



**TESTIMONY  
OF  
LINDA CHATMAN THOMSEN, DIRECTOR  
DIVISION OF ENFORCEMENT  
U.S. SECURITIES AND EXCHANGE COMMISSION**

**CONCERNING  
INSIDER TRADING**

**BEFORE THE COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**DECEMBER 5, 2006**

**U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549**

# **Testimony Concerning Insider Trading**

by **Linda Chatman Thomsen**

*Director, Division of Enforcement*

*U.S. Securities and Exchange Commission*

## **Before the U.S. Senate Committee on the Judiciary December 5, 2006**

Chairman Specter, Ranking Member Leahy, and Members of the Committee:

Thank you for inviting me to testify today about insider trading involving hedge funds. Our laws against insider trading play an essential role in protecting our securities markets and in promoting investor confidence in the integrity of those markets. Rigorous enforcement of our current statutory and regulatory prohibitions on insider trading is an important part of the Commission's mission.

I am especially pleased to testify together with Associate Deputy Attorney General Ronald Tenpas of the United States Department of Justice, and Richard Blumenthal, Attorney General of the State of Connecticut. The Commission, as you know, is a civil enforcement agency and we use civil sanctions to address insider trading. However, insider trading may also violate federal criminal law, as well as state securities regulations and other state laws. The respective histories of the SEC and the Department of Justice, as well as those of state attorneys general and securities regulators, demonstrate our collective commitment to prosecuting insider trading, civilly and criminally, under federal and state law. Our respective histories also demonstrate our collective commitment to working with each other.

### **Proving An Insider Trading Case**

When I last appeared before this Committee a few months ago, I noted that insider trading by hedge funds was an area of significant concern to the Commission, the Enforcement Division, and this Committee. Insider trading by hedge funds remains a substantial concern to the Division, and represents a significant focus of our current enforcement efforts. As suggested by your staff, I will discuss the process we follow in bringing insider trading cases in general, and also speak to cases involving insider trading by hedge funds.

Over the years, investigating and prosecuting insider trading violations has remained a central and important element of our enforcement mission. The Division pursues these cases day in and day out, and has developed unparalleled expertise in this area. Basically, the staff must prove that a trade was made on the basis of material, non-public information, with the requisite intent to violate the law, and that the information was used or obtained in violation of a duty to the source of the information. That's quite a mouthful, even for a lawyer, so it may be helpful if I describe in more detail, the three

key legal requirements that must be met for the SEC to bring a civil insider trading case, which are:

- 1) access to material, non-public information;
- 2) scienter (or culpable intent); and
- 3) breach of a duty to the source of the information.

Before I detail these legal requirements, however, let me step back and discuss some background regarding our insider trading investigations. Insider trading leads come from a host of sources, not only market surveillance but also the media, public tips, and information developed in our own inspections and investigations. Identifying suspicious trading is an essential starting point, but it is only the first step in compiling a viable case. While the SEC's Enforcement Division has brought hundreds of successful insider trading cases, there are also many investigations that are opened and later closed without enforcement action. We may open an investigation based on suspicious trading and all of the circumstances may look troubling, but after a thorough look, we may discover no evidence of insider trading or not enough evidence to prove there has been a violation of law. Because an investigation may not lead to an enforcement action, we are always mindful that public disclosure of the mere fact of an SEC investigation may unfairly impugn the reputations of the entities and individuals whose conduct may be exonerated. For this reason, as a matter of long-standing Commission policy, our investigations are conducted on a confidential basis and, as a general matter, we do not confirm or deny the existence of any ongoing investigations.

One of the challenges in successfully prosecuting insider trading is that so much of the relevant activity—trading—is legitimate and must be protected. Trading based on one's own research and financial acumen or strategies is not only legitimate but encouraged. The problem arises only when trades become unlawful because they are based on material non-public information obtained through a breach of duty to the source of the information.

As the law of insider trading has developed over time, it has come to impose legal requirements intended to distinguish legitimate conduct from illegitimate conduct. As I mentioned a moment ago, the law requires that the information be confidential and non-public. If so many people already know the information that it crosses the tipping point where it can be deemed public—based on prior media reports, for instance—there is no violation. The staff must also show scienter—a culpable state of mind or intent to violate the law. In other words, the tipping or trading must be undertaken with culpable intent to commit a violation, and not as the result of an inadvertent slip or innocent mistake. Finally, the staff must also show a violation of duty to the source of the information. The duty to the source may be easy to prove against a tipper who passes on information in breach of a confidentiality agreement. But if information is passed along a chain of tippees, it may become harder to prove that a trader who obtained the information third- or fourth-hand had any duty to the source, or knowledge of the original tipper's duty to the source. Though each of these legal requirements must be established in every insider

trading case, they are important because they help to distinguish unlawful trading from the much larger universe of lawful trading.

