

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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Gary J. Aguirre,)	
)	
Plaintiff,)	Civil Action No. 08-1872 (ESH)
)	
v.)	
)	
Securities and Exchange Commission,)	
)	
Defendant.)	
)	

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S CROSS-MOTION FOR SUMMARY
JUDGMENT IN PART AND OPPOSITION TO DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT IN PART**

I. INTRODUCTION

Plaintiff seeks the records containing the information upon which the Securities and Exchange Commission (SEC) *publically* justified its decision to shut down its investigation of Pequot Capital Management (Pequot) and its chief executive officer, Arthur Samberg (Samberg), for suspected insider trading in the securities of the Microsoft Corporation (Microsoft). The SEC first justified that decision in its Case Closing Recommendation (CCR),¹ which it released to the media the evening before its Director of the Division of Enforcement (Enforcement), Linda Thomsen (Thomsen), testified before a Senate committee looking into the SEC’s handling of its Pequot investigation.² In September 2008, the SEC’s Office of Inspector General (OIG) released its own report on SEC’s handling of the Pequot investigation (OIG Report), which incorporated the same justifications given by the SEC in the CCR for closing the Microsoft piece of the

¹ See Case Closing Recommendation (CCR), dated November 30, 2006, Ex. 10, at 3; Aguirre Decl. ¶ 11.

² The CCR was attached to the testimony of Linda Thomsen, the Director of the Division of Enforcement, which the SEC released to the Wall Street Journal immediately before the Senate hearing on December 5, 2006. See Siobhan Hughes, *Moving the Market: SEC Officials to Defend Decisions In Insider-Trading Probe of Pequot*, Dec. 5, 2006, at C3.

investigation.³ Plaintiff now seeks the records containing the information which the SEC cited in the CCR and in the OIG Report as its justification for closing its 2005-2006 investigation of Pequot's and Samberg's trading in Microsoft securities.

To the extent still in dispute,⁴ Plaintiff seeks the records containing information about the following events described in the OIG Report and CCR:

- 1) A meeting between SEC attorneys and Pequot-Samberg attorneys on April 3, 2006;⁵
- 2) Testimony of two Goldman Sachs employees;⁶
- 3) Statements of four Microsoft employees taken during phone interviews;⁷
- 4) Statements of David Zilkha during the two proffer sessions.⁸

Until recently, the SEC has relied exclusively on Exemption 7(A).⁹ Apparently losing confidence in Exemption 7(A), the SEC wishes to "reserve" Exemptions 5, 6 and 7(C). As discussed below, the SEC's new theories are procedurally and substantively flawed.

In relation to the SEC's assertion of Exemption 7(A), the release of the information could only harm an ongoing investigation if in fact the SEC was searching for grounds to file a civil or criminal proceeding against someone. The SEC has a different agenda with its current Pequot "investigation," just as it *conceded* it had a different agenda with its earlier investigation. The SEC did not close its last investigation of Pequot's trading in Microsoft securities, because the

³ See Ex. 11, excerpts of *Re-Investigation of Claims by Gary Aguirre of Preferential Treatment and Improper Termination*, Case No. OIG-431, Sep. 30, 2008, (OIG Report) at 90-91; Aguirre Decl. ¶ 12.

⁴ Only the records described in subparagraphs 1 through 6 of ¶ 46 of the Second Amended Complaint remain in dispute. The SEC has stated in its motion for summary judgment that it provided Plaintiff "the actual transcripts" of the statements or testimony sought by subsection 7 of ¶ 46. Assuming that is the case, Plaintiff seeks no further documents described in this request. Likewise, Plaintiff accepts the SEC's representation that it is not withholding any records sought by subparagraph 8 of ¶ 46 to the Second Amended Complaint

⁵ See Second Amended Complaint, ¶ 46, subparagraph 5.

⁶ *Id.*, ¶ 46, subparagraph 6. In his Nov. 9, 2006, transcribed statement taken by Senate investigators, Branch Chief Robert Hanson identified the two Goldman Sachs employees as Ned Segal and Matthew Maslow (Reporter's transcript at 64). The transcript is available at the offices of the Senate Committee on Finance. Aguirre Decl., ¶ 22.

⁷ *Id.*, ¶ 46, subparagraphs 3 and 4.

⁸ *Id.*, ¶ 46, subparagraphs 1 and 2. These proffer sessions were described in the CCR (Ex. 10, at 3) and in the OIG report (*supra*, fn. 4, at 90).

⁹ Defendant's Motion for Summary Judgment in Part (hereinafter Defendant's Partial MSJ) (Docket No. 34), at 1.

evidence trail turned cold. It simply did not follow the posted signs, which could not have been clearer if they were in blinking neon saying “this way.” There are two possibilities: the SEC was operating at the level of the Keystone Kops or it was not conducting a genuine law enforcement investigation, a possibility suggested by the Senate Report.¹⁰ The evidence points to the latter.

Second, the facts—as opposed to the SEC’s conclusory statements—demonstrate that the records sought by Plaintiff could not possibly harm a genuine SEC investigation, if indeed one truly exists. The SEC argues its investigation could be harmed in the following ways:

- (1) witness intimidation;
- (2) chilling investigations by making third parties reluctant to provide information;
- (3) giving a suspected violator early access to information in the case against it, allowing it to construct bogus defenses and to manufacture or destroy evidence;
- (4) revealing the scope, direction, or focus of investigative efforts;
- (5) revealing the agency’s impressions of testimony; and
- (6) hindering the government’s ability to shape and control its investigations.¹¹

All of these theories assume the disclosure of the information sought by Plaintiff would add to the universe of information now available to the public and thus to the targets.

The SEC fails to acknowledge that any target of the investigation would already know all facts necessary to frustrate any SEC or criminal investigations in the six ways specified above. As discussed in the next two sections, there is little about the first investigation, its closure, and the new evidence that is not already public. Indeed, the public and the SEC learned about the new evidence at the same time *from the media*. The only aspect of the investigation which is not public is exactly how the SEC botched it by ignoring the blueprint Plaintiff gave his supervisors a couple of months before they fired him. And that is the information Plaintiff seeks through the

¹⁰ The Senate Report (at 43) questions “How hard did the SEC look for such evidence?” regarding evidence that John Mack had knowledge of General Electric’s planned acquisition of Heller Financial and then points to facts that suggest the SEC did not try to find that evidence. The Senate Report made similar comments about the SEC’s investigation of Pequot’s trading in Microsoft securities. “This sort of evidence [indicating Pequot’s illegal trading in Microsoft securities] clearly warranted a serious and thorough investigation by the SEC.” *Id.* at 21 See “Despite the evidence, the SEC closed the Microsoft investigation and discounted the trades as unworthy of an enforcement action.” *Id.* at 43

¹¹ Defendant’s Partial MSJ (Docket No. 34), at 10.

FOIA claim now before the Court. The targets already know how the SEC botched the investigation, because their attorneys took the SEC hand-in-hand down the wrong path.¹²

Third, the SEC concedes that Plaintiff only seeks records relating to the earlier investigation, but argues, “The re-opened investigation concerns the same suspicious trading activity at issue in the original investigation.”¹³ This statement is inaccurate. Though both dealt with Pequot’s trading in Microsoft securities, the investigations focus on different tips and different trades. The SEC’s prior investigation focused on a purported tip on April 17, 2001, with related trading on April 19, and a second tip on April 27, 2001, with trading on April 30.¹⁴ The SEC has publically stated that neither of these tips could serve as the basis for an insider trading charge against Pequot or Samberg.¹⁵ James Eichner (Eichner), the SEC staff attorney who took over the investigation after Plaintiff’s firing testified the purported tips were not “material,” a fatal defect in an insider trading case.¹⁶ The new evidence points to a tip on April 9, 2001, and trading between April 9 and April 11, 2001.¹⁷

II. PLAINTIFF’S CLAIM RAISES PUBLIC POLICY CONCERNS WHICH REQUIRE CAREFUL SCRUTINY OF THE SEC’S ASSERTION OF EXEMPTION 7(A).

The SEC’s assertion of Exemption 6 and Exemption 7(C),¹⁸ assuming there are real privacy concerns, requires the Court to balance the privacy interests of third parties mentioned in the records against the public interest in disclosure of the records. *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004); *Ripskis v. Dep’t of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Additionally, the public interest in disclosure under the unique facts of this

¹² As discussed below, the SEC began to back off of its investigation into Pequot’s trading in Microsoft securities as a consequence of information it claims to have obtained on April 3, 2006, during a meeting between SEC staff and Samberg’s and Pequot’s attorneys.

¹³ Defendant’s Partial MSJ (Docket No. 34), at 7.

¹⁴ CCR, Ex. 10, at 3.

¹⁵ *Id.*

¹⁶ *Infra* fns. 100 and 205.

¹⁷ *Id.*

¹⁸ Defendant’s Partial MSJ (Docket No. 34), fn. 3 at 5-6.

case calls upon the Court to carefully scrutinize the SEC's grounds for asserting Exemption 7(A). As noted by its own inspector general, and corroborated by other evidence, the SEC has a history for using the fiction or appearance of an "ongoing" investigation to block legitimate FOIA requests.¹⁹ The groundless assertion of Exemption 7(A) defeats the salutary objectives of FOIA. In this case, the information sought would establish with greater clarity that senior SEC officials have placed their concerns with the SEC's public image, as well as their own, above the SEC's mission to enforce the securities laws, with calamitous consequences to the public.

Congress created the Freedom of Information Act (FOIA) as the public's vehicle to ferret out the truth. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "Free people are, of necessity, informed; uninformed people can never be free." Sen. Judiciary Comm., Freedom of Information, 88th Cong., 1st Sess. 3 (1963) (remarks of Sen. Edward Long).

The public interest in disclosure is directly proportional to the harm the SEC's botched investigation caused the capital markets and the public. And that harm is difficult to overstate. The statute of limitations has now expired on any criminal charge for insider trading²⁰ and any civil action for penalties,²¹ up to three times the unlawful gain.²² However, these consequences are minor in comparison with other harms caused by the SEC's closing of this investigation.

¹⁹ *Infra*, at 28-32.

²⁰ The statute of limitations for insider trading, a violation of Section 10(b) of the Securities and Exchange Act of 1934 (Exchange Act), is five years as set forth in 18 U.S.C. § 3282 (1988). *United States v. O'Hagan*, 139 F.3d 641 (8th Cir. Minn. 1998); See *United States v. United Med. & Surgical Supply Corp.*, 989 F.2d 1390, 1398 (4th Cir. 1993).

²¹ Section 21A(d)(5) of the Exchange Act, 15 USC § 78u-1(d)(5).

²² Section 21A(a)(2) of the Exchange Act, 15 USC § 78u-1(a)(2).

The SEC's closure of the Microsoft piece of the Pequot investigation was a necessary step to close its entire investigation of Pequot for insider trading and other forms of market abuse. Losing sight of its mission, the SEC precipitously and simultaneously closed seventeen investigations of Pequot for classic insider trading in nineteen public companies and a specialized form of insider trading in 101 public companies,²³ as well as its investigations into Pequot's suspected wash trades in millions of shares of ninety-two public companies.²⁴

Plaintiff and more experienced staff working on the Pequot investigation believed that many hedge funds, particularly the big ones like Pequot, were engaged in an institutional form of insider trading that had passed under the SEC's radar for decades. Plaintiff described this theory when he testified before the Senate Judiciary in June 2006:

But that system breaks down when it comes to hedge fund referrals. They are rarely, if ever, investigated. The investigation I conducted was an anomaly. The right person at intake found the right senior SEC official. That matter was assigned to me. I then found 13 other insider trading referrals on the same hedge fund involving 15 public companies that had been gathering dust. None had been investigated other than a cursory review. No one had looked at the referrals collectively for any patterns. I contacted and met with the head of market surveillance at the SRO [Self Regulating Organization] that originated most of the referrals. He opined that a class of hedge funds was routinely getting unlawful tips from investment banks. According to him, for the investment banks, "it was the only game in town." This was seven months before the FSA began saying much the same thing in the UK. He singled out the hedge fund I was investigating, saying they were "just too lucky." Over the next few months, SROs sent me four more insider trading referrals on the same hedge fund.²⁵

²³ CCR, Ex. 10, at 4.

²⁴ *Id.* at 3.

