks, the Credit Suisse executives that Mack had actually met with in late June 2001. Thus, in applying the ducks-in-line theory to the Mack testimony, the SEC had lined up the wrong ducks and did not find out about the right ducks until the key limitations period had expired.

I warned Hanson and Berger that the information from the CSFB staff attorney gave on this exact point—who Mack spoke to in late June 2005—might be wrong. On this point, my August 4, 2005, email (which Hanson provided to Berger and Kreitman[120]) reads:

> Further, we are operating in the dark regarding who Mack spoke with and when he spoke with them about stepping in as CSFB's CEO. CSFB's counsel tells he ... spoke with CSFB's CFO and the Credit Suisse chairman of the board. Were these the only people? Mack's testimony could point us towards the key people at CSFB. Conversely, he might tell us that he was seeing some of the people on the acquisition team [at] Morgan Stanley at this time. That would take the investigation in a completely different direction.[121]

Equally bizarre was Hanson's explanation why the SEC had allowed the statute of limitations to expire before taking Mack's testimony. Hanson explained: "We got to it as soon as we could. The predicate to trying to figure out whether to take Mack's testimony or not was whether he had the information."[122] In short, the "ducks in line" theory caused the SEC to allow the statute of limitations period to expire on its strongest remedy against its only verifiable tipper suspect in order to establish the "predicate" for taking his testimony. This kind of "predicate" paralyzes law enforcement. Only Mack got one in the PCM investigation.

To summarize, the "ducks in line" strategy is not merely a violation of the classic practice of pinning the tipper and tippee down, e.g., as the SEC did with Martha Stewart. According to the Four's story, they were busy lining up imaginary ducks until the statute of limitations ran out. I submit the Four are not so naïve. In truth, the "ducks in line" theory is just an *ad hoc* rationalization to justify the Four's decision to give Mack favored treatment.

9) Mr. Aguirre's subpoenaed too many emails, over 19 million.

This theory seems to have been cooked up for the hearing. For this reason, Kreitman did not even remember it until Hanson came to his rescue. As the C-SPAN video reveals, Kreitman first testified that subpoenas I had issued in the PCM investigation resulted in the production of 5

[119] PCM's last trades in GE and Heller were executed on July 27, 2001. See June 27, 2005, email from Aguirre to Kreitman Hanson and Ribelin, Ex. 55.

[120] See August 5, 2005, email from Hanson to Aguirre, Ex. 112.

[121] See my August 4, 2005 email to Hanson and my August 24, 2005 email to Berger, Ex. 60.

[122] Hearing RT, p. 74, l. 10.

million emails.[123] But then Hanson whispered something to Kreitman and Kreitman changed his testimony.[124] Kreitman's corrected testimony on this point reads: "In this case, the subpoenas…that Mr. Aguirre sent out—resulted in the production of, I believe, more then 19 million emails."[125]

This was a stunning new fact: my subpoenas had caused the production of 14 million more emails than I knew about at the end of my tenure with the SEC. How could this have happened? My negotiations with PCM's counsel resulted in staff access to 3.3 million emails.[126] A few days before my termination, I told Hanson PCM had produced 4 million emails.[127] Kreitman's first number—5 million emails—was high but in the ball park. PCM had discovered a new source of emails shortly before I left, but this would not likely have resulted in the production of 14 million more emails.[128]

The SEC Case Closing Recommendation (CCR) reveals that Kreitman, with the help of Hanson, again misled your Committee. Footnote 1 to the CCR states that "Pequot alone made available approximately 19.8 million *pages* of electronic email…"(emphasis added) Kreitman's testimony is misleading in two regards. First, he states more than 19 million "emails"—not pages—were produced. Second, Kreitman states that the emails were produced in response to my subpoenas *alone*. This again is erroneous: the CCR states that the SEC issued numerous subpoenas after I left. Hence, the 19 million pages would include documents produced to the SEC in response to subpoenas issued by other staff members after I left.

Incidentally, Kreitman and Hanson were informed of every step I took to obtain PCM's email production. Beginning in January 2005, before the first subpoena was issued, I updated Hanson and Kreitman on the steps being taken to subpoena the PCM emails.[129] Both Kreitman

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[123] The reporter's transcript does not state Kreitman's testimony regarding the five million emails. It is clearly audible on the C-Span video (rtsp://video.c-span.org/15days/e120506_judiciary.rm) at 1 hour, 43 minutes and 40 seconds.

[124] *Id.*

[125] Hearing RT, p. 76, l. 9-12.

[126] See June 10, 2005, email from Aguirre to Ribelin, Foster, Conroy, Glascoe, Eichner, Miller, Kreitman, Hanson, and O'Rourke; Ex. 52.

[127] See August 26, 2005, email from Aguirre to Hanson at 10:42 am, Ex. 86.

[128] See August 25, 2005 email from Aguirre to Hanson, Jama, Eichner and Ribelin, Ex. 101.

[129] See for example, January 25, 2005, email from Aguirre to Hanson, Ex. 16; Kreitman's February 14, 2005, email from to Hanson and Aguirre, Ex. 21; February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 25; February 22, 2005, email from Aguirre to Hanson, Kreitman, Foster, and Ribelin, Ex. 26; February 25, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 28; March 1, 2005, email from Aguirre to Hanson, Ribelin, Foster and Kreitman, Ex. 29; March 9, 2005, email from Aguirre to Hanson and Kreitman, Ex. 30, March 10, 2005, email from Aguirre to Berger, Kreitman and Hanson, Ex. 31; March 15, 2005, email from Aguirre to Hanson, Kreitman, Ribelin, Thomas Conroy, Stephen Glascoe, and Foster, Ex. 32; March 16, 2005, email from Aguirre to Hanson, Foster, Ribelin, Conroy, Ivarone, and Plimpton, Ex. 33; Aguirre's March 16, 2005, email from Aguirre to Kreitman, Hanson, Plimpton, Ivarone, Foster, Conroy and Ribelin, Ex. 34; March 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 35; March 29, 2005, email from Aguirre to Hanson and Ribelin, Ex. 36; April 13, 2005, email from Aguirre to Hanson, Ex. 37; April 11, 2005, Ex. 38; April 22, 2005, email from Aguirre to Hanson and Kreitman, Ex. 39; April 29, 2005, email from Aguirre to Hanson, Ex. 40; May 6, 2005, email from Aguirre to Hanson, Ex. 41; May 10, 2005, email from Aguirre to Kreitman and Hanson, Ex. 43; May 20, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Foster, James Eichner and Conroy, Ex. 45; May 24, 2005, email from Aguirre to Hanson, Foster, Ribelin, Eichner, O'Rourke, Ivarone and Kreitman, Ex. 46; May 25, 2005, email from Aguirre to Hanson, Ex. 48; June 2, 2005, email from Aguirre to Kreitman, Ex. 50; June 10, 2005, email from

and Hanson actively participated in those decisions.[130] The major breakthrough in obtaining PCM emails occurred on May 20, 2005, when I reached a tentative agreement with PCM's counsel by which the SEC would have immediate access to approximately 3.3 million emails.[131] When I informed Kreitman of the tentative agreement, he replied, "Sounds like Gary's strategy outsmarted (or terrified) Audrey and is resulting in real progress. Excellent!"[132]

10) Mr. Aguirre sent out too many subpoenas.

This allegation tracks a similar allegation Kreitman made about too many emails. It went unmentioned in any evaluation (including the "reevaluation"), the termination notice, or any other document. No supervisor ever suggested that too may subpoenas had been issued. To the contrary, Grime, Kreitman and Cain all emphasized the importance of issuing subpoenas to those possessing relevant documents.[133] Grime and Cain said subpoenas should be issued to all those who had been requested to produce records.

Nor can Kreitman or Hanson even claim they were unaware of the number of subpoenas that were issued. I had over 150 email exchanges with my supervisors regarding the issuance of subpoenas, their terms, or the opposing counsel's contentions.[134] For example, I provided both Kreitman and Hanson on February 18, 2005, with an initial list of twenty-seven individuals that Foster and I intended to subpoena in connection with the PCM investigation. [135] Neither even commented.

Robert Hanson:

1) Mr. Aguirre would not memorialize investigation.

See response to Kreitman comment 4.

Aguirre to Ribelin, Hilton, Conroy, Glascoe, Eichner, Miller, Kreitman, Hanson, and O'Rourke, Ex. 52; June 28, 2005, email from Aguirre to Hanson, Kreitman, and Ribelin, Ex. 56; July 29, 2005, email from Aguirre to Kreitman, Hanson, Ribelin, Eichner and Liban Jama, Ex. 58; February 9, 2005, email from Aguirre to Kreitman and Hanson, Ex. 64; May 11, 2005, email from Kreitman to Hanson, O'Rourke, Ribelin, Foster, and Aguirre, Ex. 89; May 11, 2005, email from Hanson to Aguirre, Ex. 90; August 25, 2005, email from Aguirre to Hanson, Jama, Eichner and Ribelin, Ex. 101; June 3, 2005, email from Eichner, to Kreitman, Aguirre, and Hanson, Ex. 105; March 11, 2005, email from Kreitman to Aguirre and Hanson, Ex. 107; March 15, 2005, email from Hanson to Aguirre, Ex. 108; March 15, 2005, email from Kreitman to Hanson, and Aguirre, Ex. 109; August 4, 2005, email from Aguirre to Hanson, Eichner, Jama, Ribelin, and Miller, Ex. 118; May 26, 2005, email from Aguirre to Hanson, Ex. 121; May 24, 2005, email from Aguirre to Hanson, Ex. 124; May 26, 2005, email from Thomas Sporkin to Aguirre, Ex. 125; and May 26, 2005, email from Sporkin to Aguirre, Ex. 126.