Insider trading can be, and usually is, accomplished within a very small group or even by a single individual. The communications that result in insider trading do not necessarily generate much of a paper trail. The executive working on due diligence for a confidential deal may meet his brother-in-law in a public park on his lunch hour and pass along a tip. Because there are so few people involved, there may not be witnesses or bystanders who will come forward and report the tipping. Moreover, those who know about the tip may become participants in a scheme because the potential (though illegal) rewards are enormous.

Despite these challenges, our staff has become particularly adept at sifting through all available forms of evidence, including phone records, emails, instant messages, and the electronic footprints of internet protocol data. Our staff culls through trading records, interviews and takes the testimony of witnesses, and reviews bank and brokerage statements. With these tools and resources, our staff has built solid, credible enforcement actions against hundreds of wrongdoers.

### **Proving Insider Trading In the Context of Hedge Funds**

Investigating potential insider trading by hedge funds presents additional challenges because of their high volume trading and proprietary trading strategies. Because they often have substantial assets under management, hedge funds may place extremely large trades in many different securities on a daily basis. The huge volume of trading by hedge funds across a broad range of securities may generate any number of transactions that appear to be unusual or suspicious, but for some hedge funds these trades may be typical. When the SEC approaches a hedge fund with evidence of a large and suspicious trade in advance of a public announcement by a company, the hedge fund often replies that it placed trades of the same magnitude in the same security on many different occasions—and the trading records generally support that claim.

Tracking a hedge fund's trading in a specific security may also be challenging. It is not uncommon for hedge funds to use the services of multiple prime brokers—registered broker-dealers that facilitate trades and other transactions on behalf of hedge funds. A hedge fund may break up a single large trade into many smaller trades to be facilitated through a number of prime brokers over time because, for example, the hedge fund may want to make its trading less obvious in the market, often to protect its proprietary trading strategy. Thus, to develop an accurate composite view of a hedge fund's trading in a particular security, it may be necessary to review records from all of its prime brokers.

The prime brokers provide the SEC with a window into the trading activities of the hedge funds they serve, but it is admittedly a limited window. While a prime broker has information about the transactions it performs for a hedge fund, it generally has little information about activities the hedge fund may be conducting through other prime brokers. Nonetheless, the Enforcement Division remains optimistic about prime brokers as a source of leads regarding unlawful insider trading.

While the SEC has access to the trading records of prime brokers and receives referrals from the SROs regarding suspicious trading executed through their markets, the available documents are generally organized according to the security involved in the suspicious transactions (e.g., XYZ Company), not the identity of the trader. Similarly, the SROs' surveillance systems are set up to trigger alerts based on aggregate trading parameters regarding a particular security, and not based on the identity of the trader. A referral from an exchange usually identifies the issuer of the security involved (which might have announced a merger or other major transaction) and a list of identified traders, which may include one or more hedge funds or accounts trading on behalf of hedge funds. As a result, referrals about suspicious trading by a particular hedge fund appear like random puzzle pieces, but whether the pieces are part of a larger pattern is far from obvious. One SRO may report suspicious trading in a security by a specific hedge fund, among other traders, on one day, while another SRO may report suspicious trading in a different security by the same hedge fund, again among other traders, on a different day. The SEC presently does not have an electronic system to aggregate referrals based on the identities of the specific traders involved, but we anticipate implementing a new case tracking system by mid-2007 that will enable us to compile all referrals from different exchanges and different time periods by trader.

The identification of suspicious trading and resulting referrals are only the start of the necessary detective work by the SROs and the SEC. The SEC and the SROs gather and analyze the trading records and survey employees of the issuer about any relationship or association they may have with a list of known traders. The objective is to eliminate traders who did not have access to inside information, and more importantly, to establish links between known traders and potential sources of inside information. In the course of an enforcement investigation, the staff's search for access to inside information is meticulous, time-consuming, and sometimes proves to be inconclusive, but all potential leads are carefully considered and examined.