²⁵ *Hedge Funds and Independent Analysts: How Independent Are Their Relationships? Hearings Before the U.S. Sen. Comm. On the Judiciary*, 19th Cong., available at http://judiciary.senate.gov/hearings/testimony.cfm?id=1972&wit_id=5485 (2006) (statement of Gary J. Aguirre, Former Investigator, U.S. Securities and Exchange Commission). For the sake of accuracy, Plaintiff later learned from Senate investigators that the SRO official with whom Plaintiff met was a high ranking official, but not the head of the SRO's market surveillance unit.

Plaintiff also received corroboration that Pequot engaged in “serial” insider trading from a most credible source within the SEC.²⁶

The Senate Report concluded the SEC “squandered” “an ideal opportunity” through its mishandling of the Pequot investigation “to develop expertise and visibility into the operations of a major hedge fund while deterring institutional insider trading and market manipulation through vigorous enforcement.”²⁷ Pequot would eventually close down “in May [2009] under the weight of investigations into possible insider trading,” according to the Wall Street Journal, but only after Self Regulating Organizations (SROs), such as the New York Stock Exchange, had sent forty-five more referrals of Pequot’s suspected insider trading to the SEC.²⁸ Several books published over the past year suggest the SEC’s mishandling of the Pequot case was symptomatic

²⁶ In his Dec. 5, 2006, written testimony before the Senate Judiciary Committee, Plaintiff testified: “Independently, Hilton Foster (Foster), perhaps the most experienced SEC attorney at conducting insider trading investigations, told me that he had investigated PCM a decade earlier and suspected Samberg and PCM were ‘serial inside traders.’” *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity: Hearings Before the U.S. Sen. Comm. On the Judiciary*, 19th Cong., available at http://judiciary.senate.gov/hearings/testimony.cfm?id=2437&wit_id=5485 (2006) (statement of Gary J. Aguirre, Former Investigator, U.S. Securities and Exchange Commission, Part I).

Plaintiff’s statement was corroborated by his email of Oct. 8, 2004, to his supervisors, *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity, 2006: Hearing Before the Senate Comm. on the Judiciary*, S. HRG. 109-898, at 119 (Dec. 5, 2006) (hereinafter “S. HRG. 109-898”), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:35458.pdf. This email read in part as follows:

At yesterday’s training session, Laura Joseph 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 [sic] 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.

The Senate Report quotes Foster’s testimony why the Pequot investigation offered a unique opportunity for the SEC to successfully bring an insider trading case against a large hedge fund. Senate Report at 16-17.

²⁷ Senate Report at 46.

²⁸ Kara Scannell, *SEC Says It Got 45 Pequot Tips It Pursued*, W. St. Journal Online Aug. 12, 2009 at M12.

of the agency's failures²⁹ which, according to its last chairman, contributed to the 2008 financial crisis.³⁰

In December 2009, the SEC's Director of Enforcement, Robert Khuzami, gave a national conference of CPAs the same message SRO officials gave Plaintiff five years earlier:

[T]he Galleon and Cutillo cases involved the repeated and more systemic effort by hedge funds to obtain material non-public information, including the cultivation of sources within the issuer community who were willing to provide material nonpublic information about their companies. Extending beyond the "opportunistic" conduct that characterized many previous insider trading cases, Galleon and Cutillo suggest that the use of insider trading as a business model, particularly for funds with event-driven strategies, is not isolated and must be explored.³¹

Director Khuzami's description of "repeated and more systemic effort by hedge funds to obtain material non-public information" and hedge funds' use of insider trading as a "business model" is indistinguishable from the institutional insider trading Plaintiff and other SEC staff were *investigating five years earlier*. At that time, the SEC had a twenty-five year history of ignoring insider trading by hedge funds.³²

The SEC's decision to take the wrong path with its Microsoft investigation in 2005 is inexplicable. In May and June 2005, Plaintiff uncovered direct evidence, according to his

²⁹ David Einhorn, Joel Greenblatt, *Fooling Some of the People All of the Time Updated and Revised: A Long Short Story* (2008); Erin Arvedlund, *Too Good to Be True, The Rise and Fall of Bernie Madoff* (2009)

³⁰ Stephen Labaton, *S.E.C. Concedes Oversight Flaws Fueled Collapse*, N.Y. Times, Sep. 27, 2008, at A1: "The chairman of the Securities and Exchange Commission, a longtime proponent of deregulation, acknowledged on Friday that failures in a voluntary supervision program for Wall Street's largest investment banks had contributed to the global financial crisis, and he abruptly shut the program down."

³¹ Remarks By Robert Khuzami, Director, Division of Enforcement, Securities and Exchange Commission, at the AICPA National Conference on Current SEC And PCAOB Developments (as released by the SEC); Dec. 8, 2009, available at <http://www.sec.gov/news/speech/2009/spch120809rsk.htm>.

³² As late as September 2003, the SEC staff report on hedge funds described its efforts to police hedge funds: it identified thirty-eight enforcement actions brought by the SEC from 1999 to September 2003. (Staff Report to the U.S. Securities and Exchange Commission, *Implications of the Growth of Hedge Funds*, at 90 (Sep. 2003), available at <http://www.sec.gov/news/studies/hedgefunds0903.pdf>). All of those cases involved the same type of hedge fund fraud: fraud by hedge funds that victimized their own investors. For the twenty-five years before the Pequot investigation, the SEC had filed only one case against a hedge fund or its principals, *SEC v. Gary M. Kornman*, SEC Litigation Release No. 18836 (Aug. 18, 2004), a one-man operation that vanished after the SEC filed its case. According to the SEC Release, "Kornman's hedge fund profited by approximately \$67,000 when the merger ultimately took place in August 2001."

supervisors, indicating Pequot and Samberg had engaged in insider trading in Microsoft securities.³³ Such evidence is rare, according to senior officials in the SEC's Division of Enforcement.³⁴ The evidence indicated a Microsoft employee, Zilkha, tipped Samberg on Microsoft quarterly results on April 9, 2001, ten days before the public announcement of those results. Between April 9 and April 11, Samberg directed trades in synthetic Microsoft stock that generated \$14.2 million in profits to Pequot hedge funds under his personal management.³⁵ These core facts were depicted on a one-page timeline Plaintiff delivered, along with a binder of supporting evidence, to his supervisors on June 14, 2005,³⁶ and the next day to two FBI agents and an Assistant US Attorney, who would open a parallel criminal investigation.³⁷ It identified

³³ Senate Report at 20: "Enforcement personnel agreed Aguirre had unearthed 'direct evidence' of insider trading." Plaintiff explained how he found the evidence in his Aug. 3, 2005, email: "I have focused on the Core Group because that's the one that is directly managed by Samberg. That's how I found Zilkha." *Supra*, fn. 27, S. HRG. 109-898 at 340.

³⁴ Thomas C. Newkirk, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Insider Trading—A U.S. Perspective*, Speech at the 16th International Symposium on Economic Crime Jesus College, Cambridge, England; available at <http://www.sec.gov/news/speech/speecharchive/1998/spch221.htm>. ("Direct evidence of insider trading is rare. There are no smoking guns or physical evidence that can be scientifically linked to a perpetrator. Unless the insider trader confesses his knowledge in some admissible form, evidence is almost entirely circumstantial.") Former Enforcement Director Linda Thomsen testified on this subject before the Senate Judiciary Committee on Sep. 26, 2006:

Piecing together an insider trading case can be a complex and painstaking process. It is rare to find a "smoking gun;" virtually all insider trading cases hinge on circumstantial evidence. It is quite common for insider traders to come up with alternative rationales for their trading—rationales that the staff must refute with inferences drawn from the timing of trades, the movement of funds and other facts and circumstances. And because many insider trading cases involve secret communications between two people – the tipper and his tippee – assembling compelling circumstantial evidence is often difficult. In some cases, such as when a corporate insider trades on company information or when an outsider steals nonpublic information, there are no communications at all to use as evidence at trial, but only the facts of the wrongdoer's access and trading.

Available at http://judiciary.senate.gov/hearings/testimony.cfm?id=2405&wit_id=5777.

³⁵ Samberg directed the purchase of 15,000 shares of Microsoft synthetic stock on April 9 and 10 using calls and puts with a strike price at \$55 See transcript and exhibits of the January 23, 2006, examination of Arthur Samberg (Samberg exam), Ex. 8(B), at Bates Nos. SEC 0007867 and SEC 0007971, Aguirre Decl., ¶ 8. Using the sale price on May 14, 2001, the Pequot funds managed by Samberg made \$11.6 million on the calls (SEC0007968) and another \$1.84 million on the puts (SEC 0007971) for a total profit of \$13.44 million. Samberg also directed trades in 13,200 calls (SEC0007968) and shorted an equal number of puts on April 11 (SEC0007972) which produced another \$778,000 in profits, for a total \$14.22 million. *Id.*, at 81-82.

³⁶ Senate Report at 24: "On June 14, 2005, Kreitman asked Aguirre to walk him through the evidence of Pequot's suspicious trades. Aguirre prepared a tabbed binder with hundreds of pages of documents including both blue sheet data reflecting Pequot's trades and Samberg's e-mail exchanges."

³⁷ Aguirre Decl., ¶ 20.

the tipper and tippee, the nature of the tip, and the date of the tip.³⁸ It pinpointed April 9, 2001, as the date of the “presumed MNI [material nonpublic information] communication” from Zilkha to Samberg on Microsoft’s quarterly results, scheduled for release on April 19.³⁹ The sole issue boiled down to this: what exact details did Zilkha provide Samberg on that quarter’s results?

As it turns out, the investigation was one step away from obtaining the two emails that would prove what details Zilkha provided Samberg on April 9, 2001, regarding Microsoft’s quarterly results. Plaintiff could not take that step before he was fired, because the SEC’s investigation of Pequot’s trading in Microsoft securities was on hold until FBI agents interviewed Zilkha, which occurred after the SEC fired Plaintiff.⁴⁰ Those two emails and other new evidence would come to Plaintiff three years later.⁴¹ Plaintiff provided this new evidence to Senate staff and the FBI in late November and early December 2008 and to the SEC in early January 2009.⁴² A few days after the media first reported on the new evidence in December 2008,⁴³ the SEC abruptly reopened its investigation.⁴⁴

The timeline Plaintiff prepared in June 2005 pointed to a 48-hour window during which Zilkha would have obtained the “tidbits” sought by Samberg: from the morning of April 7, when Zilkha sent his “MSFT ASAP” email to Samberg⁴⁵ and April 9, likely before trading, when

³⁸ *Id.*

³⁹ The Senate released the timeline. *Supra*, fn. 28, S. HRG. 109-898 at 628. Aguirre Decl. ¶ 3, Ex. 3.

⁴⁰ Aguirre Decl., ¶ 7, Ex. 7, Plaintiff’s June 29, 2005, email to Assistant Director Mark Kreitman reads in part: “The Samberg-Microsoft investigation is on hold until David Anders and the FBI speak with David Zilkha.” Plaintiff’s August 17, 2005, emails to Kreitman and other SEC staff working on Pequot investigation provided this update: “Status of FBI contact with Zilkha; we want Samberg exam immediately after Zilkha interview; we’re waiting agent’s callback.” *Supra*, fn. 27, S. HRG. 109-898 at 359.

⁴¹ *Infra*, at 21-25.

⁴² Aguirre Decl., ¶ 23(c) and (d).

⁴³ Amit R Paley, *New Evidence Emerges in Closed Insider-Trading Case*, Washington Post Dec. 12, 2008, at D1; Scot Paltrow, *Pequot’s Puzzling Payments*, Conde Nast Portfolio, Dec. 10, 2008, available at <http://www.portfolio.com/news-markets/top-5/2008/12/10/Samberg-Pequot-Zilkha-Mack/index.html>.

⁴⁴ *Infra*, fn. 183.

⁴⁵ June 2005 timeline, Ex. 3. The timeline indicates Zilkha told Samberg on April 7 that he would respond “ASAP” regarding Samberg’s request for “tidbits” on Microsoft’s quarterly results. The timeline also shows

Zilkha provided the “tidbits.” A second timeline, prepared by Plaintiff in December 2008, demonstrates the two new emails fit perfectly within the original timeline Plaintiff left on his supervisor’s desks in June 2005.⁴⁶ For reasons the SEC has never made public, its senior staff guided its investigation away from Pequot’s trading on April 9 through 11, 2001. This FOIA claim seeks the records why the SEC failed to follow the blinking neon lights saying “this way.”