[130] *Id.*

[131] See June 10, 2005, email from Aguirre to Ribelin, Foster, Conroy, Glascoe, Eichner, Miller, Kreitman, Hanson, and O'Rourke, Ex. 52.

[132] See May 20, 2005, email from Kreitman to Berger, Hanson, Ribelin, Foster, Eichner, Conroy, and Aguirre, Ex. 45.

[133] See January 7, 2005, email from Grime to Cain, Foster, and Aguirre, Ex. 131; February 18, 2005, email from Aguirre to Hanson, Ex. 24; and February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 25.

[134] See footnote 40.

[135] See February 18, 2005, email from Aguirre to Hanson and Kreitman, Ex. 24.

2) Mr. Aguirre was disrespectful and abusive to at least 3 attorneys.

Like a vintage wine, this charge has steadily improved with time. In the August 1 "reevaluation," my alleged problem with other staff attorneys arose out of my refusal to share information. The "reevaluation" reads: "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."[136] In its second iteration, found in the termination notice, my problem with other attorneys became a stand alone allegation. It reads: "you have conflicts with other staff attorneys ..."[137] The most recent variant, as stated in Hanson's testimony, upgrades the charge a couple of notches: Aguirre was "disrespectful and abusive" to at three least attorneys.[138]

Once again, the SEC makes no concrete charge much less offer any evidence. I understand Hanson is referring to O'Rourke, Eichner and Jama. O'Rourke and Eichner were assigned to the PCM investigation in May 2005. Jama was assigned in June. I respond to the SEC's accusation in relation to Eichner and Jama in this section to O'Rourke in the next.

Some background may be helpful to place the SEC's accusation in perspective. Aside from O'Rourke, Eichner, and Jama, I worked with over twenty staff members—some very closely—on the PCM investigation during my tenure with the SEC. They included Foster and Ribelin who you have interviewed. They also included a financial analyst,[139] an intern[140] and a paralegal[141] temporarily assigned to the PCM investigation. Additionally, with my supervisor's approval, I sought out and obtained the assistance of staff from five other SEC offices or to work on the case. This includes staff from (1) the Division of Investment Management (IM),[142] (2) the Office of Compliance Inspections and Examinations (OCIE),[143] (3) the Office of Economic Analysis (OEA),[144] (4) the Office of Information Technology (IT),[145] and (5) the Office of Market Surveillance (MS).[146] I also coordinated the PCM investigation with another Enforcement group conducting a related investigation.[147] I believe my relationships with all of these staff members were cordial and productive. In any case, the SEC has made no contrary assertion.

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136 See "reevaluation," Ex. 95.

137 See termination notice, Ex. 96.

138 Hanson's written testimony.

139 Marina Ulmishek.

140 Nancy Miller.

141 Constance Williams.

142 Charlotte Buford, Barbara Chretien-Dar, Brian Murphy. See, for example, March 2005 chain of emails from Aguirre to Barbara C. Chretien-Dar (IM), Ex. 62, and April 2005 chain of emails between Aguirre and Brian Murphy (IM staff), Ex. 134.

143 Shannon Behara, Melissa Clough, Gene Gohlke, and Brian Snively. See, for example, February 8, 2005, email from Brian Snively's (OCIE staff member) to Aguirre, Ex. 135.

144 See, for example, September 27, 2004, email chain between Peter Simonyi and Aguirre (OEA staff), Ex. 136; and November 2004 email chain between Peter Simonyi and Aguirre, Ex. 137.

145 Jason Ivarone, Jack Khan, Scott Plimpton, David Wiederkehr, Zaw Win and others.

146 Joseph Cella, Thomas Conroy, Eric Ribelin, Stephen Glascoe, and others.

147 In this regard, I coordinated the PCM investigation with Timothy P. Peterson. He was a Senior Counsel, assigned to a different Enforcement group, which was conducting a financial fraud investigation of one of the issuers under investigation in the PCM matter.

The SEC has produced no evaluations, except the "reevaluation," that criticized the manner in which I treated other staff members. As mentioned before, Kreitman's June 1 certification stated my personal contacts with other staff were acceptable. Hanson's June 29 evaluation emphasized my ability to work *effectively* with SEC and SRO staff. Hanson wrote: "Gary worked closely with the Office of Compliance Inspections and Examinations to develop the case and worked with several self-regulatory organizations to develop a number of potential leads."[148]

Most of my communications with other staff were by email. I am submitting over a hundred emails to or from other staff as exhibits to this response. I have provided you with others. I note that your August 2, 2006, letter requested the SEC to produce emails relating to my employment and termination. I would invite Senate staff to randomly look through my emails to or from other staff for any hint of disrespect.

Three present or former SEC staff members have stepped forward to say that I handled the PCM investigation professionally. They have nothing to gain and much to lose by speaking out. I have also attached a copy of a card from one of the interns in Kreitman's group who worked closely with me on the GE-Heller investigation over the summer of 2005. She states: "I enjoyed working with you this summer. Thanks for making my experience such a rewarding one."[149]

All this raises an obvious question the SEC has ignored: Why was I able to work effectively with OCIE and SRO staff, as Hanson highlighted, and with so many SEC offices and divisions and yet, according to the SEC, was unable to do so with the attorneys my supervisors appointed to the investigation in May and June 2005?

My Communications and Contacts with Eichner from May Through Late July 2005

Eichner joined the SEC in April 2005. He was assigned to the PCM investigation immediately after Ribelin requested Kreitman to assign a second staff attorney to that matter. In his May 4, 2005, email to Kreitman, Ribelin stated the reasons for his request:

> [W]e still need another attorney. For example, we need to start conducting phone interviews and Gary simply doesn't have the time to review documents, prepare for testimony, conduct testimony and sit in on phone interviews.... Fried Frank [has] 20 lawyers (five partners and 15 associates) working on the matter and 35 contract lawyers working 10 hours per day, six days a week. We now have a story about the cross trades in the IPO after markets that we need to track down. My preference would be to get a subpoena out today to Pequot and to their executing brokers, but it is difficult with Gary in New York reviewing documents that were dumped on him (again at the last minute) for testimony tomorrow. Without the additional resources now, we will be greatly hampered going forward. [150]

[148] See Ex. 2.
[149] See thank you note from intern Nancy Miller, Ex. 102.
[150] See May 4, 2005, email from Ribelin to Hanson and Kreitman, Ex. 103.

A few days later, Kreitman assigned Eichner to the PCM investigation.

Until early July, I had relatively little contact with Eichner on the GE-Heller investigation. At my suggestion, Hanson initially assigned Eichner in May 2005 to work up a second PCM insider trading matter involving its trading in Elite Information (Elite).[151] Elite was our strongest matter until the GE-Heller facts began to emerge in late April 2005.[152] I provided Eichner with the files on Elite, which by the way were well organized. From time to time, he asked questions about the Elite facts, which I answered. Eichner also attended the second Samberg examination on June 7, 2005.

In early June 2005, at Kreitman's request, Eichner researched whether PCM could validly object to the production of PCM emails by its spin-off, Andor Capital Management (Andor).[153] I had also researched the same issue. Eichner and I reached the same tentative conclusion: PCM's objection was not valid.[154] Later in June, Hanson reassigned Eichner to work on the PCM wash trades investigation, which meant that he would be dealing mostly with Ribelin and other MS staff.

I recall an email chain initiated by Eichner in the first part of June. We had no personal relationship at the time. His first email stated only this: "is the aguirre [sic] quoted in the clips about cox [sic] related to you?"[155] Eichner referred to an internal SEC republication of a Los Angeles Times article, titled "Cox's Past Ties to Con Man Raise Questions," in which my brother was quoted.[156] In response, I told Eichner that the Aguirre quoted in the article was my brother. Eichner's next email read: "You might want to change your name when the new Chairman arrives." My reply to that email got this response from Eichner: "I guess the two apples don't fall far from each other (and presumably not to far from the tree). Of course, I was joking about the name change (although using an alias when Pequot goes to the commission can't hurt ☺)"[157]

Eichner gradually became more directly involved in the GE-Heller investigation in July 2005. From time to time, he requested various PCM documents and I provided them to him. We also attended the same PCM staff meetings. I recall no hint of conflict or any significant difference of opinion regarding tactics, strategy or investigative plan. Indeed, agreeing with me, Eichner told Kreitman during a staff meeting that the prohibition on talking with Irvine Pollock and Larry Storch about the backup tapes made no sense. Kreitman said that he would talk it over with Berger. A few days later, Kreitman authorized staff to contact Storch and Pollock about the backup tapes.[158] I recall no other significant contacts with Eichner until late July 2005.

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[151] See May 11, 2005, email chain between Aguirre and Hanson, Ex. 104.

[152] *Id.*

[153] See June 3, 2005, email from Eichner, to Kreitman, Aguirre, and Hanson; Ex. 105.

[154] See June 3, 2005, email from Aguirre to Hanson, Ex. 141, and June 6, 2005 email from Kreitman, to Eichner, Hanson and Aguirre, Ex. 143.

[155] June 9, 2005, email from Eichner to Aguirre at 3:40 pm, Ex. 132.

[156] Michael Hiltzik, *Cox's Past Ties to Con Man Raise Questions,* LOS ANGELES TIMES, June 9, 2005, at C1.

[157] June 9, 2005, email from Eichner to Aguirre at 4:26 pm, Ex. 132.