### **The SEC's Investigation of Potential Insider Trading by Pequot**

I know our investigation of potential insider trading by a well-known hedge fund, Pequot Capital Management, has piqued the Committee's interest. A former SEC attorney has alleged that the investigation was impeded and the attorney was terminated because he sought to take testimony from a prominent individual. Speaking for the Division of Enforcement, I want you to know that these allegations are simply not true.

Although it is uncomfortable to discuss an individual's job performance in detail in a public setting, the former SEC employee's false allegations against the Enforcement Division have made the facts surrounding his termination a public issue. Therefore, I feel compelled to share with you the Enforcement Division's perspective on his performance problems and his resulting termination. After an unhappy probationary period of employment, the former SEC employee was terminated on September 1, 2005 because of "his inability to work effectively with other staff and his unwillingness to operate within the Securities and Exchange Commission (SEC) process." The SEC's termination letter is attached hereto. When the staff attorney was hired, he was required to serve a one-year probationary or trial period during which his employment could be terminated for any

reason or no reason, but there were indeed many reasons in this particular case. He had continued personality conflicts with other staff attorneys, resisted standard supervision, and ignored the SEC's chain of command. Despite these problems, the SEC attempted to accommodate him and to ameliorate the problems he caused in his work groups. During his brief tenure, he was, at his request, transferred from his original supervisor to a supervisor he requested, about whom he now bitterly complains. He also requested, and received, official time to pursue an unsuccessful age discrimination claim against the SEC for failing to hire him on 22 prior applications. The EEOC's opinion denying those claims is attached; the former employee is appealing the decision.

During his tenure, the former employee demonstrated his own dissatisfaction with his employment by twice leaving the office abruptly during the workday after disagreeing with other attorneys, and on a third occasion, by actually tendering his written resignation, only to rescind it some time later. After assuming primary responsibility for the Pequot investigation for several months in 2005, the former employee announced he would not draft the customary memorandum summarizing the investigation he now so publicly discusses. With respect to the substance of his work, he issued – without his supervisors' review or approval – subpoenas that violated federal privacy law, which were withdrawn as soon as his supervisors learned of them. But for the corrective actions of his SEC supervisors, the staff attorney's work product could have been extremely damaging to the SEC, and his continued resistance to supervision created a substantial risk of future error. After the SEC expended considerable efforts in attempts to make the employment relationship work, we decided not to extend his employment beyond the one-year probationary period.

As to the potential insider trading matters at issue in the Pequot case, they were thoroughly investigated. The investigation was ultimately conducted in large part by staff other than the one former attorney who is now heard to complain and was continued long after he left the agency. Between February 2002 and April 2005, the Enforcement Division received a total of 15 SRO referrals regarding various transactions in which Pequot, among others, was identified as a trader. After preliminary screening by two senior supervisors, 13 of these transactions were forwarded on to enforcement staff for further review and consideration, including 10 that were forwarded to staff working on the Pequot investigation. The GE/Heller transaction investigated by the former employee was not the subject of an SRO referral, and our closing of the matter was consistent with the NYSE's original decision to close the matter in 2002. After reviewing the suspicious trading at issue, the NYSE decided not to refer the matter to the SEC for further investigation, but instead sent the Commission a closing memorandum dated January 30, 2002, for informational purposes only, noting that "the deal was expected and the size did not appear out of character." Although the SEC's Pequot investigation reviewed that transaction and many others, we did not find sufficient evidence to support an enforcement action. As a result, the investigation was closed by the Enforcement Division due to lack of evidence, and thus we will not be asking the Commission to take any further action. Because of the public attention this case has received, the Commission has authorized the Division to make its closing memorandum available to

the public, and it is attached to my testimony. I think you will find it a useful summary of the many hours of hard work that went into this investigation.

Finally, Mr. Chairman, the three supervisors working on the Pequot investigation, who collectively have decades of experience and who have been involved in some of our toughest cases, were not influenced by who any of the particular people involved in the investigation were, but rather by the facts and the evidence. This is consistent with the finest traditions of this agency. We follow the facts, and if those facts take us to John or Jane Doe or some more famous John or Jane, so be it. We have gathered evidence from and about, and in some instances we have sued, captains of industry, Presidential cabinet members, Members of Congress, and celebrities, as well as thousands of other far less well known people. Indeed, a long list of prominent and not so prominent individuals would undoubtedly testify that the Enforcement Division does not pull its punches. I want to assure the Committee that we are passionate about our work and will pursue it with vigor, skill and fairness.