III. ALL DETAILS OF THE SEC’S PAST INVESTIGATION AND ITS “NEW INFORMATION” ARE KNOWN TO THE MEDIA, PUBLIC AND TARGETS.

The details of the prior investigation, its closing, and the “new information” upon which the SEC reopened its “investigation” are relevant to two issues raised by the SEC’s assertion of Exemption 7(A). First, when combined with other evidence, the facts demonstrate the SEC has not conducted its Pequot investigation for law enforcement purposes since at least June 2006.⁴⁷ Second, the extent to which this information is available to the public belies the SEC’s claim that the release of the requested records could harm its purported investigation of Pequot.

The Opening of the First Investigation

The evidence discussed in this section was found by Plaintiff between mid-May and mid-June of 2005 in documents produced by Pequot in response to subpoenas served by Plaintiff on Pequot and its principals earlier in 2005. The information was released as part of the Senate Report on the Pequot investigation or pursuant to orders of this court in the earlier FOIA case. It has also been the subject of wide media coverage.⁴⁸

Samberg first sought information from Zilkha on Microsoft on February 28, 2001, while Zilkha was still employed by Microsoft, but after Zilkha agreed to join Pequot where he would

Zilkha’s communication to Samberg on April 9. It thus implies that Zilkha collected information regarding Microsoft’s quarterly results sometime between April 7 and April 9.

⁴⁶ A copy of Plaintiff’s supplemental timeline, incorporating the new evidence, which Plaintiff provided to Senate investigators in Dec. 2008, is attached hereto as Ex. 4; Aguirre Decl. ¶ 4.

⁴⁷ *Infra*, at 27.

⁴⁸ Paltrow, *infra*, fn. 111.

report directly to Samberg. This communication came less than a week after several hedge funds managed by Samberg had taken a \$9.1 million loss on trades directed by Samberg in Microsoft synthetic stock.⁴⁹ Samberg's February 28, 2001, email to Zilkha did not overtly request him to provide material nonpublic information regarding Microsoft. In relevant part, it reads: "i'm [sic] not impressed with our research on msft (Microsoft). do you have any current views that could be helpful? Might as well pick your brain before you go on the payroll!!! [sic]"⁵⁰

Zilkha took Samberg's email literally. He responded by email on March 1, 2001, with his "views" on Microsoft but gave Samberg no material nonpublic information. Samberg apparently had no interest in Zilkha's "views," since he placed no trades on Microsoft over the next month.⁵¹ These events were noted in the original timeline Plaintiff provided to his supervisors, the Assistant US Attorney (SDNY) and two FBI agents in June 2005.⁵²

Five weeks later, Samberg again sought information from Zilkha on Microsoft, but this time his email was very specific. Samberg's April 6, 2001,⁵³ email sought "tidbits" on Microsoft results for Microsoft's third quarter, which it had closed on March 31, 2001,⁵⁴ and which it would release on April 19, 2001.⁵⁵ Samberg's email reads: "i own some msft based on the win2000 cycle, despite recurring indications from knowledgeable people that the company will either preannounce or take guidance down. any tidbits you might care to lob in would be appreciated [sic] (emphasis added)."⁵⁶

⁴⁹ Samberg directed the purchase of 27,000 call options in Microsoft on March 16, 2001, and sold them five days later for a loss of \$4.9 million. See Ex. 8(B), Samberg exam, at SEC0007966 (Ex. 105 thereto). He directed a short of 27,000 put options on March 16, 2001, and covered them five days later for a loss of \$4.2 million. *Id.*, at SEC0007970.

⁵⁰ *Id.*, at SEC0007955 (Ex. 102 thereto).

⁵¹ *Id.*, at SEC0007956 (Ex. 103 thereto).

⁵² June 2005 timeline, Ex. 3. Aguirre Decl., ¶ 20.

⁵³ Ex. 8(B), Samberg exam, at SEC0007981 (Ex. 108 thereto).

⁵⁴ Rebecca Buckman, *Microsoft Easily Tops Reduced Forecasts—Fiscal Third-Period Net Rose on 14% Sales Gain, Aided by Demand for Software*, W. St. Journal, Apr. 20, 2001, at A3.

⁵⁵ *Id.*

⁵⁶ See Apr. 6, 2001, email from Samberg to Zilkha, Ex. 8(B), Samberg exam, at SEC0007981 (Ex. 108 thereto).

Several aspects of this email indicate Samberg was seeking MNI. First, his email refers to “recurring indications from *knowledgeable people* that the company will either preannounce or take guidance down (emphasis added).”⁵⁷ Samberg had access through two avenues to some of the most knowledgeable people in the financial industry and to whatever information they could glean from lawful sources on Microsoft’s likely earnings and revenues.

First, as the chief executive officer of the world’s largest hedge fund, Samberg had immediate access to the best of Wall Street’s analysts through Pequot’s relationships with the largest investment banks and brokerage firms.⁵⁸ Pequot would pay over \$226 million dollars in commissions over the next year to those banks and brokers plus prime broker fees.⁵⁹ There was little legitimate information on Wall Street to which Pequot did not have privileged access.⁶⁰

As Microsoft’s quarter ended, Wall Street analysts had expressed growing concern, as reflected in Samberg’s email, that Microsoft would miss its estimates for earnings and revenues for the quarter about to close. On March 22, 2001, CBS MarketWatch noted:

Goldman Sachs dropped its estimates for Microsoft (MSFT) yet again, as analysts said personal computer sector weakness may make the company miss an already reduced revenue target. ... Analysts from other investment banks are starting to wonder if Microsoft will miss earnings targets when the company reports its fiscal-third quarter on April 19.⁶¹

Likely of greater concern to Samberg were the “knowledgeable people” *inside Pequot* who were negative on Microsoft, including Pequot’s own analysts and his partner. Pequot’s “tech

⁵⁷ *Id.*

⁵⁸ Danny Hakim, *World's Biggest Hedge Fund Group Plans, Once More, to Split*, N.Y. Times, April 5, 2001 at C5.

⁵⁹ S. HRG. 109-898, at 672.

⁶⁰ The SEC’s Case Closing Report (Ex. 10) tells how Samberg and Pequot were entitled to lawfully receive information from Goldman Sachs before that information was made available to others: “Finally, the staff determined there was nothing illegal about Goldman giving its clients, including Pequot, information it developed internally, before that information was publicly disseminated.” Ex. 10, at 3.

⁶¹ Mike Tarsala, *Tech Stocks Claim Back Some Turf*, CBS MarketWatch March 22, 2001.

group” had been shorting Microsoft, according to Pequot emails.⁶² The tech group and its twenty-four analysts were led by Daniel Benton,⁶³ described by the New York Times as Samberg’s protégé.⁶⁴ In contrast, the hedge funds managed by Samberg—the core group—had no analysts.⁶⁵ Outside of the tech group, Pequot had no analysts covering Microsoft.⁶⁶ In short, the only people at Pequot who followed Microsoft were betting it would miss its earnings.

Another factor suggesting that Samberg sought material nonpublic information was his choice of words: he was no longer seeking Zilkha’s “views.” He wanted “tidbits” on earnings and revenues for the recently closed quarter.⁶⁷ Webster’s Third New International Dictionary defines the word “tidbit” as follows:

“1: a delicate piece of anything eatable: a choice morsel of food;

2: a small and pleasing, interesting, or spicy bit (as of news or information).”

Samberg was seeking “choice morsels” on Microsoft earnings and revenues. As discussed below, he got exactly what he asked for.

On April 7, 2001, at 9:05 a.m., Zilkha replied to Samberg’s request for “tidbits.” Zilkha wrote: “I will get back to you on MSFT [Microsoft] ASAP.”⁶⁸ Zilkha’s April 7 email was the last email Plaintiff turned up between Zilkha and Samberg or between Zilkha and anyone else on Microsoft’s third quarter results before Samberg directed purchases of 2.8 million shares of Microsoft synthetic stock⁶⁹ on April 9, 10 and 11, 2001.⁷⁰ Put differently, there was no evidence

⁶² Ex. 8(B), Samberg exam, at SEC0007987 (Ex. 113 thereto).

⁶³ *Id.*, at 28.

⁶⁴ Hakim, *supra*, fn. 59.

⁶⁵ Ex. 8(A), Samberg exam, at 28.

⁶⁶ *Id.*

⁶⁷ Ex. 8(B), Samberg exam, at SEC0007301 (Ex. 108 thereto).

⁶⁸ *Id.* at SEC0007982 (Ex. 109 thereto).

⁶⁹ The synthetic stock uses a combination of stock options to simulate the price moves of holding the stock long, but it is highly leveraged and thus its price moves up and down are a much larger percentage of the invested capital.

⁷⁰ *Supra*, fn. 37.

exactly what “tidbits” Zilkha collected and provided to Samberg before he directed those trades. Pequot hedge funds managed by Samberg made \$14.2 million in profits from these trades.⁷¹

However, there was persuasive direct and circumstantial evidence that Zilkha had passed along some “tidbits” to Samberg on April 9, 2001. First, both Samberg and Zilkha made written statements that Samberg used information obtained from Zilkha before the public announcement of Microsoft’s quarterly results on April 19, 2005, to make large profits trading Microsoft securities. In an email to Samberg, Zilkha claimed credit for Samberg’s decision to purchase Microsoft stock on April 9, 2001.⁷² Zilkha’s email dovetails with Samberg’s emails giving credit for his April 2001 trading decisions on Microsoft to Zilkha.⁷³ On April 20, 2001, the day after Microsoft announced its earnings, Samberg sent Zilkha an email stating that Pequot’s tech group “has a very dim view of pc demand, and consequently msft. in fact, they are short the stock in one account, *while it is my largest long* [sic] (emphasis added).”⁷⁴ In this context, Samberg told Zilkha: “i shouldn’t say this, but you have probably paid for yourself already! [sic]”⁷⁵ Likewise, Samberg sent an email to two Pequot executives on April 23, 2001, stating: “our new guy david zilkha is in ct [Connecticut] today. Check him out. *he’s already got a great p&l* [profit and loss] *based on his msft; input* [sic] (emphasis added).”⁷⁶

In both emails, Samberg attributes the profit Pequot made to “input” from Zilkha before the public announcement of Microsoft’s third quarter results on April 19, 2001. Samberg’s statements raise a simple question: after which communications from Zilkha did Samberg make trading decisions that resulted in profits to Pequot hedge funds? The table below specifies the

⁷¹ *Id.*

⁷² Samberg exam, Ex. 8(B), at SEC0007987 (Ex. 113 thereto). In the email (*Id.*, at SEC0008000), Zilkha states he and Samberg discussed Microsoft on April 9, 2010, and also takes credit for Pequot’s trades on April 9, 2001 (*Id.* at SEC0008002).

⁷³ *Id.* at SEC0007987 (Ex. 113 thereto).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*, at SEC0007989 (Ex. 114 thereto).

dates of communications from Zilkha to Samberg during the period in question, the trading decisions made by Samberg, and the consequential profits, if any, derived by Pequot after those communications.⁷⁷

Date of Zilkha communication to Samberg	Samberg's trading decisions	Profits
February 28, 2001	None during next month	\$0 ⁷⁸
April 9, 2001	Samberg directs purchases of 2.8 million shares of synthetic Microsoft stock over next three days	\$14.2 million ⁷⁹
April 9, 2001	Continued to hold 1.5 million shares of synthetic MSFT stock	\$17 million ⁸⁰
April 17	Purchased 600,000 shares of synthetic Microsoft stock on April 19	\$1.6 million ⁸¹

To summarize, 95% of the profits (\$31.2 million) made by Pequot hedge funds on Microsoft trading during this period are attributable to decisions made by Samberg immediately after he received the four “tidbits” from Zilkha on April 9. Hence, Samberg’s emails on April 20 and April 23 praising Zilkha for his input on Microsoft point to the April 9 communication.

⁷⁷ Samberg’s emails (Apr. 20 and Apr. 23, 2001) were sent immediately after the public announcement of Microsoft’s third quarter results (Apr. 19, 2001), so the table deals with the communications prior to this announcement.

⁷⁸ After receiving Zilkha’s Mar. 1, 2001, email, Samberg did not place another trade on Microsoft securities until Apr. 3, 2001. Ex. 8(B), Samberg exam at SEC0007966 (Ex. 105 thereto).