[158] According to Kreitman's testimony at the December 5, 2006, hearing, there was an issue whether Storch and Pollock represented PCM. Hearing RT, p. 84, l. 22 through p. 85, l. 1. That was not true. When I spoke with Storch around July 11, he told me that they had represented PCM from sometime in May. Hanson and Kreitman had me send an email to Storch confirming that fact. See the draft of that letter and Hanson's July 13, 2005, email to me, Ex. 106.

On a Second Track: the August 1 "Reevaluation"—Just a Little "Constructive Criticism"

Meanwhile, on a separate track, two interconnected events in late July 2005 would shape all others to come, including my dealings with Eichner and, to some extent, with Jama. Those events were: (1) my meeting with Berger on July 21 or 22 during which I told him about Hanson's decision blocking the Mack subpoena and his statement attributing that decision to Mack's political influence[159] and (2) my email of July 27 confirming and restating my earlier comments to Berger regarding Mack's favored treatment.[160] Three days later, on August 1, Berger, Kreitman, and Hanson would collaborate and create the "reevaluation,"[161] a process rarely, if ever, used at the SEC.[162]

That "reevaluation" described a person who had no future at the SEC. He had conflicts with other staff, drew complaints from opposing counsel, misstated SEC policy, issued subpoenas that violated the privacy laws, refused to share information, and, worst of all, was "resistant to supervision" and "insufficiently cognizant of institutional protocols."[163] There would seem to be only one option with such an employee: fire him immediately before he could cause any more damage to the agency. Kreitman testified to as much when he said that an unacceptable rating in any category described in SEC Form 2494 would require immediate termination.[164] The August 1 "reevaluation," if true, was equivalent to an "unacceptable" rating for each of the four categories in Form 2494.[165]

This "reevaluation" was a three-level drop from what Berger had approved less than two weeks earlier at the compensation committee meeting. The four levels were described in the declaration of the Enforcement Division's Chief Accountant, Susan Markel (Markel) filed by the SEC in my pending FOIA/Privacy Act case.[166] Markel coordinated the merit pay raises in July and August 2005.[167] She described the four levels as follows:

> 4. The spreadsheet included a column showing whether each employee's supervisor had provided a summary of the employee's contributions as well as columns showing the recommendations that each employee's immediate supervisor had made regarding the employee's contributions. For each employee, supervisors could say that the employee had (1) made contribution of the highest quality, (2) made contributions of high quality, (3) made contributions of quality, or (4) made no significant contribution beyond an acceptable level of performance.[168]

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[159] See July 27, 2005, email from Aguirre to Paul Berger and Kreitman, Ex. 59.
[160] *Id.*
[161] See Ex. 2.
[162] Hearing RT, p. 87, ll. 4-25.
[163] See August 1, 2005, "reevaluation" of Gary Aguirre, Ex. 95.
[164] Kreitman's written testimony. Also, Hearing RT, p. 91, ll. 11-15.
[165] I submit this is self-apparent when the deficiencies stated in the "reevaluation" (Ex. 95) are compared with the requirements stated in SEC Form 2494 for "an "acceptable" rating, see Ex. 1.
[166] January 8, 2007, declaration of Susan Markel Ex. 138.
[167] *Id.* par. 2.
[168] *Id.* par 4.

Had the "reevaluation" gone into effect, it would have dropped my performance rating from contributions of "high quality" (level 2), through contributions of "quality" (level 3), through the "acceptable level" (level 4), to an unacceptable level (implied level 5).

There was of course one possible option to the "fire him immediately" solution. My supervisors could have told me, the employee with the alleged deficiencies described in the August 1 "reevaluation", the unvarnished truth and demanded immediate improvement. The Four did the exact opposite. None hinted that my performance had been reevaluated or that my performance was deficient in any regard, much less the twenty-three particulars they now describe. Instead, my supervisors waited until I was on vacation some twenty-five hundred miles away and then they fired me on one day notice.

Berger faced a formidable challenge in explaining the August 1 "reevaluation" at the hearing. He had sat on the compensation committee that approved my two-step merit increase on July 18. Nine days later, he received my email questioning Mack's special treatment. Less than three days after that, he initiated the process that resulted in the "reevaluation." I was out of the office on official leave for most of the time between July 18 and August 1. In short, absolutely nothing had happened between July 18 and August 1 that could conceivably trigger the reevaluation. Here is how Berger explained his flip flop on rating my performance rating in less than two weeks: "I noted, though, that the draft evaluation did not contain any *constructive criticism*. ... They decided that, ***to be fair*** to Mr. Aguirre, they should include some *constructive criticism* (emphasis added)."[169]

So, according to Berger, the "reevaluation" was just "constructive criticism ... to be fair to Mr. Aguirre"? If so, it is a rare specie. For it to work, someone would have to tell me about it. I did not see the "reevaluation" until October and then only after pressing the SEC to reconcile my two-step merit pay increase on August 21 with my firing 11 days later.[170] And then in response to my inquiry, the SEC lied about the history of the "reevaluation."[171] The August 1 "reevaluation" also seems a tad severe for constructive criticism: it describes my performance three levels below the finding of the compensation committee two weeks before. I submit the "reevaluation" was a termination notice; it just did not get served for another month.

Berger's testimony about the "reevaluation" incorporates a second lie. His testimony continued: "They [Kreitman and Hanson] showed me those comments and told me that they had relayed their substance to Mr. Aguirre." With this, Berger, Kreitman, and Hanson have offered three different stories whether the "revaluation" was shared with me. Kreitman first stated it was not given to me or shown to me, but he later claims it was shown to me. Hanson came up with his own version: another half truth: the "reevaluation" was not shown to me [true] because I was on vacation [false].[172]

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[169] See Berger's written testimony.

[170] September 21, 2005, email from Aguirre to Delores Ruffin, Ex. 110.

[171] Even then the SEC gave no clue when this "reevaluation" was completed. Instead, the SEC sent it to me as part of Kreitman's September 26 email along with this lie: "The attached supervisory summary from Mark Kreitman *mistakenly* did not go to the compensation committee (emphasis added)", Ex. 111. The compensation committee, with Berger as a member, met on July 18, 2005; the "reevaluation" was done at Berger's suggestion on August 1, 2005, almost two weeks after the meeting.

[172] Hanson's written testimony.

Why the intrigue about the August 1 "reevaluation"? Why did it never find its way to my personnel file? Why was I never told about it much less shown it? Why did my supervisors have conflicting stories? What exactly was being covered up? I submit there is a simple answer to all these questions: My supervisors had decided to fire me after Berger received my July 27 email, and the "reevaluation" was the first step. Apparently, the "reevaluation" came too late to intercept my two-step merit pay increase, which all of my supervisors approved less than two weeks before. Thus, Berger, Kreitman, and Hanson were stuck with their positive performance evaluations which were likely on their way or had already arrived at Human Resources. To fire me at that moment—days after my email questioning Mack's special treatment which came on the heels of the two-step merit increase—would be tantamount to a consent judgment for reprisal under 5 U.S.C. 2302 (b)(8). The SEC needed a little time to dilute the obvious causal connection between my July 27 email and the August 1 "reevaluation." They had that time since my probationary period would not expire for another five weeks.

But there was a downside in keeping me around another month. I might have found more evidence pointing to Mack. That would have made it even tougher to maintain the pretense—then or later—that no cause existed to subpoena Mack. It was, therefore, not enough to block the Mack subpoena; nor was it enough to erect a nine-foot evidentiary bar to any reconsideration of that decision. The investigation of Mack would be brought to a halt. Hanson would encourage, if not direct, Eichner and Jama to move the GE-Heller investigation away from Mack. He would also put a hold on another subpoena which was "critical," as I told him, if I was to have "any chance in getting over what I [saw] as a 9' bar."[173] Likewise, in the last two weeks of August, as discussed next, every step I initiated toward developing any evidence to overcome that nine-foot bar was blocked. Since Berger suggested the "reevaluation" to Kreitman and Hanson in late July, it seems logical that he also made a similar suggestion to steer the GE-Heller investigation away from Mack.

Back to Square One: Eichner's Initiation of the Search for a New Tipper

The SEC's Case Closing Recommendation (CCR) states that the SEC began hunting for new tippers in September 2005. It reads: "Starting in September 2005, the SEC staff focused on identifying other potential tippers who could have provided Samberg information about the GE/Heller transaction."[174]

Actually, the search for other tippers began earlier. It was first discussed at a meeting convened by Hanson on July 27 for staff working on the PCM insider trading investigation. During this meeting, Eichner announced that he would begin looking for new possible sources of the GE-Heller tip (other than Mack) to Samberg. Hanson quickly embraced the idea and requested that Jama and I assist in this effort. A few hours earlier, I had notified Berger that I was withdrawing my resignation and would question the decision to block the Mack subpoena through appropriate channels.[175]

[173] See August 26, 2005, email from Aguirre to Hanson, Ex. 114.
[174] See SEC Case Closing Recommendation on the Pequot Capital Management investigation, Ex. 115.
[175] My communications with Berger on this point on July 27 are discussed at page 14 of the OSC complaint.