That concludes my testimony. I would be glad to answer any questions you may have.

Attachments

MEMORANDUM

ATTACHMENT 2

VIA: Federal Express, Certified and First Class Mail

TO: Gary J. Aguirre

FROM: Linda Chatman Thomsen *by PPs*  
Director, Division of Enforcement

DATE: September 1, 2005

SUBJECT: Notice of Termination During Trial Period

This is to inform you that your employment as a General Attorney (SI), Enforcement Division, will be terminated during your trial period based upon your demonstrated inability to work effectively with other staff members and your unwillingness to operate within the Securities and Exchange Commission (SEC) process. Your termination from the SEC and from the Federal service will be effective at the close of business on Friday September 2, 2005.

You began your employment with the Commission on September 7, 2004. As you were advised at the time of your appointment, an employee who is given a career conditional appointment, as you were, must serve a one-year trial period. It is during this time that an employee has to demonstrate fully his/her qualifications for continued employment.

Several times throughout your trial period, your supervisors advised you that your conduct was inappropriate. You were permitted to transfer from one Assistant Director group to another after assuring your Associate Director that problems that had occurred, including personality conflicts and resistance to standard supervision, would not recur. However, you have continued to have conflicts with other staff attorneys, your branch chief, and a Trial Unit attorney assigned to your primary case responsibility. You have continually expressed dissatisfaction with the supervisory structure and ignored the chain of command in the Division. On one occasion, you submitted (and later withdrew) your resignation to your Associate Director, and indicated that you were uninterested in participating in preparation of your primary case assignment beyond its investigatory stage. While your substantive work generally has been good, the problems that have occurred in other areas are so significant that they far outweigh the value of that work.

During the last several months, your Associate Director, your Assistant Director, and your branch chief have met with you on several occasions to explain to you the importance of working together with other staff members to achieve consensual goals and the importance of operating within the SEC process.



Since those meetings, your conduct has not improved to the level that warrants retention beyond your trial period. Therefore, your employment with the SEC will be terminated during your trial period, effective September 2, 2005 at 5:00 p.m., in accordance with the provisions of 5 CFR 315.804.

I have reviewed the situation with your supervisors, and this decision represents the consensus reached among them. You may appeal this action to the Merit Systems Protection Board (MSPB) only if you believe it was based on partisan political reasons or marital status. Any such appeal must be submitted in writing, not later than thirty days after the effective date of this action, to the Merit Systems Protection Board, Washington, D.C. Regional Office, 1800 Diagonal Road, Suite 205 Alexandria, VA 22314-2480; e-mail: [washingtonregion@mspb.gov](mailto:washingtonregion@mspb.gov); Fax: (703) 756-7112. Appeal forms are attached. You can access the relevant regulations at [www.mspb.gov](http://www.mspb.gov).

If you have any questions about this notice or your rights, please contact Linda Borostovik, Human Resources Specialist, at 202-551-7871. Although she may not represent you, Ms. Borostovik is available to answer questions you may have regarding your attendant rights. In addition, we need to coordinate your obtaining personal items from Station Place and returning your laptop, token, identification badge, and office key. You may contact Chuck Staiger at 202-551-4990 to arrange to come into the office for your personal belongings and the return of Commission items or to use a courier service for this purpose.

Attachment: MSPB Appeal Forms

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON FIELD OFFICE  
1801 L Street, N.W., Suite 100  
Washington, D.C. 20507

Gary Aguirre,

Complainant,

v.

William H. Donaldson, Chairman,  
U.S. Securities and Exchange Commission,

Agency.

EEOC No. 100-2005-00413X

Agency No. 155120631-48

Date: June 14, 2006

**DECISION**

This Decision is being issued without a hearing, pursuant to 29 C.F.R. § 1614.109(g)(3) (2005). On June 28, 2005, I issued a Notice of Intent to Issue a Decision Without a Hearing (Notice). On July 13, 2005, the Agency issued a response to my Notice by filing a Motion for Summary Judgment Without a Hearing and Memorandum in Support. Complainant filed a Memorandum of Points and Authorities in Opposition for Summary Judgment, on August 15, 2005. The remaining procedural history is contained in the case file and the Investigative Report ("IR") and will not be reiterated. The record before me consists of the IR and the parties' submissions.<sup>1</sup>

<sup>1</sup> On August 15, 2005, Complainant filed a Declaration and Application for Extension of Page Length to Motion for Summary Judgment and Motion to Strike Inadmissible Evidence Offered in Support of Summary Judgment. Complainant's request for an extension of page length is **GRANTED**. Complainant's request to strike is **DENIED**.