⁷⁹ Samberg directed the purchase of 15,000 shares of Microsoft synthetic stock on April 9 and 10 using calls and puts with a strike price at \$55 (*Id.* at SEC0007867 and SEC0007971). Using the sale price on May 14, 2001, the Pequot funds managed by Samberg made \$11.6 million on the calls (*Id.*, at SEC0007968) and another \$1.84 million on the puts (*Id.* at SEC0007971) for a total profit of \$13.44 million. Samberg also directed trades in 13,200 calls (*Id.* at SEC0007968) and shorted an equal number of puts on April 11 (*Id.* at SEC0007972) which produced another \$778,000 in profits, for a total \$14.2 million. Ex. 8(A) at 81-82.

⁸⁰ Samberg’s statement in his April 6 email to Zilkha (Ex. 8(B) at SEC0007301 (Ex. 108)) that there were “recurring indications from knowledgeable people that [Microsoft] will either preannounce or take guidance down” implies he was weighing whether to liquidate his highly leveraged holdings in synthetic Microsoft stock (1.35 million shares). Further, the hedge funds he managed had sustained \$11 million in losses in the prior three weeks on his trading in Microsoft synthetic stock. He risked more of the same going forward. The tip from Zilkha on April 9 told Samberg not to liquidate Pequot’s holdings in Microsoft synthetic stock. Consequently, by holding the 1.35 million shares in Microsoft synthetic stock, Pequot funds under Samberg’s management made an additional \$17 million profit in the next thirteen days. Samberg faces no criminal or civil liability for continuing to hold the Microsoft stock after he received the tips from Zilkha. *Blue Chip Stamps v. Manor*, 421 US 723 (1975). The details on these trades may be found in Ex. 8(B), Samberg exam, at SEC0007966, SEC0007967, SEC0007968, SEC0007970, and SEC0007971.

⁸¹ See 2006 Draft Wells notice, ¶ 16, Aguirre Decl. ¶ 10, Ex. 9.

For the reasons described above, Plaintiff postulated the existence of a “Presumed MNI Communication” from Zilkha to Samberg on April 9, 2001, on the timeline he created in mid-June 2005 and presented to his supervisors, two FBI agents and the Assistant US Attorney assigned to the case.⁸² Yet, there was no hard evidence exactly what “tidbits” Zilkha had collected within Microsoft between his April 7 email telling Samberg he would get back to him “on MSFT ASAP” and his communication to Samberg on April 9, which triggered Samberg’s purchase of 2.8 million shares in synthetic Microsoft stock. Still, the timeline, and its supporting documents, told the SEC when and where to look: Zilkha’s communications with other Microsoft staff between April 7 and April 9, 2001.

The SEC Botched Its First Investigation of Pequot’s Trading in Microsoft Securities.

After Plaintiff’s discharge, evidence *which is entirely public* tells how SEC staff closed their eyes to every sign pointing to the Zilkha communication to Samberg on April 9 as the pivotal factual issue in the case. The CCR makes no reference to this key communication. Nor does it indicate that any Microsoft employee was even questioned about communicating information to Zilkha on or before April 9.⁸³ Nor is there any reference to the April 9 communication in the draft Wells notice.⁸⁴ Nor did the SEC take the testimony of any Microsoft employee on this issue.⁸⁵ Yet, the following evidence was screaming for Enforcement to focus the investigation on April 9:

- 1.) Zilha claimed his recommendation to Samberg on April 9 was the basis for

⁸² June 2005 timeline, Ex. 3. Aguirre Decl., ¶ 20.

⁸³ *Id.*

⁸⁴ See 2006 Draft Wells notice, Ex. 9,

⁸⁵ According to the chronology prepared by James Eichner and Liban Jama as described in the OIG report in Case No. 431 at 90-91, SEC staff took no testimony from any Microsoft employee. Instead, the SEC had four phone interviews with Microsoft employees, one sometime during Feb. 2006, and three on Mar. 16, 2006. The fact the SEC only conducted phone interviews of Microsoft employees is also stated in the CCR (Ex. 10)

Samberg's decision to buy Microsoft stock on that same date;⁸⁶

- 2.) The Samberg-Zilkha emails on April 6 and 7 unequivocally point to the April 9 communication;⁸⁷
- 3.) Pequot's trading records on April 9, 10, and 11 demonstrate Samberg tripled his holdings, despite his pessimism on Friday April 6, the prior trading day;⁸⁸
- 4.) 95 percent of the profits to the Pequot hedge funds on Microsoft trading are attributable to Samberg's trading decision made on April 9 through 11;⁸⁹
- 5.) Samberg's emails praising Zilkha for providing Samberg with information about Microsoft logically pointed to April 9;
- 6.) The timeline Plaintiff provided his supervisors, the FBI and the US Attorney on June 14 and 15, 2005, pinpointed the "presumed MNI communication" from Zilkha to Samberg on April 9, 2001;⁹⁰ and
- 7.) Plaintiff's June 13, 2005,⁹¹ and June 29, 2005,⁹² emails to his supervisors identify April 9, 2001, as the key communication for any civil case or criminal case.

Enforcement admittedly dropped the investigation of the April 9 communication. As the CCR explains: "By March 2006, the staff had focused on two pieces of information Zilkha

⁸⁶ See Sep. 28, 2001, email from Zilkha to Samberg (Subject: "David Zilkha's recommendations since 4/9 and their performance"), Ex. 8(B), Samberg Exam at SEC0008000 (Ex. 123 thereto).

⁸⁷ Samberg exam, Ex. 8(B), at SEC0007981 and SEC0007982 (respectively Exs. 108 and 109 thereto).

⁸⁸ *Supra*, table at 16.

⁸⁹ *Id.*

⁹⁰ June 2005 timeline, Ex. 3.

⁹¹ Aguirre Decl. ¶ 2, Ex. 2. Plaintiff's June 13, 2005, email to Branch Chief Robert Hanson stated in part:

On April 6, before Zilkha joined Pequot, Samberg wrote Zilkha: "i own some msft based on the win2000 cycle, despite recurring indications from knowledgeable people that the company will either pronounce or take guidance down. Any tidbits you might care to lob in will be appreciated." Zilka replied the next day, "I will get back to you ASAP." I know from a later e-mail that Zilkha provided info to Samberg on 4/9/2001, and that Samberg traded heavily in options from 4/9 through 4/11. However, I have no e-mails from Zilkha from 4/7 through 4/17 re MSFT. If Zilkha sent e-mail during this period similar to the one he sent on June 17, the case against Samberg would be over.

⁹² Aguirre Decl. ¶ 7, Ex. 7. Plaintiff's June 29, 2005, email to Assistant Director Mark Kreitman states in part: "That matter really depends on whether Zilkha tells the FBI that he tipped Samberg around April 9. If he does, David Anders will likely continue the matter as a criminal investigation."

provided to Samberg by email,”⁹³ Zilkha’s emails to Samberg on April 17 and April 27, 2001. A closer look at the stronger of these two “pieces of information” sheds light on why the investigation went nowhere after Plaintiff’s discharge.

Of the two communications, only Zilkha’s communication on April 17 occurred before Samberg’s April 20 email to Zilkha stating, “you have probably paid for yourself already!”⁹⁴ Zilkha’s April 17 email to Samberg stated, “I heard this afternoon from the MSN finance controller that our CFO has been much *more relaxed* before this earnings release than he has been in the last year (emphasis added).”⁹⁵ According to the SEC’s theory, Pequot made trading profits of \$1.6 million on this tip.⁹⁶ As the CCR tells, Enforcement later dropped this investigation—not surprisingly—because “[T]he information about a controller being *relaxed* is vague, and the alleged source denies providing the information to Zilkha (emphasis added).”⁹⁷ Eichner, who took over the investigation after Plaintiff’s firing, put it this way: “So on the tip from the MSN controller, you know, there was always the concern that the tip is kind of vague. You know, what does it mean that they’re more relaxed?”⁹⁸ Ultimately, Eichner explained the obvious, i.e., the tip the CFO was more “relaxed” was not material fact:

Mr. Kemerer: So that was a materiality concern, just to clarify, whether the information was truly material.

Mr. Eichner: Yes, and whether a jury would believe that Samberg traded on it because it’s so vague.⁹⁹

The second tip the SEC investigated, Zilkha’s April 27, 2001, email, came a week *after* Samberg’s incriminating April 20 email (“you have probably paid for yourself already!”).

⁹³ CCR, Ex. 10, at 3.

⁹⁴ Ex. 8(B), Samberg exam, at SEC0007987 (Ex. 113 thereto).

⁹⁵ *Id.* at SEC0007985 (Ex. 112 thereto).

⁹⁶ CCR, Ex. 10, at 3.

⁹⁷ *Id.*

⁹⁸ Transcribed interview of James Eichner, excerpt (Nov 14, 2006) (p.52), Ex. 12 to the Senate Report, at 234.

⁹⁹ *Id.*

According to the SEC's theory, Pequot made trading profits of \$530,000 on this tip.¹⁰⁰ This time Zilkha's email told Samberg a Microsoft employee had told Zilkha that a rumor regarding a delay in the release of a Microsoft product was untrue.¹⁰¹ A Senate investigator aptly referred to this theory as a rumor that another rumor is false.¹⁰² Both, Eichner¹⁰³ and the CCR¹⁰⁴ concluded the SEC's theory—a rumor that a rumor was false—did not satisfy the materiality requirement.

To sum up, the SEC ignored the blueprint and evidence pointing to the April 9 tip, which generated \$14.2 million in illegal profits to Pequot, without conducting any real investigation, in order to pursue two groundless theories of insider trading. It would not have been hard to find the source of the missing evidence needed to make the case. The source of the April 9, 2001, "tidbits" on Microsoft earnings and revenues, which Zilkha passed along to Samberg, was Zilkha's *next door neighbor, colleague at Microsoft, close friend, and investor, Mark Spain*.¹⁰⁵ For SEC investigators and the FBI, that evidence was just one phone call away.

The Senate Report was sharply critical of the SEC's handling of its investigation into Pequot's trading in Microsoft securities. At one point, it noted, "This sort of evidence clearly warranted a serious and thorough investigation."¹⁰⁶ It later concluded: "In any event, given the apparently inculpatory e-mails from Samberg telling Zilkha, (e.g. "I shouldn't say this, but you have probably paid for yourself already!"), it is difficult to understand why the SEC would not, at bare minimum, invite Pequot, Samberg and Zilkha to respond to a Wells notice."¹⁰⁷

The SEC's "New Information" Came to the SEC through the Media.

¹⁰⁰ CCR, Ex. 10, at 3.

¹⁰¹ Ex. 8(B), Samberg exam, at SEC0007993 (Ex. 118 thereto).

¹⁰² Reporter's Transcript, of the Nov. 14, 2006, interview of James Eichner, at 57. The transcript is available at the office of the Senate Finance Committee.

¹⁰³ During the Senate investigation, Eichner testified, "[A]t the end, you know, when I was trying to get my ducks in a row on materiality and a couple of other things, it kind of fell apart." Senate Report, at 44.

¹⁰⁴ *Id.* ("The second, the Information about the product delay, did not drive the rise in Microsoft's stock price.")

¹⁰⁵ Aguirre Decl. ¶ 23(f).

¹⁰⁶ Senate Report at 21.

¹⁰⁷ *Id.*, at 45.

In November 2008, Glen Kaiser (Kaiser), a physician, previously unknown to Plaintiff, contacted him regarding the Microsoft aspect of the Pequot investigation. Kaiser informed Plaintiff he had information regarding the Microsoft aspect of the Pequot investigation and requested Plaintiff's assistance in placing the information in the hands of the appropriate authorities, but he had not done so yet.¹⁰⁸ Kaiser explained to Plaintiff he had read the Senate Report on the Pequot investigation and was skeptical whether the SEC would conduct an authentic investigation of Pequot and Samberg for insider trading.¹⁰⁹ Initially, Kaiser provided Plaintiff with information that Pequot was in the process of paying Zilkha \$2.1 million in three annual installments of \$700,000, which began a few months after the SEC closed its investigation.¹¹⁰ He also informed Plaintiff of the existence of a hard drive that might contain emails between Samberg and Zilkha. Plaintiff told Kaiser the most relevant emails were those relating to events which occurred between April 6, 2001, and April 9, 2001.¹¹¹

Immediately after his initial contact with Kaiser in November 2008, Plaintiff began providing information received from Kaiser to Senate investigators.¹¹² Ten days later, Plaintiff provided the same information to the FBI. At that time, Plaintiff also had concerns whether the SEC was capable of conducting a legitimate investigation of Pequot's trading in Microsoft securities. Plaintiff's December 8, 2008, email to the FBI agent reads in part:

I am attaching the Samberg transcript obtained from the SEC through my FOIA case. Please see the discussion of Exs. 108 ("Buying MSFT - we talked next day") and 109 beginning at page 69. In this context, I also refer you to the "presumed MNI communication" mentioned in the timeline sent last week.