Following up on Hanson's request, I sent an email ("Developing other possible GE-HF tippers") the next day to Hanson, Eichner, Jama and Ribelin suggesting a starting point for the search for a new tipper suspect—various Samberg acquaintances at Morgan Stanley. It read in part:

> Following up on the discussion yesterday, I am also attaching the part of the Samberg exam where I asked him about his acquaintances at Morgan Stanley in 2001, to be distinguished from the questions about his contacts with anyone at MS who had any involvement in the acquisition. Like John Mack, most of these people are fairly prominent, e.g., Byron Wien. I did not run thorough searches on Onsite's or our databases for those on Samberg's Morgan Stanley acquaintance list.[176]

I also expressed my doubts that this new search would find another tipper suspect as promising as Mack, but did not rule out that possibility: "Although I have my doubts from my review of Samberg's e-mails, it is conceivably possible to develop the facts suggesting a possible tipper: trust relationship with Samberg, possible access to info, contacts with Samberg at key times, and motive to pass along tip."[177] Mack satisfied each of these criteria.[178]

Finally, I suggested that any search for a new tipper suspect would likely hit the same impasse that was blocking the Mack subpoena at that moment: "However, if you get that far, there will remain another obstacle as I understand our current thinking—establishing evidence that the person 'went over the wall' before you can take his or her exam. I suspect that will not be easy to do."[179]

On August 3, Eichner circulated an email on the same subject.[180] He suggested several steps to implement the search for another possible tipper. He also observed, "It seems like our efforts so far have been based on the assumption that Samberg got the tip directly."[181] I responded with:

> Not exactly an assumption. More of a working hypothesis that tip went directly to Samberg. Got there because all other trails came up dry and continue to do so--and more and more evidence pointed to the tip going directly to Samberg. But take a stab at it. Who knows, could lead somewhere.[182]

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[176] See July 28, 2005, email from Aguirre, to Hanson, Jama, Ribelin, and Eichner, Ex. 93.

[177] *Id.*

[178] My August 4, 2005, email, Ex. 60, stated that evidence established that Mack satisfied each of these factors: trust relationship with Samberg, possible access to info, contacts with Samberg at key times, and motive to pass along tip.

[179] Kreitman had stated in his July 25, 2005, email to me (Ex. 98) that there would have to be proof that Mack was "brought over the wall" before any subpoena was issued to him. I responded to this contention by my July 27 email to Kreitman and Berger, Ex. 59.

[180] See August 3, 2005, email from Eichner to Ribelin, Jama, Hanson, Miller, and Aguirre, Ex. 116.

[181] *Id.*

[182] See August 3, 2005, email from Aguirre to Eichner to Ribelin, Jama, Hanson, Miller, *Id.*

Later that day, Hanson jumped into the discussion. Responding to Eichner's email, Hanson added: "These sound like excellent ideas to me."[183] Hanson directed that Eichner's suggestions be implemented. In response to Hanson's email, I pointed out that all but one of the steps Eichner had proposed had already been implemented months before, but I also suggested to Jama where he should look for the information Hanson had directed him to collect on the open item.[184]

The search for another tipper suspect was puzzling. Enormous human resources had been expended over the past eleven months to identify the strongest PCM insider trading case, which was by consensus GE-Heller.[185] Likewise, the evidence pointed to Samberg as the tipper.[186] The evidence trail also led to Mack as the most likely source of the tip, as summarized in several of my emails.[187] Hanson pointed to the next logical step in his August 5 email: "I think we should meet after some of the facts in the memo [my August 4 email] are nailed down to discuss whether it makes sense to go forward."[188] Instead of using our limited resources to nail down the facts on Mack, as Hanson had suggested, he was directing staff to start from scratch to find a new suspect.

Nevertheless, I expressed no objection to Eichner's proposed search for a new tipper suspect. I expressed, however, my view that it would not likely be a productive endeavor. But I offered my guidance and assistance to Eichner on how he might begin the search for a new evidence trail. I also included Eichner's new search in the investigative plan.[189]

The August 17 Phone Call

In the second half of August, I was critical of Eichner's handling of two matters involving the same opposing counsel. This was the only time I spoke critically to Eichner and I believe it was warranted. Both incidents had their origin in the afternoon of August 17, 2005, my last day in the office before going on vacation.[190] During the prior two weeks, I had little contact with Eichner.[191]

Late that morning, Kreitman had circulated an email to Eichner, Jama, Hanson (who was on vacation) and me. He asked: "Where are we on determining the date Mack was brought over the wall re GE-Heller deal—the necessary perquisite to subpoena to (sic) Mack (emphasis added)?" This was more a declaration than a question. It reinstated the requirement that I prove that Mack "was brought over the wall" before I could issue any subpoena to him. It effectively revoked Hanson's last position expressed in his August 5 email: that the facts in my August 4

[183] See August 3, 2005, email from Hanson to Eichner, Miller, Jama, Ribelin, and Aguirre, Ex. 117.
[184] See August 4, 2005, email from Aguirre to Hanson, Eichner, Jama, Ribelin, and Miller, Ex. 118.
[185] See May 11, 2005, email from Hanson to Aguirre, Ex. 104.
[186] See June 27, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 55.
[187] June 28, 2005, email from Aguirre to Hanson, Kreitman, and Ribelin, Ex. 56; July 27, 2005, email from Aguirre to Paul Berger and Kreitman, Ex. 59; and August 24, 2005, email from Aguirre to Berger; and August 4, 2005, email from Aguirre to Hanson, Ex. 60.
[188] See August 5, 2005, email from Hanson to Aguirre, Ex. 112.
[189] See August 17, 2005, email from Aguirre to Jama, Eichner and Kreitman, Ex. 127.
[190] I would not return to my office, since I was fired while on vacation.
[191] I was out of the office for much of the first two weeks of August on official leave.

email would be "nailed down" and then a decision would be made "whether it [made] sense to go forward."[192] My August 4 email assumed no direct proof that Mack had knowledge of the acquisition, much less that he "was brought over the wall." [193] Thus, according to the Kreitman email, no subpoena would be issued to Mack even if the facts in my August 4 email were "nailed down." Hence, my focus shifted back to overcoming Kreitman's revived objection. There were few possibilities.

Later that day, I emailed Eichner and Jama and asked if they wished to participate in calls that afternoon, including a call with Andor's attorney, James Benjamin (Benjamin), to confirm the testimony of Andor's CEO, Daniel Benton (Benton), for the week of September 5.[194] Benton had been Samberg's partner at PCM when Samberg directed the trades in GE-Heller. I expected that he would be a cooperative witness and possibly provide information about Samberg's trading in GE-Heller, Mack's connection with Samberg and PCM, or both.[195]

Eichner showed little enthusiasm for moving promptly with Benton's testimony. He replied: "If you aren't going to be back until the 6th do we really want to take Benton's exam that week?" I replied: "Good for background for Dartley (the PCM trader who executed the GE and Heller trades) and Samberg exams."[196]

Later that day, Eichner, Jama and I called Andor's attorney, Benjamin. On the subject of Benton's testimony, Benjamin said Benton would not be available during the week of September 5. Thus, we began to discuss the week of September 12. My August 26 email to Hanson and Kreitman picks up from this point:

> I went off the line to ask Jim E if we could go ahead during the week of the 12th. He agreed and made no mention that we should avoid the 14th or 15th. I went back on line and told Benjamin he could give us any date during the week of the 12th. Jim said nothing. Had he raised the issue, I would have limited the dates by Jim's availability. When Benjamin came back later with the 14th, Jim said he had an examination on that date. We went back to Benjamin a couple more times, finally pressing him for the 15th, which he agreed to do by rescheduling his calendar.

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192 See August 5, 2005, email from Hanson to Aguirre, Ex. 112.

193 See August 4, 2005, email from Aguirre to Hanson, Ex. 60.

194 See August 17, 2005, email from Aguirre to Jama and Eichner, Ex. 128.

195 Eichner also would not accept Benjamin's position that Andor had no objection to producing PCM backup tapes containing PCM emails. See August 24, 2005, email from Aguirre to Kreitman and Hanson (Ex. 129). Those backup tapes may have included missing Samberg emails for the critical time period of June and July 2001.

196 I do not have a copy of Eichner's email, but my answer of the same date incorporates his questions. See August 17, 2005, email from Eichner to Aguirre, Ex. 128. His questions and my replies are in different font. For the sake of clarity, Eichner's questions and my responses were as follows:

Eichner: "If you aren't going to be back until the 6th do we really want to take Benton's exam that week?"

Aguirre: Good for background for Dartley and Samberg exams."

Eichner: "I don't think Liban has had the chance to look at the back up materials. Should we wait to call until he has?"

Aguirre: "The testimony is for all our learning curves."

Eichner: "What is the issue with Harnish. I thought they were going to complete the production by 8/23?"

Aguirre: "He was to give us some feedback today whether they have Mack trading records. Also, some other gaps in subpoena."

Then, Jim said he had testimony on that day as well. Hence, we now have to go back for another change only because we are cannot get our own calendars straight.[197]

As stated above, because of Eichner's "calendar conflicts," the Benton testimony was scheduled, unscheduled, scheduled, and then unscheduled again, and would have to be rescheduled again. The first "calendar conflict" was surprising. When Jama emailed that Benton had confirmed the September 14 date for Benton,[198] Eichner replied that he had testimony scheduled on September 14. His August 18 email read: "As we discussed, that is the day [September 14] I am taking testimony in the PIPES case."[199] I replied:

> I'm a little confused.
>
> Before I told Benjamin that we he could schedule it during the week of August 12, I went off line and asked you if it was OK if Liban and I handled this one. You said yes. Based on your statement, I told Benjamin he could schedule it during this week if necessary. It would have been helpful had you spoken out at that time. Have you changed your mind?[200]

Eichner replied:

> I didn't change my mind. I was just telling you guys that I wouldn't be there on that date.
> However, when I talked to Liban, *he suggested we find another date* (emphasis added).[201]

This was even more puzzling. According to Eichner, it was Jama who made the decision to get another date. Yet, according to Jama, as I recall, Eichner made the request because of his conflict.