On July 13, 2005, the Agency filed a Motion for Leave to File a Motion for Summary Judgment in Excess of Fifteen Page Limit. The motion is **GRANTED**. On August 25, 2005, the Agency filed an Opposition to Complainant's Declaration and Application for Extension of Page Length. (continued...)

## CLAIMS

Whether the Agency discriminated against Complainant on the bases of his race (Caucasian), National Origin (Hispanic), sex (male), and age (DOB: 03/07/40), when:

(1) the Agency failed to select him for the following Vacancy Announcements:

- a. 03-268-SW
- b. 04-034-DC
- c. 04-077-MK
- d. 04-083-DJ
- e. 04-88-MB
- f. 04-128-MK
- g. 04-060-DP (re-posted as 04-154)
- h. 03-256-TR
- i. 04-069-DC
- j. 03-206-DC
- k. 03-208-DC
- l. 03-251-DC
- m. 04-076-DP;

(2) the Agency failed to select him for an SK-14 position in the San Francisco District Office, as advertised in the Legal Career Center's May 30, 2003 posting;

(3) the Agency failed to select him for a position in the SEC's Northeast Regional Office in response to the special application he submitted on March 1, 2004; and

(4) the Agency cancelled Vacancy Announcement 04-027-DP without filling the position.

## FINDINGS AND ANALYSIS

### A. THE GOVERNING LAW FOR SUMMARY JUDGMENT

The EEOC's regulations on summary judgment are patterned after Rule 56 of the Federal Rules of Civil Procedure, which provides that a moving party is entitled to summary judgment if

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<sup>1</sup>(...continued)

Limit or in the Alternative, Agency's Motion for Leave to File a Reply to Complainant's Opposition to the Agency's Motion for Summary Judgment. The Agency requests are **DENIED**.

there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. There is no genuine issue of material fact where the relevant evidence in the record, taken as a whole, indicates that a reasonable factfinder could not return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

## **B. FACTS**

1. Complainant practiced law from 1967 until 1995.
2. Complainant was the senior partner in a small law firm from 1984 to 1995.
3. Complainant retired from active legal practice in 1995 to attend film school.
4. Subsequently, Complainant formed a film company and engaged in some part-time civil litigation consulting work between 1996 to 2000. The consulting work took 30% of his time.
5. In 2001, Complainant returned to law school and received an L.L.M from the Georgetown University Law Center.
6. Complainant applied for an SK-16 Senior Trial Attorney position with the U.S. Securities and Exchange Commission's (SEC) Midwest Regional Office, Vacancy Announcement No. 03-268-DW. The position was opened in October 2003.
7. The applications for the position were screened by a Human Resources (HR) Specialist, who decided not to certify Complainant as being minimally qualified. Thereafter, Complainant contacted the HR Specialist via telephone and after the conversation, she decided to forward Complainant's application to the selecting official for consideration.
8. Senior Associate Regional Director, Midwest Regional Office, and selecting official

for the position, Robert Burson (Caucasian, American/Irish/English, male, DOB: 4/26/54), selected two candidates for the position. Complainant was not selected.

9. Complainant applied for an SK-14, General Attorney position with the SEC's Securities Industry Division, Vacancy Announcement No. 04-034-DC.

10. HR received the applications for the position, screened them and certified sixty-four candidates, including Complainant, as being minimally qualified for the position.

11. James Clarkson (Caucasian, White, male, DOB: 3/1/42), Director of Regional Office Operations in Enforcement, the selecting official for the position, selected Francisco Medina from the certificate, without conducting an interview. Clarkson interviewed Medina a few months before the vacancy announcement was posted for another position (not presently at issue) and invited Medina to apply for General Attorney position 04-034-DC.

12. Complainant applied for an SK-17, Supervisory Trial Attorney position with the SEC's Southeast Regional Office in Miami, Vacancy Announcement No. 04-077-MK.

13. HR received the applications for the position, screened them and certified thirteen candidates, including Complainant, as being minimally qualified for the position.

14. Associate Regional Director and selecting official, Glenn Gordon (Caucasian, American/Eastern European Descent, White, male, DOB: 6/5/61), reviewed the certificate and resumes and identified three candidates for interviews. Complainant was not selected for an interview. Gordon, Peter Bresnan and Teresa Verges interviewed the candidates. Robert Levenson was selected for the position.