I have seen nothing in any documents obtained through the FOIA case or through the Senate investigation suggesting that the SEC focused on the factual theory that

¹⁰⁸ Aguirre Decl. ¶ 23(a).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*, ¶ 23(b). Scott J. Paltrow, *Renewed Case Peers at Hedge Fund; SEC Dropped Early View, But New Revelations Force Agency's Hand*, *The Boston Globe*, Sep. 6, 2009 at 1.

¹¹¹ *Id.*

¹¹² *Id.*, ¶ 23(c).

Zilkha tipped Samberg about Microsoft earnings just before the April 9-11 call purchases. Indeed, the SEC's case closing report suggests the focus was elsewhere
¹¹³
...

It appears the SEC reopened its investigation of Pequot's trading in Microsoft approximately two weeks after Plaintiff began providing the new evidence to the FBI, ¹¹⁴ shortly after the first media coverage. ¹¹⁵

On December 11, 2008, Kaiser provided Plaintiff with a Zilkha memorandum summarizing his stock recommendations to Pequot for the period from April 9, 2001, through November 16, 2001. ¹¹⁶ Of the Pequot trading investigated by the SEC, Zilkha only took credit for the trades directed by Samberg on April 9, 2001. ¹¹⁷ He made no claim that his communications on April 17 and April 27, 2001, caused Pequot to purchase Microsoft securities, the theories the SEC pursued after it fired Plaintiff. ¹¹⁸

On December 20, Kaiser provided Plaintiff with the smoking gun: an email exchange between Zilkha and Mark Spain (Spain), a Microsoft executive, ¹¹⁹ on April 7 and April 8, 2001, which filled the gap in the evidence described above. It established exactly what steps Zilkha had taken after his April 7 email to Samberg (will get back to you "on MSFT ASAP") ¹²⁰ and his

¹¹³ Aguirre Decl., ¶ 14, Ex. 13.

¹¹⁴ The SEC reopened its investigation of Pequot's trading approximately two weeks after Plaintiff began providing the new evidence to the FBI and a few days after a Washington Post article reported:

According to documents, the hedge fund—Pequot Capital Management—secretly began to pay \$2.1 million to a key witness in the case last spring, just three months after several senators called on the SEC to reopen its investigation. Top Republicans on the Senate Finance and Judiciary committees asked Pequot's chairman this week to provide records related to the payments. The FBI is also looking into the matter, according to people familiar with the case.

Amit R. Paley, *New Evidence Emerges in Closed Insider-Trading Case*, Washington Post Dec. 12, 2008, at D1.

¹¹⁵ See fn. 183.

¹¹⁶ Ex. 11, Aguirre Decl., ¶¶ 12 and 23(e).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Mark Spain was director of Microsoft's mobile devices unit at the time. Scot J. Paltrow, *Renewed Case Peers at Hedge Fund; SEC Dropped Early Review, but New Revelations Force Agency's Hand*, The Boston Globe, Sep. 6, 2009, at Financial 1.

¹²⁰ Ex. 8(B), Samberg exam at SEC0007982 (Ex. 109 thereto).

April 9 communication to Samberg.¹²¹ Zilkha sent the first email late on the evening of April 7, after he received Samberg's email requesting "tidbits" on Microsoft's quarterly results and the same day he sent his "ASAP" email to Samberg.¹²² Zilkha's one-line email to Spain—Zilkha's next door neighbor, friend and investor—sought exactly the type of "tidbits" Samberg had requested. The subject line read: "Re: Any visibility on the recent quarter?" The body of the email asked two questions: "Have you heard whether we will miss estimates? Any other info?"¹²³

On April 8, at 11:08 a.m., Spain responded with four "tidbits" on revenues and earnings: [1] "march was the best month of record. [2] made up the shortfall in us sub. [3] w2k pro major contributor. [4] on track for revised forecast (MYR). [sic]"¹²⁴ There is no reference to any of these "tidbits" in any source available to the public prior to Microsoft's release of its quarterly results on April 19, 2001. Further, only a few days before, Microsoft had refused to provide any guidance on the quarter it was closing.¹²⁵ Indeed, the only comments offered publicly by Microsoft's Chairman, Bill Gates, were negative.¹²⁶

Each of the four "tidbits" separately meets the applicable definition of materiality: information "a reasonable investor would use in deciding whether to invest." *U.S. v. Mooney*, 425 F.3d 1093, 1096 (8th Cir. 2005). The "best march [sic] on record" is a stunning statement about earnings and revenue momentum, critical considerations for any investor. Likewise, the statement that Microsoft had made up the shortfall of its US subsidiary addressed a key concern

¹²¹ *Id.*, at SEC0008002 (Ex. 123 thereto).

¹²² Aguirre Decl., ¶ 1, Ex. 1.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Microsoft offers no new guidance on profit outlook. Reuters News, March 30, 2001.* "Microsoft Corp. declined to say on Friday whether the sputtering U.S. economy would have an impact on its earnings outlook for the second half of its current business year, which ends in June."

¹²⁶ *Id.* "'Whatever goes on in the economy will affect our sales like any other company,' chairman and chief software architect Bill Gates told Reuters in an interview."

at that time—whether the slowing US economy would impact Microsoft’s earnings and revenues, a question Microsoft refused to answer a few days before.¹²⁷ The statement “w2k professional,” a Microsoft operating system, had been a major contributor told the reasonable investor the source of the revenues and income which made March a record month. Finally, the statement that Microsoft was on track for a revised mid-year forecast suggested an upward revision of earnings and revenues rather than the downward revision some Wall Street analysts were predicting.¹²⁸ That was also a specific concern—a downward revision—Samberg articulated in his April 6 email.¹²⁹ This “tidbit” by itself would have had the highest value to “a reasonable investor ... in deciding whether to invest” in Microsoft prior to the release of its quarterly results on April 19. Collectively, these four tidbits satisfy the materiality requirement beyond any shadow of a doubt.

Kaiser provided a third piece of new evidence: Zilkha’s admission he gave illegal tips to Pequot. Zilkha retained a forensic psychologist, Peggy Thomson, (Thomson) in his pending dissolution proceeding. When her deposition was taken in October 2009, she testified with her notes in hand that Zilkha told her during a June 2008 interview: “His first boss in New York was Art Samberg who was disrespectable and was investigated for insider trading. This is the pequot (sic) company. It turn (sic) out he wanted Mr. Zilhka to get inside information on Microsoft and Mr. Zilhka stopped providing it, he was fired.”¹³⁰ When Zilkha’s deposition was taken in the same matter, he took the Fifth Amendment more than 150 times, including all questions relating to the \$2.1 million Pequot was paying him.¹³¹

¹²⁷ *Id.*

¹²⁸ *Supra* fn. 125.

¹²⁹ Samberg exam, Ex. 8(B), at SEC0007301 (Ex. 108 thereto).

¹³⁰ Ex. 14, excerpts from Thomson’s exam at 41-42, and 90-91. Aguirre decl. ¶ 15

¹³¹ Aguirre decl. ¶ 23(h). Also, Ex. 16, letter of Senators Chuck Grassley and Arlen Specter to Chairman Schapiro.

IV. THE SEC MAY NOT WITHHOLD RECORDS OF ITS PEQUOT INVESTIGATION, BECAUSE IT CEASED CONDUCTING THE INVESTIGATION FOR LAW ENFORCEMENT PURPOSES IN 2006

Exemption 7(A) allows the SEC to withhold “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings ...”

Exemption 7(A) cannot justify withholding material unless it relates to a “concrete prospective law enforcement proceeding,” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 222 (U.S. 1978); *Juarez v. DOJ*, 518 F.3d 54, 59 (D.C. Cir. 2008); *Carson v. U.S. Department of Justice*, 631 F.2d 1008, 1018 (D.C. Cir. 1980). Accordingly, if at some point the SEC ceased investigating Pequot for the purpose of filing a law enforcement proceeding, it lost its right to assert Exemption 7(A) to withhold investigative records at that moment. The release of SEC records cannot interfere with an enforcement action it has no intention of ever filing. Indisputable direct evidence proves the SEC ceased investigating Pequot for law enforcement purposes no later than June 2006. Since then, convincing circumstantial evidence proves the SEC has not conducted its Pequot investigation for law enforcement purposes.

The Last Phase of the Pequot Investigation Was Not a Law Enforcement Investigation.

Plaintiff begins his analysis of the SEC’s purpose in conducting its current phase of the Pequot investigation by focusing on the SEC’s purpose in conducting the last active phase of the investigation before it closed the entire investigation. By the summer of 2006, the SEC’s insider trading investigation of Pequot had travelled a tortuous path. In June of 2005, with his supervisors’ initial blessing, Plaintiff had focused the investigation on whether John Mack had tipped Samberg that General Electric would soon announce its acquisition of Heller Financial. After firing Plaintiff, the SEC shifted the investigation away from John Mack as the source of the

GE-Heller tip. From September 2005 until December 2005, the SEC claims it looked for other possible tippers of the GE-Heller tip, but came up dry.¹³² In December, the SEC shifted the investigation from Pequot's trading in GE-Heller securities to its trading in Microsoft securities, where it remained until June 2006, when it came up dry again.¹³³ The SEC then shifted the investigation *back* to Mack "in the summer" of 2006 and decided to take testimony of six witnesses, including Mack, on the GE-Heller trades *after the statute of limitations expired*.¹³⁴

These facts raise an obvious question: After halting its investigation of Mack in September 2005, why would the SEC revive it in July 2006 and then take testimony *after* the statute of limitations expired? The OIG Report noted: "[I]t was virtually unprecedented in Enforcement for testimony to be taken after the statute of limitations had run."¹³⁵ The report also states the SEC made the decision for *public relations*—not law enforcement—purposes:

As of June 15, 2006, Enforcement had no plans to take the testimony of Mack ... Shortly thereafter, however, *in light of Congressional interest* in the Pequot investigation -and *press reports* about Aguirre's termination, Deputy Directors Bresnan and Ricciardi decided *for the good of the Enforcement program* to take Mack's testimony (emphasis added).¹³⁶

Plaintiff's immediate supervisor, Branch Chief Robert Hanson (Hanson), gave the same explanation for the SEC's decision to take Mack's testimony when he testified before the Senate Committee on the Judiciary. However, Hanson linked the SEC's decision to public statements he erroneously¹³⁷ attributed to Plaintiff. Hanson had the following exchange with Senator Specter on this issue:

¹³² CCR, Ex. 10, at 2-3.

¹³³ *Id.* Also, OIG Report, *supra*, fn. 4, at 99-100.

¹³⁴ OIG Report at 99-100, and 107.

¹³⁵ *Id.* at 107.

¹³⁶ *Id.* at 91.

¹³⁷ By way of clarification, Plaintiff did not publically disclose the SEC's decision to close the Mack investigation. The N.Y. Times article which first disclosed the Senate inquiry into the Pequot investigation and Plaintiff's firing stated that the sources for the story came exclusively from government officials. Walt Bogdanich and Gretchen

Chairman Specter: But that does not tell us why you waited until after the statute of limitations had expired [before taking Mack's testimony].

Mr. Hanson. We got to it as soon as we could. The predicate to trying to figure out whether to take Mr. Mack's testimony or not was whether he had the information. We did not think, at the time that we took Mr. Mack's testimony, that there was any—there was virtually no likelihood, by the time we took Mr. Mack's testimony, that he had any information regarding the transaction that he could have passed on.

Chairman Specter. So why did you take his testimony?