In any case, Jama went back to Benjamin to get the examination set for September 15, when Eichner would be free. When Benjamin rescheduled his calendar to accommodate *our* request, Eichner suddenly had a *new* calendar conflict for the 15th. This was again surprising: his August 18 email only indicated that he had one conflict, September 14. As Eichner put it: "That's the day I'm taking testimony in the PIPES case."[202]

A second issue dealing with opposing counsel arose during the discussion with Benjamin on August 17. It related to PCM's backup tapes that had been in Andor's possession since it split off from PCM in September 2001, two months after PCM's trading in GE-Heller. I told

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[197] See August 24, 2005, email from Aguirre to Kreitman and Hanson, Ex. 129.
[198] See August 18, 2005, email from Jama to Aguirre and Eichner, Ex. 133
[199] See August 18, 2005, email from Eichner to Liban and Aguirre, *Id.*
[200] See August 18, 2005, email from Aguirre to Eichner and Jama, *Id.*
[201] See August 22, 2005, email from Eichner to Aguirre and Jama, Ex. *Id.*
[202] See August 18, 2005, email from Eichner to Aguirre and Jama, Ex. *Id.*

Kreitman and Hanson about the existence and possible relevance of these tapes two months earlier in my May 31 email (subject: "Some missing tapes found?). It read:

> Jim Benjamin of Akin Gump represents Andor, the entity that Dan Benton, Samburg's protégé, created when he broke from Pequot. Benjamin told me that Andor has two of Jim seems cooperative at this point. Do we want the tapes or just e-mails? Since Pequot gave tapes to Andor (a different entity), we could take the position that Pequot waived any privilege (emphasis added).
>
> Jim Benjamin of Akin Gump represents Andor, the entity that Dan Benton, Samburg's [sic] protégé, created when he broke from Pequot. Benjamin told me that *Andor has two of Pequot's backup tapes dated June and July of 2001, the very months Samburg would have been considering Heller Financial.* Jim seems cooperative at this point. Do we want the tapes or just e-mails? Since Pequot gave tapes to Andor (a different entity), we could take the position that Pequot waived any privilege. Jason Ivarone is checking out whether we could retrieve e-mails or whether it would have to go to vendor. We could also seek all e-mails if Andor retrieved e-mails from the tapes.
>
> There seem to be a shortage of Samberg e-mails for July. He is averaging approximately 2,000 e-mails a month but we have only 837 for July 2001. This makes no sense, because Pequot was it largest at this point and there was much going on.[203]

Hence, the backup tapes might lead to evidence to overcome the nine-foot bar.

Months earlier, I had discussed a strategy with Hanson to obtain the backup tapes and he asked me to present the strategy to Kreitman, which I did.[204] Kreitman initially had some concern whether the tapes could be privileged,[205] but both Eichner's and my tentative research suggested they were not and Kreitman seemed to agree.[206] In early August, however, Eichner had reversed his opinion and became convinced that the tapes were privileged. His rationale rested on the theory that Andor's attorneys would object to the production of the tapes. I told Eichner more than once that Bejamin was not objecting, but Eichner, who had not spoken with Benjamin, did not accept my statement.

During the phone call with Benjamin on August 17, I decided to ask Benjamin again whether Andor objected to producing the PCM backup tapes, so Eichner could hear Benjamin's response first hand.[207] I summarized the background facts and what transpired during the call with Bejamin in my August 24 email to Hanson and Kreitman:

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[203] See May 31, 2005, email from Aguirre to Hanson and Kreitman, Ex. 139.

[204] See June 2, 2005, email from Aguirre to Kreitman, Ex. 140.

[205] See June 3, 2005, email from Aguirre to Hanson, Ex. 141.

[206] See June 3, 2005, email from Eichner to Kreitman, Hanson, and Aguirre, Ex. 142; and June 6, 2005 email from Kreitman, to Eichner, Hanson and Aguirre, Ex. 143.

[207] See August 24, 2005, email from Aguirre to Hanson and Kreitman, Ex 133.

Prior to the conversation referred to above with Benjamin, I repeatedly told Jim that **Benjamin was not objecting** to the production of the Andor tapes. Jim ignored my comments and repeatedly stated we have to find out Andor's position. This has moved in circles for weeks. To put the matter to rest, I put this question to Benjamin during the call with Liban and Jim E: "Jim, would you refresh me on your position on the Andor tapes?" He again said Andor had no objection and he had placed this issue in Pequot's lap, which was all he thought he had to do under the agreement. Jim E then picked up the conversation and asked Benjamin the same thing in a different way and once again got the same answer. He then went a step further: he asked Benjamin his opinion of the validity of Pequot's position. I did not object to Jim's question because I did not want to emphasize it, but I do not think it is appropriate for an SEC attorney to ask Benjamin, Andor's attorney, how he feels about the position Strauss is taking on behalf of Pequot. This suggests that we do not have confidence in our own analysis. If we do not, why should Benjamin? Further, we can assume that Benjamin and Audrey are talking and that Benjamin will pass along to Audrey the fact that we are asking him about the validity of her position. You guys make the calls, but I think this demonstrates a certain lack of confidence on our part. As you must know, Audrey is adept at exploiting weaknesses in the SEC's position. [208]

After the call, Eichner immediately declared that Benjamin's position—that Andor did not object—was unacceptable and he would have to "take a more concrete position that he had."[209] Eichner's stance made no sense and his questions to Bejamin—what did he think of PCM's position?—left the impression that we lacked confidence in our position. I expressed my concerns to Eichner[210] and, when he rebuffed them, to Kreitman and Hanson.[211] Neither supported Eichner's position.[212]

Berger, Kreitman, and Hanson Had Backed Some Conflict into the Case.

The obstacles with the Andor tapes and Benton testimony were just two of the multiple obstacles during the second half of August that derailed the GE-Heller investigation. When I left on vacation, I circulated an email describing "Pequot pending matters."[213] Eight of the ten matters sought evidence which might help convince my supervisors to reconsider their decision blocking the issuance of the Mack subpoena. Jama and Eichner were supposed to follow through on these matters while I was away. None would progress an inch after I left.[214]

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[208] *Id.*

[209] See August 24, 2005, email from Kreitman, to Aguirre and Hanson, Ex. 145. This does not seem to be the one you need here.

[210] See August 23, 2005, email from Aguirre to Eichner at 1:50 pm, Ex. 144.

[211] See August 24, 2005, email from Aguirre to Hanson and Kreitman, Ex 133.

[212] Kreitman replied: "Seems to me the agreement between Andor and Pequot is a matter for them to resolve. Why don't we simply ask Andor to respond to our subpoena. If they assert privilege, we'll inquire as to the basis and go from there." See August 24, 2005, email from Kreitman, to Aguirre and Hanson, Ex. 145; and Hanson, August 26, 2005, email from Hanson to Aguirre, Ex. 133.

[213] See August 17, 2005, email from Aguirre to Jama, Eichner a d Kreitman, Ex. 127.

[214] I refer to items 1 through 5 and 7 through 9 of my August 17 email, Ex 127. Item 1 (Benton testimony) encountered one Eichner calendar conflict after another. Item 2 (testimony of Dartley, who executed GE-Heller trades) still had not been set. I received no feedback on Item 3 (subpoena for Mack's deals), item 4 (status from Larry Storch on PCM missing and corrupted backup tapes), item 5 (possible Mack emails after he left Morgan

One key item was the draft subpoena for CSFB, which I left with Jama to finalize.[215] One hour of Jama's time would have sent the subpoena out the door. It sought, among other things, emails and other communications between CSFB and its parent CS relating to Mack and GE-Heller. Hanson would not send out that subpoena until September 1, 2005, the day the SEC fired me.[216] I had described the importance of the subpoena to Hanson with these words: "if we are to have any chance in getting over what I see as a 9' bar, these docs are critical."[217] Significantly, Hanson effectively conceded at the December 5 hearing that Mack had met with CS officials just before Mack's call to Samberg on June 29.[218]

The stall on everything prompted my email with this subject: "S/L will soon be an issue in GE/Heller 10b against Samberg" to Kreitman, Hanson, Eichner, Ribelin, and Jama. It read in part:

> We have miles to go before we could file a 10b action against Samberg and the investigation on these examinations and other aspects has slowed to a snail's pace. I do not see why are so relaxed about the scheduling on these exams and others. It may bite us in the end.[219]

With hindsight, I submit that some tension was cooked into the cake in the last two weeks of August. One force likely stopped each of these steps: the Mack subpoena, the CSFB subpoena, the Andor subpoena, the Benton testimony, the PCM subpoena seeking Mack's investments, and everything described in my August 17 email to Jama and Eichner.[220] The same force likely prompted the search for new tipper suspects. After Berger *et al.* decided to fire me for questioning their decision to give Mack favored treatment, it made no sense to allow me to strengthen the case against Mack. That would only increase the risks to my entire chain of command for blocking the Mack subpoena and firing me. I submit a full-blown cover up of the Mack decision was taking shape. For that reason, on August 29, 2005, three days before I was fired, I contacted the Disclosure Unit of the Office of Special Counsel to discuss the filing of a complaint arising out of the PCM investigation.[221]

Stanley), item 6 (FBI status on Zilkha), item 7 (Samberg phone records which might have shown calls to Mack for critical GE-Heller period), item 8 (subpoenas to CSFB), Item 9 (Andor backup tapes which might have contained missing Samberg emails for key GE-Heller period), or Item 10 (progress of Eichner's search for new tipper suspect). I handled item 4 myself while on vacation since no one contacted Storch and the missing backup tapes could contain relevant emails.

[215] See August 17, 2005, email from Aguirre to Jama, Eichner and Kreitman, Ex. 127, item 8(f) in the email.

[216] Hanson's oral testimony, Hearing RT, p. 71, l. 23, through p. 72, l. 10.