15. Complainant applied for an SK-14, General Attorney position with the SEC's Fort Worth District Office, Vacancy Announcement No. 04-083-DJ.

16. HR received the applications for the position, screened them and certified twenty-three candidates, including Complainant, as being minimally qualified for the position.

17. Associate District Administrator and selecting official, Spencer Barasch (Caucasian, American, male, DOB: 11/27/57), and other managers reviewed the certificate and identified applicants for interviews. Complainant was not interviewed.

18. Two individuals were selected for the position, Jennifer Brandt (Caucasian, female) and Jay Reddien (Caucasian, male). Reddien declined the offer and a third offer was extended to Jason Lewis (Native American, male), who accepted the offer.

19. Complainant applied for an SK-16, Senior Special Counsel position with the SEC's Division of Market Regulation, Washington, D.C., Vacancy Announcement No. 04-088-MB.

20. HR received the applications for the position, screened them and certified thirty-six candidates, including Complainant, as being minimally qualified for the position.

21. Associate Directors David Shillman (Caucasian, American, male, DOB: 9/9/60) and Elizabeth King (American, White, female, DOB: 12/31/66), the selecting officials, reviewed the applicants and identified eleven applicants for interviews. Complainant was not interviewed. John Roeser (Caucasian, male) and Michael Gaw (Asian, male) were selected for the position.

22. Complainant applied for an SK-16, Trial Attorney position with the SEC's Securities Industry Division, Vacancy Announcement No. 04-128-MK.

23. HR received the applications for the position, screened them and certified forty-five candidates, including Complainant, as being minimally qualified for the position.

24. Glenn Gordon, Robert Levenson (Caucasian, White, male, DOB: 11/12/57), and Christopher Martin (Caucasian, American, male, DOB: 10/27/70), were members of the

interview panel. Nine applicants, including Complainant, were interviewed by the panel.

25. Gordon was the selecting official for the position.

26. Complainant was not selected for the Trial Attorney position.

27. Complainant applied for an SK-12/13/14 Advisor position with the SEC's Securities Industry Division, Vacancy Announcement No. 04-060-DP.

28. HR received the applications for the position, screened them and produced a certificate for the Division of Corporate Finance for further consideration. Complainant was not included in the certificate.

29. The Attorney Advisor position was open only to SEC employees.

30. Complainant applied for an SK-16, Trial Attorney position with the SEC's Northeast Regional Office, Vacancy Announcement No. 03-256-TR.

31. HR received the applications for the position, screened them and certified sixty candidates, including Complainant, as being minimally qualified for the position.

32. Barry Rashkover (protected categories unknown), Associate Regional Director, was the selecting official.

33. Ten applicants were interviewed for the position.

34. David Markowitz was selected for the position.

35. Complainant applied for an SK-16, Trial Attorney position with the SEC's Enforcement Division, Washington, D.C., Vacancy Announcement No. 04-069-DC.

36. HR received the applications for the position, screened them and certified eighty-eight candidates, including Complainant, as being minimally qualified for the position.

37. A panel consisting of three members, Ken Miller, Suzanne Romajas, and Rick

Simpson, reviewed the certificate and referred seventeen applicants for interviews to the selecting official, Kornblau. Complainant was not referred to the selecting official for an interview.

38. Complainant applied for a Trial Attorney position, Vacancy Announcement No. 03-206-DC, with the SEC's Enforcement Division, in Washington, D.C.

39. Complainant was included in the Excepted Service Attorney Selection Certificate (certificate) for the position as being minimally qualified for the position.

40. The certificate listed one hundred and thirty-seven applicants as minimally qualified for the position.

41. A panel consisting of three Enforcement employees reviewed the certificate and interviewed twenty-two of the certified applicants, including Complainant.

42. Eight candidates were referred to the selecting official, David Kornblau (Caucasian, American, male, DOB: 4/18/61), Chief Litigation Counsel, Enforcement, by the panel.

Complainant was initially not included. However, one of the panel members referred Complainant's resume to Kornblau, because he deemed it "unusual." IR, F-2 at 14.

43. All nine candidates were interviewed by Kornblau and Peter Bresnan (Caucasian, Irish/German/Hungarian/Jewish, male, DOB: 3/24/55), Deputy Chief Litigation Counsel.