Mr. Hanson. As I explained in my written statement, one consideration was the harm Mr. Aguirre had caused by taking this confidential, nonpublic investigation public for his own purposes, and the need to maintain public investor confidence in the work of the Division of Enforcement.¹³⁸

The statements of senior SEC staff—Bresnan, Ricciardi, and Hanson—prove the SEC conducted the Pequot investigation in the summer of 2006 as damage control, because it was getting beat up in Congress and in the media for its miscues in the Pequot investigation and its decision to fire Plaintiff. This was the last active phase of the Pequot investigation. The SEC's public relations ploy worked. It received wide coverage in the print¹³⁹ and electronic media¹⁴⁰ that it was leaving no stone unturned in its investigation of one of Wall Street's elite bankers.

After reviving the GE-Heller investigation, the SEC would still have to craft the last chapter of its fictional Pequot investigation. This time it elevated mere fiction to theatre. The evening before the last Senate hearing on the SEC's Pequot investigation, the SEC released

Morgenson, *S.E.C. Is Reported to Be Examining a Big Hedge Fund*, N.Y. Times, June 23, 2006, at A1. By way of clarification, Plaintiff did not publically disclose the SEC's decision to close the Mack investigation.

¹³⁸ *Id.* Transcript, *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity: Hearings Before the U.S. Sen. Comm. On the Judiciary*, 19th Cong., (2006), *supra*, fn. 26, S. HRG. 109-898, at 29.

¹³⁹ Randall Smith and Kara Scannell, *Morgan Stanley's CEO Agrees to Interview by SEC on Pequot*, W. St. Journal Jul. 22, 2006, at B4; Walt Bogdanich and Gretchen Morgenson, *In Reversal, U.S. Decides To Question Firm's Chief*, N.Y. Times, Jul. 22, 2006, at C1; Wall St. Roundup; *Morgan Stanley CEO to Testify*, L.A. Times, Jul. 22, 2006, at C3; Joseph A. Giannone, *Morgan Stanley Chief Says He Will Cooperate with SEC; Executive Asked to Testify about Role at Former Company*, The Houston Chronicle Jul. 22, 2006, at Business 2; Carrie Johnson, *SEC Wants To Question Morgan Stanley Chief*, Washington Post Jul. 22, 2006, at D1; Roddy Boyd, *Mack Oks SEC Sit-Down*, N.Y. Post, Jul. 22, 2006, at 20.

¹⁴⁰ *CNBC's Charlie Gasparino and Linda Thomsen of the SEC discuss SEC indictment of Greg Reyes of Brocade for option backdating* CNBC, News Transcripts July 21, 2006.

Enforcement Director Thomsen's testimony along with the CCR (which was unprecedented)¹⁴¹ to the Wall Street Journal.¹⁴² The CCR would tell the public what a fine job the SEC did on its Pequot investigation, while the testimony of Thomsen and other senior SEC staff would attack every aspect of Plaintiff's performance, competence, professionalism and sanity,¹⁴³ a strategy designed by the SEC's Office of the General Counsel (OGC) six months earlier.¹⁴⁴

In doing so, the SEC abandoned any law enforcement objective. It investigated only two of eighteen referrals from SROs of suspected insider trading by Pequot, another Senate criticism of the SEC's handling of the Pequot investigation.¹⁴⁵ Further, as the SEC conceded last year, new referrals from SROs on Pequot's suspected insider trading were pouring in to the SEC.¹⁴⁶

The SEC Routinely Uses "Open Investigations" to Block Congressional and FOIA Inquiries

The SEC has a history of using "open" investigations for blocking legitimate inquiries into its operations. An OIG report last year tells how the SEC and its OGC ignore their obligations under FOIA and abuse Exemption 7(A) in doing so. In general, the report observes "in all FOIA request disposition categories, the Commission's overall rate was significantly lower when compared to all other federal agencies."¹⁴⁷ "Significantly lower" is generous: A table in the report compares the SEC's "full grants" (10.5%) and "partial grants" (2.9%) of FOIA

¹⁴¹ A Google search yields two SEC Case Closing Reports: one for the Madoff investigation and another for the Pequot investigation. The only Case Closing Report that appears on the SEC website is the one for the Pequot investigation.

¹⁴² Hughes, *Moving the Market*, *supra*, fn. 3. This article describes Thomsen's testimony, which "offers [a] different picture than the one painted by Gary Aguirre," and states the testimony is yet "to be delivered to the Senate Judiciary Committee."

¹⁴³ Their testimonies are available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=2437>.

¹⁴⁴ The handwritten notes of Melinda Hardy record a meeting on June 8, 2006, among Richard Humes, Samuel Forstein, Noelle Frangipane and herself. To the extent the notes are unredacted, they state: "Aguirre wrote 19-page letter to NYT [redaction]... What can we say about him as a basketcase [sic] former employee? No IG report on removal." Ex. 18, Aguirre Decl., ¶ 19.

¹⁴⁵ Senate Report at 46: [T]he SEC squandered this opportunity through a series of missteps excluding many of the suspicious transactions ..."

¹⁴⁶ Scannell, *supra*, fn. 30.

¹⁴⁷ *Review of the SEC's Compliance with the Freedom of Information Act*, Report No. 465, Sep. 25, 2009 (OIG FOIA Report), at 9. Available at <http://www.sec-oig.gov/Reports/AuditsInspections/oig.gov/Reports/AuditsInspections/2009/465.pdf#xml=http://www.sec-oig.gov/Search/PdfHighlighter.aspx?DocId=30&Index=D%3a%5cWebsites%5cUseIndex%5cSEC&HitCount=12&hits=1+2+3+4+5+6+7+8+9+a+b+c+>

requests with those of all other Federal agencies' full grants (41.8%) and partial grants (18.7%).¹⁴⁸ In short, the SEC releases records 13% of the time versus 60% for all other agencies.

The report noted that appeals on all matters are handled by the SEC's OGC,¹⁴⁹ while the OGC also advises the FOIA Office on the same matters. The report concluded: "This results in a potential conflict of interest that raises concerns about OGC's ability to render unbiased appeal opinions."¹⁵⁰ In Plaintiff's case, that conflict is aggravated by the fact the OGC continues as counsel in the pending MSPB case and is "Of Counsel" in this matter.

The report concludes the SEC has replaced the presumption of disclosure under FOIA with a "Presumption of Non-Disclosure" and cites the SEC's abuse of Exemption 7(A) as a device for doing so.¹⁵¹ The OIG report raised specific concerns about SEC and its OGC practices that affect the legitimacy of the SEC's assertion of Exemption 7(A):

- 1) The "OGC supports and defends the practice of limited and perfunctory document review;"¹⁵²
- 2) Unlike other Federal agencies which most frequently rely on Exemption 6, the SEC relies most frequently on Exemption 7(A);¹⁵³
- 3) In more than half the files reviewed, legal memoranda prepared by OGC attorneys "contained standardized, boilerplate legal explanations upholding the SEC's routine application of FOIA exemption (b)(7)(A);"¹⁵⁴
- 4) In many cases, "no efforts were made to segregate portions of records for disclosure purposes. Accordingly, the effect was a practical presumption in favor of withholding

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*, at ii.

¹⁵⁰ *Id.* at 19.

¹⁵¹ *Id.*

¹⁵² *Id.* at 14.

¹⁵³ *Id.* at 10.

¹⁵⁴ *Id.* at 13.

information, rather than the disclosure as required by the Freedom of Information Act;”¹⁵⁵

- 5) “The practice of the SEC not conducting a document-by-document review has been challenged and has resulted in censure by the courts on two recent occasions;”¹⁵⁶
- 6) “[T]he current SEC practice and policy disregards the intent of FOIA to maximize disclosure and, more importantly, negates the principle of openness in government that is embodied by FOIA.”¹⁵⁷

During the Senate investigation, a senior SEC official described a concrete example of the SEC’s abuse of Exemption 7(A). Branch Chief Eric Ribelin testified that he was present with Plaintiff in the office of Assistant Director Mark Kreitman when staff attorney Donald Chumley, the liaison between Enforcement and the FOIA Office, entered the office and had an exchange with Kreitman regarding a FOIA request relating to Eastman Kodak. Eventually, Chumley proposed the use of the “Humes’s lie” as a basis for withholding the records. Ribelin explained his understanding of the term: “If the case is inactive or closed and you say it's active, and therefore the documents wouldn't be FOIAble ...”¹⁵⁸

Plaintiff heard the same exchange between Chumley and Kreitman as Ribelin described.¹⁵⁹ A day or two later, Plaintiff encountered Chumley in a hallway at the SEC and asked him what is the “Humes lie”? Chumley replied to the question in close to these exact words: “The ‘Humes lie’ is to respond to a FOIA request by saying there is an open investigation,

¹⁵⁵ *Id.* at 15.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 16.

¹⁵⁸ Transcript of the interview of Eric Ribelin by Senate investigators at 94, *supra*, fn. 26, S. HRG. 109-898, at 1175.

¹⁵⁹ Plaintiff recalls Donald Chumley (Chumley) asking Kreitman in matter-of-fact way: “Should I respond to the FOIA request with the ‘Humes lie’”? Aguirre Decl. ¶ 21.

when in fact there is none”¹⁶⁰ Shortly afterwards, Plaintiff sent an email to Richard Humes requesting a meeting about Chumley’s statement, but did not receive a response.¹⁶¹

According to the Chairman of the Senate Finance Committee, the SEC’s OGC tried to play the same trump card to block the Senate investigation. After the New York Times published its first article regarding the Senate investigation of the SEC’s handling of its Pequot investigation,¹⁶² the SEC promptly revived its Mack investigation and its OIG reopened its investigation of the SEC’s handling of Pequot and Plaintiff’s firing.¹⁶³ Through Associate General Counsel Humes, the SEC quickly asserted both investigations as a basis for refusing to provide the documents and testimony sought by the two Senate Committees.¹⁶⁴ The SEC eventually backed down, but only after the Chairman of the Senate Finance Committee, Senator Charles Grassley, sent his August 21, 2006, letter to the SEC Chairman, Christopher Cox, in which he stated:

Additionally, I am concerned about the position taken by your staff that SEC regulations prohibit employees from “disclosing” information about ongoing investigations. These investigations (both the underlying PCM matter as well as the IG’s inquiry into Aguirre’s firing) were closed or inactive at the time Congress started its inquiry. RE-opening these investigations after Congress begins to ask

¹⁶⁰ *Id.* On approximately Feb. 17, 2005, Plaintiff encountered Chumley in a corridor at the SEC and asked him specifically what he meant when he used the expression “Humes lie” during his exchange with Kreitman. Chumley responded in substance as follows: “I’ll tell you, but do not ever try to use it when you’re in private practice; the “Humes lie” is to respond to a FOIA request by saying there is an open investigation, when in fact there is none.” Through his own FOIA request, Plaintiff obtained a copy the FOIA request of J. Patrick Gavin (Gavin), dated February 2, 2005, in which Gavin requested records relating to Eastman Kodak.

¹⁶¹ On Feb. 17, 2005, Plaintiff sent the following email to Humes: “Do you have an open door policy? I was recently privy to some disturbing comments regarding your office’s policy in responding to FOIA requests. I would like to find out the facts first hand.” (Ex. 15) Humes never replied. Aguirre Decl. ¶ 16.

¹⁶² Walt Bogdanich and Gretchen Morgenson, *S.E.C. Is Reported to Be Examining a Big Hedge Fund*, N.Y. Times, June 23, 2006, at A1.

¹⁶³ On Jul. 20, 2006, the SEC Enforcement attorneys informed Morgan Stanley that Mr. Mack’s testimony would be taken. “The Securities and Exchange Commission contacted Mack on Thursday to request an interview stemming from its 18-month probe into whether officials at Pequot were tipped off in advance of a corporate merger by Mack or others.” Carrie Johnson, *SEC Wants To Question Morgan Stanley Chief*, Washington Post Jul. 22, 2006, at D1. The SEC’s OIG simultaneously notified Plaintiff it had reopened its investigation. Walt Bogdanich and Gretchen Morgenson, *In Reversal, U.S. Decides To Question Firm's Chief*, N.Y. Times, Jul. 22, 2006 at C6.

¹⁶⁴ See Aug. 9, 2006, letter from SEC Associate General Counsel Richard Humes to a Senate investigator. Senate Report at 673.

questions and then citing the fact that they are active as a pretext to deny or delay Congressional requests is unacceptable.¹⁶⁵

The SEC Now Has Evidence It Claimed Was Missing, Yet It Files No Case.