[217] See August 26, 2005, email from Aguirre to Hanson, Ex. 114.

[218] Hearing RT, p. 73, ll. 1-16.

[219] See August 26, 2005, email from Aguirre to Kreitman, Hanson, Eichner, Ribelin, and Jama, Ex. 119.

[220] See August 17, 2005, email from Aguirre to Jama, Eichner and Kreitman, Ex. 127.

[221] I discussed with Office of Special Counsel attorney Mathew Glover whether nonpublic documents relating to an ongoing SEC investigation could be filed with a whistleblower complaint.

The allegation that I treated Jama with disrespect or abuse is mystifying. Since I began working with Jama, I believe we were in the process of developing a personal relationship. We discussed personal matters, e.g., our families. We both expressed interest in the possibility that he would work closely with me on the insider trading investigation.[222] However, in late August, Jama was the point person to follow up on the "Pequot pending matters," which dealt almost exclusively with GE-Heller and to a large extent with Mack.[223] When I called in or emailed, the answer was always the same: such and such and such did not happen. I am sure that the frustration in my voice was evident, but it was not directed at Jama. Nor did he seem to take it that way.

3) Mr. Aguirre misrepresented Commission policy to opposing counsel.

This is one of the half truths that fictionalize a real event. I will discuss the real event first and then the SEC's effort to fictionalize it. The facts below also address Hanson's accusation that I was abusive or disrespectful to O'Rourke.

The PCM investigation hit an impasse in February 2005—foot-dragging by PCM's attorneys in producing their client's emails. On February 15, 2005, I emailed Kreitman, Hanson and other staff, pointing out the following: "In 12 weeks, we've got 1/2 of 1% of the e-mails Pequot was requested and now subpoenaed to produce. At this rate, we have only 48 years to go."[224]

The primary reason for the delay, according to PCM's lawyers, was their need to review *every* email to determine whether it contained a privileged attorney-client communication. During a phone conference on February 4, 2005, Kreitman proposed a shortcut to the PCM's attorneys: "There are software systems that can isolate e-mails that can be privileged. We can also give you assurance that if we receive any e-mails that are privileged we will return them."[225] The PCM attorneys did not agree to Kreitman's proposal at that time.

But the PCM attorneys themselves suggested the same approach in May 2005. By my email of May 11, 2005, I informed Kreitman, Hanson, Ribelin, Foster and Kevin O'Rourke (O'Rourke) that PCM's attorneys were willing to produce the emails subject to the offer Kreitman had made in February. My email read: "Audrey told me they are ready to discuss using search terms (attorney's names) to ID possible attorney attorney-client documents, with our agreement to return any privileged documents inadvertently produced (emphasis added)."[226]

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[222] June 20, 2005, email from Aguirre to Hanson and Kreitman, Ex. 146.

[223] See August 17, 2005, email from Aguirre to Jama, Eichner and Kreitman, Ex. 127

[224] See February 15, 2005 email from Aguirre to Kreitman, Hanson, Ribelin, Foster, Williams, Conroy, and Ivarone, Ex. 87.

[225] I referred to Kreitman's offer twice in my May 24, 2005, emails. See May 24, 2005, email chain; Ex. 120. I also recall that Hanson gave me his handwritten notes which recorded Kreitman's comments during that telephone conference. I placed these notes with mine in a folder in the PCM files maintained in my office. See February 4, 2005, staff meeting notes, Ex. 148.

[226] See May 11, 2005, email from Aguirre to Kreitman, Hanson, O'Rourke, Ribelin, and Foster, Ex. 88.

Kreitman responded by email: "Progress"[227] and Hanson's email said: "Good. What's your take?"[228] Ribelin, Foster and O'Rourke did not respond. After which, I informed PCM's attorneys that I believed we would agree in principle to return inadvertently produced emails, but the language would have to be worked out.

Later in May, I asked Kreitman and Hanson for their suggestions how to draft the language to be included in the agreement to cover the return of inadvertently produced, privileged emails. Kreitman told me that it was an SEC policy to do so and Hanson told me where I could find the controlling policy on the SEC website.

On May 24, 2005, I circulated a *draft* letter (which would be sent to PCM's attorneys once consensus had been reached) among Kreitman, Hanson and five other staff members, including O'Rourke, seeking their input on the letter. My email contained notes to five staff members seeking their specific input on various points discussed in the proposed letter. There were two notes to Hanson seeking his input on the language covering the return of emails. The note in the text of the email read: "Bob: I need to get the guidelines again relating to the return of inadvertently produced privileged communications (emphasis added)."[229] The draft letter attached to my email contained the following proposed language and comment highlighted in green: "Further, the Staff represents that Commission policy is to return inadvertently produced documents containing privileged attorney-client communications, without a request to do so. [Bob: I need to reread the guidelines again on this point]" Hanson responded by citing the location on the SEC website which stated the SEC policy applicable to inadvertent production, thereby confirming his approval to this approach.[230] Kreitman did not immediately respond.

After studying the SEC policy, which Hanson cited in his email, I drafted and circulated proposed language to my supervisors for their approval or comments. It read:

> Redraft now reads:
>
> Staff will return any privileged material that was inadvertently produced by PCM's counsel upon its request. Further, the Staff represents that the Commission's policy is to return an inadvertently produced document that is clearly a privileged attorney-client communication, without a request to do so, and to either return or notify the party's counsel if an inadvertently produced document contains material that is possibly privileged.

O'Rourke vigorously objected to both drafts mentioning the SEC policy to return inadvertently produced documents subject to the attorney-client privilege. He also accused me of "taking it upon" myself to disclose SEC internal policy[231] After O'Rourke objected to the

[227] See May 11, 2005, email from Kreitman to Hanson, O'Rourke, Ribelin, Foster, and Aguirre, Ex. 89.

[228] See May 11, 2005, email from Hanson to Aguirre, Ex. 90.

[229] See May 24, 2005 email from Aguirre to Kreitman, Hanson, Foster, Ribelin, Eichner, O'Rourke, and Ivarone, Ex. 46.

[230] See Hanson's May 24, 2005, email to Aguirre: "See attached on our policy for inadvertent production. http://enforcenet/investigations/red%20flag%20issues/inadvert%20doc%20production.htm", *Id.* Ex 46.

[231] May 24, 2005, email from O'Rourke to Hanson, Foster, Ribelin, Eichner, Ivarone, Kreitman and Aguirre at 5:54 pm, Ex. 120.

proposed language, Kreitman asked me to remove the proposed language from the draft letter, which I did. PCM's attorneys insisted that the letter contain some language by which the SEC agreed to return privileged emails. I prepared a third draft removing any language referring to the SEC policy of returning privileged emails. Hanson approved the revised language[232] and the final letter went out a week later.[233]

Turning now to the SEC's fiction, it states that I "misrepresented Commission policy to opposing counsel." This is false and misleading at multiple levels. First, neither draft discussing SEC policy was provided to opposing counsel. I circulated both drafts internally and invited comments of other staff. Nor were the contents of either draft discussed with opposing counsel. The final draft sent to opposing counsel, approved by Hanson, contained no language regarding SEC policy.

But the SEC's statement is also misleading. The original idea to return privileged documents was Kreitman's idea.[234] I told O'Rourke and reminded Hanson and Kreitman of this fact with my last email on May 24: "I proposed the statement because my AD [Assistant Director, which referred to Kreitman] told Audrey Strauss that we would return all unprivileged documents which were inadvertently produced if Fried Frank would conduct an electronic search to identify potentially unprivileged documents." Third, the specific approach used in my first two drafts—citing SEC policy on the inadvertent production of documents—came out of discussions with my supervisors—Kreitman and Hanson—how the agreement should deal with that issue. Indeed, Hanson expressly approved this approach; he cited me to the SEC website after I informed him in my email that I intended to use this language in drafting the agreement.[235] Finally, I believe the statement in my second draft, describing SEC policy, accurately and concisely described that policy as it would apply to PCM's production.

4) Mr. Aguirre's records and files were disorganized and sloppy.

Once again, this is a new contention. It was not mentioned in my termination notice or my "reevaluation." My positive evaluations speak to the contrary. Nor are there any emails or other contemporaneous documents supporting this accusation.

I spent approximately thirty or more hours a week organizing and filing documents. Other staff came in and out of my office requesting documents. Hanson and Kreitman both came to my office, Hanson more frequently. On one occasion I reviewed with Kreitman my document organization. On another occasion, I provided Eichner with the extensive files relating to PCM's trading in Elite Information. No one—neither staff nor supervisors—ever suggested that the files were disorganized or sloppy. The electronic files which I maintained relating to the PCM investigation were accessible to all staff working on the matter, including every supervisory

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232 A meeting between Hanson and me on this point was scheduled by our email exchange on May 25, 2005. My May 25, 2005, email to Hanson read: "Please see me re some of the changes." Hanson's email of the same date to me read: "Come on by." See May 25, 2005, email exchange between Hanson and Aguirre, Ex. 91.

233 The revised language read: "Staff will return any written or electronic communications which are protected by PCM's attorney-client privilege upon the valid assertion in writing by PCM of such privilege in relation to a specific e-mail or when the privileged status of any such e-mail otherwise becomes known to Staff." See May 31, 2005 letter from Aguirre to Audrey Strauss Ex, 147.

234 See February 4, 2005, staff meeting notes, Ex. 148.

235 May 24, 2005, email from Hanson to Aguirre, Ex. 46.

level. I received no complaints regarding the manner in which I had organized or maintained those files.