44. Six candidates were selected for the 03-206-DC positions. Complainant was not one of the candidates selected.

45. Complainant applied for an SK-14, General Attorney position with the SEC's Securities Industry Division, San Francisco District Office (SFDO), Vacancy Announcement No. 03-208-DC.



46. HR received the applications for the position, screened them and certified nineteen candidates as being minimally qualified for the position. Complainant was not included in the certificate.

47. Robert Mitchell, Assistant District Administrator for Enforcement, selected Jina Choi for the General Attorney position. Mitchell knew Choi, therefore, she was not interviewed for the position.

48. Complainant applied for an SK-17, Supervisory Trial Attorney position with the SEC's Pacific Regional Office, Vacancy Announcement No. 03-251-DC.

49. HR received the applications for the position, screened them and certified twenty-one candidates, including Complainant, as being minimally qualified for the position.

50. Associate Regional Directors, Sandra Harris (Caucasian, Irish/German/Romanian/Dutch/Native American, female, DOB: 7/12/58) and Randall Lee (Asian, American, male, DOB: 8/15/61), identified seven applicants for interviews. Complainant was not selected for an interview.

51. Michael Piazza (Caucasian, male, over 40) was selected for the position.

52. Complainant applied for an SK-13/14, Attorney-Advisor position with the SEC's Securities Industry Division, Office of International Affairs, Washington, D.C., Vacancy Announcement No. 04-027-DC.

53. HR received the applications for the position, screened them and issued a certificate listing the applicants who were minimally qualified for the position. Complainant was not included in the certificate.

54. Complainant was not selected for the position.

55. Complainant applied for a non-posted Staff Attorney position with the Northeastern Regional Office.

56. Complainant was interviewed by several employees in the office, including Christopher Castano (Staff Attorney), Bennett Ellenbogen (Trial Attorney) and Leslie Kazon. Complainant's file was forwarded to Deputy Regional Director, Edwin Nordlinger, for further consideration.

57. Complainant was not selected for a position.

58. On February 18, 2004, the Agency canceled Vacancy Announcement No. 04-027-DP, SK-16 Attorney-Advisor, Securities Industry, Division of Corporate Finance. The Vacancy Announcement was set to close on February 25, 2004.

59. Complainant is currently employed as an SK-14 Trial Attorney in the SEC's Division of Enforcement in Washington, D.C.

### C. CONCLUSIONS OF LAW

To establish a *prima facie* case of disparate treatment in a nonselection case, a Complainant may show: (1) that he/she is a member of a group protected from discrimination; (2) that he/she applied for and was qualified for the position at issue; and (3) that he/she was rejected under circumstances which give rise to an inference of unlawful discrimination, *e.g.*, the Agency continued to seek applicants or filled the positions with persons who were not members of Complainant's protected group. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), n.13.

If a *prima facie* case is established, the burden shifts to the Agency to articulate a legitimate, non-discriminatory reason for the challenged action. *Texas Dep't of Cmty. Affairs v.*

*Burdine*, 450 U.S. 248, 253-54 (1981); *McDonnell Douglas*, 411 U.S. at 802. Complainant may then show that the explanation offered by the Agency was not the true reason, but a pretext for discrimination. *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804. The ultimate burden of persuading the trier of fact that the Agency discriminated against the Complainant always remains with the Complainant. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

Although the initial inquiry in a discrimination case usually focuses on whether the Complainant has established a *prima facie* case, following this order of analysis is unnecessary when the Agency has articulated legitimate, nondiscriminatory reasons for its actions. See *Washington v. Dep't of the Navy*, EEOC Petition No. 03900056 (May 31, 1990). In such cases, the inquiry shifts from whether the Complainant has established a *prima facie* case, to whether he has demonstrated by a preponderance of the evidence that the Agency's reasons for its actions were merely a pretext for discrimination. *Id.* See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-17 (1983). In this case, I find that the Agency has articulated legitimate, nondiscriminatory reasons for its actions.

#### ARTICULATED NONDISCRIMINATORY REASONS

1. Vacancy Announcement No. 03-268-SW

Robert Burson, selecting official, indicated that he was looking for a candidate who could manage and conduct complex trials, who possessed practical knowledge of the securities laws, had excellent writing and pretrial skills, and exhibited strong interpersonal skills. Burson stated that he selected Thomas Szomba, based on his trial experience at SEC and the U.S. Attorney's Office as a federal prosecutor, and his success in trying complex securities cases. Burson also