The SEC repeatedly justified its decision to close the Microsoft aspect of the Pequot investigation, because no Microsoft employee admitted providing Zilkha with material nonpublic information.¹⁶⁶ Branch Chief Hanson explained: “Well, we had what we thought was the tipper. ... What we didn’t have was what the tip was, and the person who would have given the tip to Zilkha, in essence. We couldn’t find anyone at Microsoft who remembered talking to Zilkha or even remembers who Zilkha was.”¹⁶⁷ The SEC now has that information: not in the form of a fading five year old memory, which could be impeached, but an email to Zilkha at exactly the right moment containing four material nonpublic “tidbits” on Microsoft’s quarterly earnings.

What more could the SEC possibly need to file an insider trading case? It has the emails establishing that Samberg sought “tidbits” regarding Microsoft’s quarterly results on April 6,¹⁶⁸ Zilkha’s email on April 7 saying he would get back to Samberg on “MSFT ASAP,”¹⁶⁹ Zilkha’s email to Spain on April 7 requesting the same tidbits, Spain’s email back to Zilkha on April 8 providing four tidbits,¹⁷⁰ Pequot’s trades directed by Samberg on April 9 through 11, 2001,¹⁷¹ the profit to Pequot of \$14.2 million on those trades,¹⁷² Zilkha’s email and memorandum he was

¹⁶⁵ Senate Report at 677.

¹⁶⁶ The CCR (Ex. 10) tells how staff “interviewed by phone” one Microsoft employee as a potential source of a tip, but the individual denied knowing Zilkha. The CCR continues, “The staff interviewed two other Microsoft employees identified by Zilkha as his sources for other information he provided to Samberg around the time Pequot traded in Microsoft, and both categorically denied providing him with any Information.” Ex. 10, at 3. The OIG states SEC staff made four phone calls to Microsoft employees who either denied knowing Zilkha or denied providing him information, Ex. 12, at 99-100.

¹⁶⁷ Transcript of the Nov. 9, 2006, exam of Robert Hanson, at 29, available at the Senate Finance Committee offices. Aguirre Decl. ¶ 22.

¹⁶⁸ Ex. 8(B), Samberg exam, at SEC0007981 (Ex. 108 thereto).

¹⁶⁹ *Id.*, at SEC0007982 (Ex. 109 thereto).

¹⁷⁰ Ex. 1.

¹⁷¹ *Supra*, fn. 35.

¹⁷² *Id.*

responsible for Pequot's on April 9,¹⁷³ and Samberg's emails eleven days later telling Zilkha and others that Zilkha had already paid for himself.¹⁷⁴

And there is more. The SEC possesses Zilkha's near-confession to his psychologist in June 2008,¹⁷⁵ Pequot's agreement to pay Zilkha \$2.1 million,¹⁷⁶ and Zilkha taking the Fifth Amendment more than 150 times.¹⁷⁷ Senior SEC officials have testified before Congress¹⁷⁸ and have given lectures¹⁷⁹ that it is extremely rare to have this type of evidence in an insider trading case. Given the scope, nature and details of this evidence, the SEC's failure to file any action suggests that some factor other than law enforcement continues to drive its Pequot decisions.

And meanwhile the case gets older. Nine years have passed since the alleged tip and the related trading, five years since the case was opened, almost 3.5 years since it was closed, sixteen months since it was reopened, and almost a year since the SEC sent Samberg and Pequot a Wells notice.¹⁸⁰ The SEC claimed it conducted a thorough investigation before it closed the investigation in 2006. It has spent another sixteen months on the same facts. It would seem that any evidence that could ever surface would have done so by now. Two US Senators have also raised the question why the SEC has been unable to make a decision, one way or another, to file

¹⁷³ Zilkha takes credit for Pequot's trading on April 9, 2001, in an Excel spreadsheet ("All of David Z's recommendations to Pequot: 4/9-11/16"), Aguirre Decl. ¶ 11, Ex. 11. See also, Zilkha's email to Samberg on Sep. 28, 2001, Samberg exam, Ex. 8(B), at SEC0008000 (Ex. 123 thereto).

¹⁷⁴ Ex. 8(B), Samberg exam, at SEC0007987 (Ex. 113 thereto).

¹⁷⁵ Excerpts of the deposition of Peggy Thomson, Ex. 14, Aguirre Decl., ¶ 15.

¹⁷⁶ "Because of a dispute over child support, Zilkha was required to file periodic financial statements with a Stamford, Conn., court. In 2008, he disclosed Samberg was paying him \$2.1 million in three installments, beginning in April 2008." Scott J. Paltrow, *Renewed Case Peers at Hedge Fund; SEC Dropped Early View, But New Revelations Force Agency's Hand*, The Boston Globe, Sep. 6, 2009 at 1.

¹⁷⁷ See Nov. 18, 2009, letter of Senators Charles Grassley and Arlen Specter to SEC Chairman Mary Schapiro, Ex. 16, Aguirre Decl. ¶ 17.

¹⁷⁸ *Supra*, fn. 36. Former Enforcement Director Linda Thomsen testified on this subject before the Senate Judiciary Committee on September 26, 2006.

¹⁷⁹ Newkirk, *supra* fn. 36.

¹⁸⁰ "The firm [Pequot] received the Wells notice about six weeks ago, a person familiar with the matter said." Kara Scanell and Jenny Strasburg, *SEC Is Ready to File Case Against Pequot*, W. St. Journal Aug. 13, 2009, at C4.

a case or close the Pequot investigation, given the passage of time and new evidence. Senators Grassley and Specter pointed out the obvious:

During his October 20, 2009 deposition, Mr. David Zilkha asserted his Fifth Amendment right against self-incrimination over 100 times when questioned about his finances. While Mr. Zilkha has a constitutional right to invoke the privilege, *the breadth of questions he would not answer suggests the need to conclude the SEC's investigation—one way or another.* Furthermore, during the testimony of Dr. Peggy Thomson, a psychologist retained by Mr. Zilkha to perform a psychological evaluation, it was revealed that Mr. Zilkha admitted that he provided Arthur Samberg with insider information (i.e. tips) and was fired after he was unable to provide additional tips.¹⁸¹

All of these facts point to the same conclusion: the Pequot investigation is over. As before, however, “for the good of the Enforcement program,” it is better to pretend it is still open.

The SEC's Forever “Open” Investigation of Pequot Provides Damage Control.

The same dynamic that drove the SEC to conduct an investigative charade when it revived its investigation of Mack—to protect its public image—is now present with even greater intensity. The SEC revived its focus on Mack and took his testimony in July 2006, shortly after the New York Times reported on the Senate inquiry into the SEC's decision to prohibit the examination of Mack.¹⁸² The SEC reopened its investigation of Pequot's trading in Microsoft securities shortly after a Washington Post article reported on the Senate's renewed interest in the same aspect of the Pequot investigation.¹⁸³ The SEC has even more motivation to protect its public image, because the Senate's renewed interest in the SEC's Pequot investigation came “at a time when the SEC is sustaining intense public and congressional criticism for lapses in its

¹⁸¹ See Ex. 16, Nov. 18, 2009, letter of Senators Charles Grassley and Arlen Specter to SEC Chairman Mary Schapiro. Aguirre Decl., ¶ 17.

¹⁸² Walt Bogdanich and Gretchen Morgenson, *S.E.C. Is Reported to Be Examining a Big Hedge Fund*, N.Y. Times, June 23, 2006, at A1.

¹⁸³ The SEC appears to have reopened its formal investigation approximately a week after the an article in the Washington Post, Amit R. Paley, *New Evidence Emerges in Closed Insider-Trading Case*, The Washington Post Dec. 12, 2008, at D1 “New evidence has emerged in an insider-trading investigation that the Securities and Exchange Commission closed two years ago without filing charges, raising questions on Capitol Hill about the government's oversight of what was once one of the nation's most prominent hedge funds.”

oversight and enforcement efforts ... [because] revelations surfaced that staff at the SEC repeatedly failed over the course of a decade to fully investigate credible allegations against [Bernard Madoff].”¹⁸⁴ Some of the financial media linked the SEC’s botched investigation of Madoff and Pequot in ways that did not flatter the SEC.¹⁸⁵

The current FOIA claim goes to the heart of what the SEC seeks to keep secret: exactly how it blundered in closing its first Pequot investigation. Plaintiff’s timeline pointed to April 9 tip and implied the existence of the new evidence.¹⁸⁶ His emails said the same.¹⁸⁷ Among the records Plaintiff seeks are the notes of SEC staff who met with Samberg’s and Pequot’s attorneys when the SEC made the decision to close its investigation of Pequot’s trading in Microsoft securities.¹⁸⁸ No information could be more damaging to the SEC’s public image than yet

¹⁸⁴ Marcy Gordon and John Christoffersen, *SEC reopens insider-trading probe of hedge fund*, The Associated Press State & Local Wire, Jan. 8, 2009.

¹⁸⁵ Adam Zagorin and Michael Weiskopf, *The Inside Story on the Breakdown at the SEC*, Time Magazine, Feb. 26, 2009. See also:

Regulatory reform. The changes don’t start and end on Wall Street. Washington’s regulatory structure has proven to be an abject failure. ... It means the SEC should stand behind its own people such as attorney Gary Aguirre who was road blocked for looking into insider trading claims among Wall Street’s elite. It also means the SEC should become blind to power, influence and reputation—the kind that shielded Bernie Madoff from thorough examination—and give even the most unimpeachable figures no benefit.

David Weidner’s Writing on the Wall, *It’s morning on Wall Street. Commentary: Will investors be better off four years from now?* Marketwatch.com, Jan. 20, 2009. Available at <http://www.marketwatch.com/story/dont-ask-what-obama-can-do-for-wall-street>.

¹⁸⁶ June 2005, timeline, Ex. 3. The timeline references Zilkha’s Apr. 7, 2001, email to Samberg (Samberg exam, Ex. 8(B), at SEC0007982, Ex. 109 thereto) “to get back...on MSFT” and the “presumed MNI communication” from Zilkha to Samberg on Apr. 9, 2001. It thus implies that Zilkha obtained some “tidbits” on Microsoft’s quarterly results between Apr. 7 and Apr. 9, 2001.

¹⁸⁷

On April 6, before Zilkha joined Pequot, Samberg wrote Zilkha: “i [sic] own some msft [sic] based on the win2000 cycle, despite recurring indications from knowledgeable people that the company will either pronounce or take guidance down. Any tidbits you might care to lob in will be appreciated.” Zilkha replied the next day, “I will get back to you ASAP” I know from a later e-mail that Zilkha provided info to Samberg on 4/9/2001, and that Samberg traded heavily in options from 4/9 through 4/11.”

Plaintiff’s email of Jun. 13, 2005 to Robert Hanson, Ex. 17, Aguirre Decl. ¶ 18. Also: “The Samberg-Microsoft investigation is on hold until David Anders and the FBI speak with David Zilkha. That matter really depends on whether Zilkha tells the FBI that he tipped Samberg around April 9. If he does, David Anders will likely continue the matter as a criminal investigation.” Plaintiff’s email of Jun. 29, 2005 to Mark Kreitman, *supra*, fn. 26, S. HRG. 109-898, at 240.

¹⁸⁸ Second Amended Complaint, ¶ 46, subparagraph 5.

another case where it buckled under to pressures from influential attorneys.¹⁸⁹ Reopening the Pequot investigation provides damage control; it allows the SEC to ignore Congressional inquiries and assert Exemption 7(A). If the SEC revived the Mack investigation for damage control, as it concedes, and routinely abuses Exemption 7(A) to withhold records, as it inspector general found, its assertion of Exemption 7(A) for damage control is merely instinctive.

SEC Conclusory Statements of a Pequot Investigation Are Insufficient as a Matter of Law.

The SEC supports its motion with the vaguest statements to prove it currently conducts a genuine investigation of Pequot. Assistant Director Bradford Ali merely states the investigation was reopened “in or about late 2008” and he is “one of the supervisors responsible for overseeing” it.¹⁹⁰ Assistant US Attorney Jonathan Streeter is even vaguer about the purported criminal investigation he is conducting, explainable by the fact the statute limitations has run on any criminal proceeding for insider trading.¹⁹¹ Given the history of the SEC’s handling of the Pequot investigation, as a matter of law, these conclusions are insufficient to establish either agency is conducting a “concrete prospective law enforcement proceeding,” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 222 (U.S. 1978).