To be sure, staying current with PCM's hard copy and electronic document production was not easy. At one point, the PCM was producing approximately 80,000 documents a week. PCM and its officers were represented by seven law firms, including two former Directors of the SEC's Enforcement Division. One law firm had fifty-five attorneys working on the case. In all, I was personally dealing with approximately fifty individual attorneys.[236] Given the volume of documents the PCM investigation was generating, I applied for the appointment of a paralegal to assist with document organization.[237] Both Hanson and Kreitman approved my application. The staff person who evaluated these requests for the Enforcement Division concluded that the case met the qualifications for the appointment of a full-time paralegal, but Berger would also have to request the appointment.[238] He refused to do so.

5) Mr. Aguirre made factual statements that turned out to be mere speculation.

I understand that senior SEC officials previously contended that factual statements in my emails were erroneous. Since no evidence supported that allegation, it morphed into a new one—that I made factual statements that turned out to be speculation.[239] As before, the SEC has provided no concrete examples where any "factual statements...turned out to be mere speculation."

My emails summarizing the evidence were commonly circulated among my supervisors and other staff. I never received an email or spoken comment from anyone that any factual statement in any of my emails was inaccurate.[240] For example, my nine-page email to Hanson, Kreitman and Ribelin summarizing the testimony of Samberg in early May and June.[241] I later forwarded it to Jama and Eichner.[242] Ribelin, Eichner and Jama attended one or both Samberg examinations. No one suggested that any factual statement was inaccurate or turned out to be speculation. Likewise, I provided Hanson, Kreitman and Berger detailed evidentiary analyses why I believed the Mack testimony should be taken, including my email of August 4, 2005.[243] Again, no one ever told me of any inaccuracy in this email. Hanson said he was going to fact-check that email, but I never heard back from him.[244]

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[236] See May 4, 2005, email from Ribelin to Hanson and Kreitman at 12:05 pm, Ex. 103.
[237] See May 9, 2005, email from Aguirre to Lesley Florschutz with copy to Kreitman, and Hanson, Ex. 42.
[238] See May 23, 2005, email from Florschutz to Aguirre, Ex. 92.
[239] Hanson stated in his written testimony: "Information that Mr. Aguirre presented as fact often turned out to be mere speculation based on fragments of information that did not reflect reality."
[240] I recall two occasions when my emails inadvertently referred to the wrong person and one occasion to the wrong company. On another occasion, I referred to an attorney with by wrong surname.
[241] See June 27, 2005, email from Aguirre to Kreitman, Hanson and Ribelin, Ex. 55.
[242] See July 28, 2005, email from Aguirre to Hanson, Jama, Ribelin, and Eichner, Ex. 93.
[243] See August 4, 2005, email from Aguirre to Hanson, Ex. 60.
[244] *Id.* See also Aug 5, 2005, email from Hanson to Aguirre, Ex. 94.

6) **Mr. Aguirre's desire to take Mack's testimony was because of his high profile status and not evidence based.**

This newly-minted accusation is ridiculous. It does not appear in the "reevaluation," the termination notice or, to the best of my knowledge, any email or other document the SEC has produced. The evidence trail simply led to Mack's door, and with more clarity as time passed. When I sent my June 28, 2005, email to Kreitman, Hanson and Ribelin, I stated that there were four other possible but less likely sources of the tip. Those possibilities were eliminated by the time I sent my August 4, 2005, email to Hanson. On this point, it stated: "The evidence does not merely point to Mack. It points to no one else. I have been through the Samberg e-mails, his calendar, his credit card receipts and his phone slips. Hilton, Eric, Nancy, have been through the e-mails. No one has shown up as a possible candidate."[245]

Obviously, Hanson and Kreitman thought the same when they authorized me to present the evidence to the FBI and the US Attorney in connection with a possible criminal proceeding against both Mack and Samberg. Or did they also decide to do this because of Mack's high profile status? And, once again, the SEC has produced no emails or other documents lending the slightest support to this theory.

7) **Mr. Aguirre was disorganized and unprofessional during Samberg's June testimony.**

Again, I never heard this contention while I was at the SEC. I circulated a summary of the testimony of this examination to five other staff members, including four that were present at the examination.[246] I had positive feedback from most of the staff members present at the testimony, including Ribelin (who at the time had seventeen years of experience wit the SEC) and Foster (who at the time had thirty years of experience with the SEC and was the SEC insider trading specialist). On questioning by Senator Grassley, Hanson testified at the December 5, 2006, hearing that the source of this information was another Senior Counsel who attended the examination. The only two at the examination—other than Foster—were Eichner and Jama, who had each been with the SEC less than two months at the time of the second Samberg examination.

8) **Mr. Aguirre left work abruptly after disagreements with other attorneys.**

This is another half truth. It is true that I left the office "early" on two occasions during the period from September 2004 until September 2005. On both occasions, Hanson approved my request to leave early. On both occasions, I left in the mid to late afternoon. On both occasions, I had already put in a full work day.[247] One occurred on June 28 when it first appeared that my entire supervisory chain had decided to block the issuance of a subpoena to Mack as favor to him or to Morgan Stanley. I decided to go home early on that day in order to give careful thought to

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[245] See August 4, 2005, email from Aguirre to Berger, Ex. 60.

[246] See June 27, 2005, email from Aguirre to Kreitman, Hanson and Ribelin, Ex. 55.

[247] My first email on that day was sent at 5:46 am (see June 28, 2005, email from Aguirre to Kreitman and Hanson, Ex. 56). However, as I understood the applicable SEC workday, the time before 7:30 am did not count. I was approximately two hours short of a full workday.

my options for dealing with my supervisors' decision, which, in my judgment, would undermine the GE-Heller investigation violate the SEC's mission.

I met with Kreitman early on June 28, 2005, to discuss the GE-Heller investigation and my recommendation to issue a subpoena to Mack. Before that meeting, I had submitted two detailed emails and two spreadsheets[248] supporting my recommendation. Kreitman's refusal to even discuss this evidence, coupled with other recent events, pointed to an extremely distasteful conclusion. My entire supervisory chain seemed to be giving Mack preferential treatment. I asked Hanson if I could leave early that day and he approved my request. I left work at around 2:15. Since my workday had begun before 6 am on that day, I had already put in a full eight-hour workday before I left. Later, I approached Hanson with two separate forms in hand to adjust my time for the day. Hanson asked how much time I had missed on that day. I told him and he said that I did not have to file any form.

There was one other occasion that I asked to go home early. I am unable to pinpoint the date, because I can find no related emails. I believe it was likely in the first half of March. I do recall that it had been a long and frustrating day. In the mid afternoon, I told Hanson that I would like to leave early and he authorized my request. There was no discussion or hint that I was thinking about leaving the SEC. Of course, neither Hanson nor Kreitman made any reference to my early departure in my evaluations or in any other document.

9) Mr. Aguirre sent out several subpoenas violated privacy law.

See my response to Thomsen's more concrete allegation on the same point below.

Paul Berger:

1) Mr. Aguirre asked to report directly to an Assistant Director, outside the normal chain of command.

Neither this nor the next allegation is accurate. I met with Berger, as I recall, during the first week of January to discuss the possibility of transferring from Cain's branch.[249] I tossed out several possibilities for Berger's consideration: stay in Grime's group and report to a different branch chief, stay in Grime's group and report to him (as I had seen and was told some other staff attorneys did), transfer to a branch in Kreitman's group (Kreitman told me there was a vacancy in his unit), or transfer to another branch chief in a different group. During the conversation with Berger, he eliminated the possibility of reporting to Grime and was unsure whether a vacancy would exist in Kreitman's group. My confirming email to Berger did not limit his options. It read:

> For example, as we discussed, I understand that there will be an opening in Mark Kreitman's section in the near future and I would appreciate being transferred

[248] See June 27, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 55, and June 28, 2005, email from Aguirre to Hanson, Kreitman and Ribelin, Ex. 56.

[249] For my reasons for seeking a transfer from Cain's group, please see my January 10, 2005, letter to Berger requesting a transfer, Ex. 122, and my response to Berger allegation 7.

there if possible. But I believe there are many others with whom I could work where my age and, consequently my experience, would not be a detriment.[250]

2) **Mr. Aguirre asked to work only for Mr. Kreitman.**

This is false. See my response to Berger allegation 1 above.

3) **Mr. Aguirre had shouted at and hung up on opposing counsel.**

This is simply false. As with the other accusations, this one is unsupported by any form of documentation. I would expect that hanging up on opposing counsel would have at least triggered one email. None of my supervisors ever suggested that I hung up on opposing counsel, that I treated them in a rude manner or that I should handle my calls differently in the future. For further discussion of my contacts with opposing counsel, please see my response to Kreitman allegation 5 (a), pp. 15-16.

4) **Mr. Aguirre left the premises several times for the remainder of the day without approving the leave.**

See response to Kreitman allegation 7, pp. 17-19.

5) **Mr. Aguirre resigned several times.**

Please see my response to Kreitman allegation 7 at pp. 17-19.

6) **Mr. Aguirre issued too many subpoenas during the course of the investigation.**

Please see my response to Kreitman allegation 10 at pp.25-26.

7) **Mr. Aguirre was unhappy with edits by Charles Cain "on a relatively ministerial matter".**

This was no "ministerial matter," nor was the issue whether I was "unhappy" with anyone's edits. Very simply, Cain instructed me to make a false statement in a Formal Order Memorandum to the five SEC Commissioners. I was personally and directly responsible for the accuracy of the representations in this memorandum.

On October 6, I prepared a draft Formal Order Memorandum and submitted it to branch chief Cain for his "comments and suggestions."[251] The draft stated the number of suspected insider trading matters that had been referred to the SEC over the two prior years. On this point, the draft read: "Over the past two years, SROs have referred or 'highlighted' at least six matters

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[250] *Id.*

[251] See October 6, 2004, email from Aguirre to Cain, Ex. 4. I am attaching the single page from the redrafted Formal Order Memorandum, which contained this change.

involving possible insider trading by the Pequot Management and one or more of Pequot Funds to the Division of Enforcement."[252]

On October 7, Cain dropped off a copy of the Memorandum with his hand written revisions at my office while I was at a training session. One of Cain's revisions deleted the quoted language above about SRO referrals involving PCM and replaced it with the following language: "Subsequent investigation by the staff identified at least six transactions involving possible insider trading by the Pequot Management and one or more Pequot Funds."[253]

After reviewing Cain's comments, I went to his office to discuss the above change. I asked him if his revisions were intended to be final.[254] Cain said they were. I told Cain that the revision about SRO referrals above was not accurate because it suggested that I had uncovered six insider trading matters, when in fact those had been discovered by SROs and had been referred to the SEC. Cain angrily stated that the Memorandum was not going to state that Joe Cella (Assistant Director of Market Surveillance) had been informed but had failed to act on the prior SRO referrals.

The next morning, I sent an email to Cain and Assistant Director Richard Grime, Cain's immediate supervisor, stating my concerns:

> With training over, I will soon redraft and resubmit the Pequot action memo. I assume our primary concern is the memo's accuracy since it will be circulated among the Commissioners. In this regard, the proposed revisions would now offer this case history: The NASD referred the Elite Information matter to Enforcement in August 2003 and then, "Subsequent investigation by the staff identified at least six transactions involving possible insider trading by the Pequot Management and one or more Pequot Funds.
>
> This statement is unsupportable. Neither I nor anyone on the staff has discovered an insider trading transaction involving Pequot. Yes, I have prepared a spreadsheet of suspected Pequot insider trading activity since 1999. However, in each one of those 11 cases, an SRO identified the transaction and referred it to Enforcement (Market Surveillance), where it stopped. Under these circumstances, the quoted revision is not merely unsupportable; it could be the source of embarrassment or worse for each of us....
>
> Shall we discuss?[255]

Later that morning, Grime asked me to come to his office to meet with him and Cain regarding my email above. During this meeting, I informed Grime of the history that preceded his October 8 email. Grime agreed that Cain's language stating "Subsequent investigation by the staff identified at least six transactions involving possible insider trading ..." be removed from Formal Order Memorandum. The language was redrafted to read:

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[252] *Id.*
[253] See October 8, 2004, email from Aguirre to Cain and Grime, Ex 5.
[254] Cain's notes on the draft seemed to be final edits.
[255] See October 8, 2004, email from Aguirre to Cain and Grime, Ex 5.

> Over the past 15 months, the NASD and NYSE have made several referrals to the Division of Enforcement in which one or more hedge funds affiliated with Pequot Management has been identified for possible insider trading. Two of these referrals are discussed below.[256]

These facts were true. At the time this statement was submitted to the Commission, we knew of only three referrals over the prior eighteen months. I discussed this matter with Berger during the week of January 3, 2005, when I requested a transfer from Cain's unit.

8) **Mr. Aguirre refused to write up his investigation in the required formal memorandum.**

Please see my response to Kreitman allegation 4 at pp. 14-15.

Linda Thomsen:

1) **Ms. Thomsen stated in her testimony that Mr. Aguirre issued, "without his supervisors review or approval, subpoenas that violated federal privacy law, which were withdrawn after his supervisors learned of them. But for the supervisors' corrective actions, the former employee's work product could have been extremely damaging to the SEC."**

This is another half truth. This one is told by the SEC's Director of the Enforcement Division. More than anyone, she sets the standard of conduct for Berger, Kreitman and Hanson. She so thoroughly reworked the truth that it bore little resemblance to fact. The kernel of truth was this: I mistakenly issued two subpoenas in May 2005. As the documents tell, everything else about the Director's account is false. If a public company had massaged the truth in connection with the sale of securities, as the Director did with this allegation, it could expect the SEC to come knocking at its door.

Once again, neither Kreitman nor Hanson ever discussed this allegation with me at my evaluation. No one ever spoke to me about the matter after May 26, 2005. I did not learn that it was even an issue until I obtained the "reevaluation" more than a month after I was fired.[257] Once again, this allegation has improved with time. The "reevaluation" merely stated "certain subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes..." Thomsen's new and improved allegation tells how my "supervisor's corrective action" averted a crisis that "would have been extremely damaging to the SEC." In truth, when the matter occurred, my supervisors considered the mistake a non-event.

The issue of serving a subpoena on Bloomberg or similar email service providers was first discussed at a meeting on May 10, 2005, among Hanson, Kreitman, possibly Eichner and me. Hanson set the meeting to discuss my email, circulated earlier that day, proposing a plan to deal with PCM's attorneys regarding its email production.[258] One of the topics in my email was

[256] See October 22, 2004, email from Aguirre to Cain, Ex. 149.
[257] See August 1, 2005, "reevaluation", Ex. 95.
[258] See May 10, 2005, email from Hanson to Kreitman and Aguirre; Ex. 43.

the following: Samberg's Instant Messaging: "Samberg said in an e-mail (2003) that he only used IM to communicate with a certain group of people. If they have these IMs, they have not been produced."[259] I suggested during the meeting that we could also subpoena the PCM's instant messages directly from Bloomberg or PCM's other email service providers. No one questioned or objected to such subpoenas, nor did anyone mention any special requirements for their issuances.

I drafted proposed subpoenas to Bloomberg, AOL, and Reuters for Samberg's and PCM's emails and instant messages and emailed them to Hanson early in the morning of May 23, 2005. The text of the email read: "These were leftovers from last weekend"[260] and the subject read "subpoenas and other correspondence to be faxed on Monday."[261]

I did not get to the office until late morning because of a medical examination. Since I received no response from Hanson, as had occurred sometimes in the past, I assumed that he had no comment regarding the subpoenas. I therefore began faxing the subpoenas, including one to Bloomberg and one to Reuters. Sometime during this process, I learned that Hanson had not come to work that day and thus may not have seen the subpoenas.[262] I discontinued faxing the subpoenas until the next day.

By the afternoon of May 24, I had not received a response from Hanson to any of the emails I had sent to him on the prior day. I sent him two emails regarding the same subpoenas. In one email, I pasted the text of the document description in the body of the email; its subject was "Urgent, Samberg subpoena."[263] Hanson responded to that email.[264] I also sent him all of the subpoenas in a second email with this text: "These are the subpoenas that I forwarded Monday that still have not gone out."[265] Hanson did not respond to this email. Later that afternoon, I went to Hanson's office to speak with Hanson about another matter. He casually mentioned there could be "some privacy concerns" with the subpoenas that had gone to Bloomberg and Reuters, but he did not specify what the problem was or offer any guidance how to correct it. I told Hanson that I would look into it and take care of it.

I had taken the SEC course dealing with privacy issues, but it did not touch upon the issue of subpoenaing email service providers. That afternoon, my research on the SEC website failed to turn up anything helpful. That same afternoon, I called the attorney representing Reuters and asked him to disregard the subpoena in question. The next morning, May 25, I sent the Bloomberg attorney a fax requesting that he do the same.[266] Hanson had not requested that I take either step.

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[259] May 10, 2005, email from Aguirre to Kreitman and Hanson, Ex. 43.
[260] See May 23, 2005, email from Aguirre to Hanson, Ex. 123.
[261] *Id.*
[262] I had also sent Hanson several emails that morning and did not receive a reply.
[263] May 24, 2005, email from Aguirre to Hanson, Ex. 124.
[264] May 24, 2005 email from Hanson to Aguirre, Ex. 124.
[265] See May 25, 2005, email from Aguirre to Hanson, Ex. 47. In rereading that email, I noticed that one of the subpoenas that I had sent out was attached to this email.
[266] My letter to the Reuters's attorney confirming my call to him on May 24 is attached as Exhibit 150. My letter to Bloomberg's attorney on May 25 is attached as Ex. 17.

Also on the morning of May 25, I sent Hanson an email with this question: "can I see the documents that raise the privacy concerns?" Hanson replied by giving me the SEC internal address which addressed his "privacy concern."[267] I do not recall finding anything helpful on the website and told that to Hanson. Hanson then told me to contact another staff attorney, Thomas Sporkin (Sporkin), who was knowledgeable on how to handle this type of subpoena. I did so and Sporkin explained the process to be followed and said he would email me the address of the correct internal site.[268] Sporkin called back a little later and said he had given me the wrong site and he would send me another email with the correct site, which he did.[269] As I recall, this website discussed the applicable law.

On May 26, 2005, I apologized to Hanson for the error and informed him that I would not assume his consent in the future if he did not respond to my emails. Hanson said he was fine with my response and that was the end of it. In sum, I do not believe Hanson uttered more than three short sentences from beginning to end. His only email directed me to the wrong internal SEC site.

On June 1, 2005, I met with Kreitman and Hanson regarding my performance. Neither of them mentioned the subpoenas to Reuters and Bloomberg. Kreitman certified that my performance met all applicable SEC standards, including language that covered the emails issue on May 23. I never heard a word from Hanson or from anyone else regarding the subpoenas during the rest of my tenure with the SEC.

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[267] See May 25, 2005, email exchange between Aguirre and Hanson, Ex. 48.

[268] See May 26, 2005, email from Thomas Sporkin to Aguirre, Ex. 125. Please note he cited me to a different internal site address than Hanson did in his May 25, 2005, email, Ex. 48.

[269] May 26, 2005, email from Sporkin to Aguirre, Ex. 126.