V. THE SEC HAS NOT AND CANNOT PROVE THE RELEASE OF THE RECORDS SOUGHT COULD INTERFERE WITH ITS INVESTIGATION *IF ONE EXISTS.*

¹⁸⁹ The Senate Report speaks to this same issue in the context of senior SEC staff prohibiting a subpoena for John Mack. On this point, the Senate Report reads:

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

Senate Report at 37.

¹⁹⁰ Declaration of Bradford E. Ali (Docket no. 34-2), ¶ 7.

¹⁹¹ *Supra*, fn. 20.

As a second condition to the assertion of Exemption 7(A), the SEC must show that disclosure of the “documents would, in some particular, discernible way, disrupt, impede, or otherwise harm the enforcement proceeding,” *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989). See also *Judicial Watch v. FBI*, 2001 U.S. Dist. LEXIS 25732 (D.D.C. Apr. 20, 2001) (The Government “must show that release of the withheld documents is likely to cause some distinct harm.” Rather, the government”) The SEC “does not meet its burden, nor does the district court discharge its responsibility, through conclusory statements, unaccompanied by supporting detail, that these exceptions are applicable,” *Campbell v. Department of Health & Human Servs.*, 682 F.2d 256, 265-266 (D.C. Cir. 1982). As this Court noted in *ACLU v. FBI*, 429 F. Supp. 2d 179, 191 (D.D.C. 2006), “The categories relied upon, however, must be ‘functional’ – ‘allowing the court to trace a rational link between the nature of the document and the alleged likely interference,’” citing *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 252 U.S. App. D.C. 232, 789 F.2d 64, 67 (D.C. Cir. 1986).

In this case, the SEC offers two sets of conclusions as proof the release of the documents could reasonably be expected to harm its reopened Pequot investigation. First, it offers these conclusory statements what information would be disclosed: (1) the government’s impression of witness testimony or interviews, (2) the likely scope, direction or focus of the current investigation, (3) some of the questions Commission investigators asked witnesses; and (4) the evidence those witnesses would (and would not) provide.¹⁹²

It also offers a second set of conclusions how the release of the information would harm its case:

- (1) witness intimidation;
- (2) chilling investigations by making third parties reluctant to provide information;
- (3) giving a suspected violator early access to

¹⁹² When the repetition in their declarations is eliminated, SEC Assistant Director Ali and AUSA Streeter used the vague categories stated in the text to describe the information that would be disclosed by the release of the records.

information in the case against it, allowing it to construct bogus defenses and to manufacture or destroy evidence; (4) revealing the scope, direction, or focus of investigative efforts; (5) revealing the agency's impressions of testimony; and (6) hindering the government's ability to shape and control its investigations.¹⁹³

The SEC's double set of boilerplate conclusions is an excellent example how the SEC OGC routinely uses Exemption 7(A) to frustrate FOIA. In his audit of the SEC's FOIA compliance, or lack thereof, the Inspector General found "legal memoranda [in the majority of the FOIA appeals] that were prepared by OGC attorneys and contained standardized, boilerplate legal explanations upholding the SEC's routine application of FOIA exemption (b)(7)(A)."¹⁹⁴

The SEC cannot cure the deficiencies in its moving papers for two reasons. First, as discussed above, the SEC has already disclosed the information a target would wish to know about the SEC's first investigation of Pequot's trading in Microsoft securities in its CCR. What the SEC did not disclose has been made public through the OIG Report, the Senate Report and the Senate's release of SEC records and testimony, and orders of this court in the first FOIA case. Likewise, the media has reported on the details of the new evidence: the Zilkha-Spain smoking guns,¹⁹⁵ Pequot's partially executed agreement to pay Zilkha \$2.1 million,¹⁹⁶ Zilkha's assertion of the Fifth Amendment,¹⁹⁷ and Zilkha's admission he gave illegal tips on Microsoft and was fired when he stopped.¹⁹⁸ As the Court noted in *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996): "If the target of the investigation—the one who might use the information to intimidate witnesses, destroy evidence, and so forth—already has the information, public access to it is unlikely to interfere with law enforcement proceedings." See also: *Campbell v. Department of Health & Human Servs.*, 682 F.2d 256, 264 (D.C. Cir. 1982).

¹⁹³ Defendant's Partial MSJ (Docket No. 34), at 10.

¹⁹⁴ *Supra*, fn. 147, OIG FOIA Report at 13.

¹⁹⁵ Paltrow, *supra*, fn. 176.

¹⁹⁶ Paley, *supra*, fn. 120.

¹⁹⁷ Marcy Gordon, *New questions arise in Pequot trading probe*. Associated Press, Nov. 20, 2009.

¹⁹⁸ *Id.*

Second, Plaintiff only seeks information that would disclose how the SEC repeatedly took itself down dead ends, as the SEC concedes in the CCR, while holding an accurate roadmap to its intended destination. This is not the type of information which Congress intended for agencies to withhold under Exemption 7(A). On the other hand, it is exactly the type of information which Congress intended FOIA to make available to the public.

Records Relating to the SEC Staff Meeting on April 3, 2006

As discussed below, this meeting between four SEC staff attorneys and six Pequot-Samberg attorneys, according to the SEC, was the turning point in the Microsoft aspect of the Pequot investigation.¹⁹⁹ Since the SEC claims it was unable to locate the records of this meeting, it is unclear whether it also asserts Exemption 7(A). In any case, since these records would contain information which Samberg's and Pequot's attorneys provided the SEC, which, in turn, the SEC relied upon in closing the investigation, the information is already known to the targets and thus is not protected by Exemption 7(A). *Swan*, 96 F.3d 500; *Campbell*, 682 F.2d at 264.

Testimony and Interviews of Two Goldman Sachs Employees

At the meeting on April 3, 2001, Samberg's and Pequot's attorneys provided SEC attorneys which "called into question whether the information Zilkha provided Samberg with material nonpublic information."²⁰⁰ The CCR explained "staff learned that information relevant to both the earnings announcement and the product delay had been provided to Pequot by Goldman Sachs ("Goldman") in advance of Goldman publishing the Information and before Pequot's trades."²⁰¹ Branch Chief Hanson identified the two Goldman Sachs's employees: Ned

¹⁹⁹ Ex. 17, Pequot Chronology, at AGUIRRE 25973.

²⁰⁰ *Id.*

²⁰¹ CCR, Ex. 10, at 3.

Segal (Segal) and Matthew Maslow (Maslow).²⁰² SEC staff took the testimony of Segal and Maslow; both exculpated Samberg, Pequot, and themselves.²⁰³ In essence, the targets' attorneys explained to SEC attorneys why the SEC's insider trading theory against the targets was flawed. Hence, the disclosure of the details regarding this process could not possibly assist the targets. The release of these transcripts would only disclose the shallowness of the SEC's investigation and how Pequot's and Samberg's attorneys were able to direct the SEC investigation of their clients' possible insider trading.

Zilkha's Two Proffer Sessions

The CCR and the OIG Report tell how the SEC tried but failed to build an insider trading case based on tips which it admits contained no *material* information.²⁰⁴ Zilkha told SEC staff that "he did not believe the information [he provided Samberg] was either material or confidential," i.e., the April 17 and April 29 tips.²⁰⁵ The SEC staff attorney who took over the Pequot investigation ultimately agreed these "tips" were immaterial.²⁰⁶

Further, Zilkha repeatedly gave the SEC erroneous information about the source of the immaterial tips. The CCR explains: "The staff interviewed by telephone the person Zilkha identified as the source of the first tip [about the "relaxed" CFO], but she denied even knowing Zilkha ... (emphasis added)."²⁰⁷ Likewise, the other Microsoft employees denied giving the tips to Zilkha on April 27, 2001.

²⁰² In his Nov. 9, 2006, transcribed statement taken by Senate investigators, Branch Chief Robert Hanson identified the two Goldman Sachs employees as Ned Segal and Matthew Maslow (Reporter's transcript at 64). The transcript is available at the offices of the Senate Committee on Finance.

²⁰³ *Id.*, at AGUIRRE 25974.

²⁰⁴ CCR, Ex. 10, at 3; OIG Report, Ex. 12, at 100.

²⁰⁵ *Id.*

²⁰⁶ "[A]t the end, you know, when I was trying to get my ducks in a row on materiality and a couple other things, it kind of fell apart." Senate Report at 44.

²⁰⁷ CCR, Ex. 10, at 3.

The SEC fails to explain how releasing the details of Zilkha's proffer sessions in which he claims to have received information that was neither confidential nor material from individuals who deny giving it to him could harm its present investigation, if one in fact exists. The disclosed facts again suggest the SEC was either incompetent or not trying. Did the SEC really cycle through the entire investigation before deciding the communications were immaterial? At some point, why did it not occur to SEC staff that Zilkha, an Oxford graduate with three advanced degrees, was concealing the real source, which turned out to be Mark Spain, of the material nonpublic information he had fed to Samberg?

The SEC would also carve out a new FOIA exemption, allowing it to destroy records. It asks the court to recognize an interagency agreement to withhold records as a non-statutory FOIA exemption. The SEC seeks to withhold responsive records it obtained from the Department of Justice "pursuant to an express agreement limiting the staff's ability to use the documents and requiring that the documents not be retained by the Commission. *The documents must be destroyed* or returned ... (emphasis added)." Congress included no such exemption in FOIA. Nor has the SEC cited a legal theory under which such records may be withheld or destroyed.

Interviews of Certain Microsoft Employees

Again, it is clear from the CCR and the OIG report that the release of this information could not harm the purported SEC investigation. The SEC had four phone interviews with Microsoft employees, one in February 2006²⁰⁸ and three on March 16, 2006.²⁰⁹ The phone interviews related to the tips of *immaterial* information which Zilkha provided Samberg on April 17 and April 27, 2001. All four employees deny providing any information to Zilkha. Hence, the release of this information could not harm the investigation.

²⁰⁸ OIG Report, Ex. 12, at 90.

²⁰⁹ *Id.*

On the other hand, the SEC clearly has its reasons for not disclosing the information and those are precisely the reasons FOIA requires that it be disclosed. The four phone calls to Microsoft employees comprise the totality of the SEC's contacts with Microsoft employees to obtain information that Zilkha may have communicated to Samberg. The SEC took no testimony from any Microsoft employee. Nor did the SEC even conduct an interview which would have allowed SEC staff to observe the demeanor of the prospective witnesses. Again, the SEC handling of this matter suggests it was utterly incompetent or not making an effort.

By itself, the trades Samberg directed on April 9 through 11, 2001, generated \$14.2 million, a potential SEC recovery of \$42.6 million under the Exchange Act. The SEC repeatedly acknowledged that it needed evidence indicating Zilkha had obtained material nonpublic information from source within Microsoft. The timeline Plaintiff left his supervisors narrowed the search to three days: April 7, 8 and 9, 2001. Yet, the CCR and OIG Report establish the SEC's only effort to obtain any information from Microsoft employees was four phone calls.

The SEC's failures must be placed in context. At this point in time, April 2006, the SEC had never brought a case against any of the nation's larger hedge funds for any of the classic forms of insider trading.²¹⁰ The SEC new Enforcement Director now says a class of these hedge funds, in which Pequot was a member, were using insider trading as a "business model." The disclosure of the information sought by Plaintiff goes to the core of Congress's purpose in enacting FOIA.

VI. THE SEC'S SEARCH WAS INADEQUATE AND IT FAILED TO DEMONSTRATE ANY ATTEMPT TO SEGREGATE PORTIONS OF THE RECORDS

²¹⁰ *Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity: Hearings Before the U.S. Sen. Comm. On the Judiciary*, 19th Cong., available at: http://judiciary.senate.gov/hearings/testimony.cfm?id=2437&wit_id=5485 (2006) (statement of Gary J. Aguirre, Former Investigator, U.S. Securities and Exchange Commission, Part I). This testimony demonstrated that in its entire history, the SEC had (1) brought and settled a total of three cases against small hedge funds for classic insider trading where it obtained a total recovery of \$110,000 and (2) had settled three other cases dealing with a highly specialized form of insider trading involving "PIPE" transactions.

There is no clue in the SEC's affidavits that it conducted the document-by-document review contemplated in *Bevis v. Department of State*, 801 F.2d 1386 (D.C. Cir. 1986). The court there noted:

Although the FBI need not justify its withholding on a document-by-document basis in court, the FBI must itself review each document to determine the category in which it properly belongs. Absent such individual scrutiny, the categories would be no more than smaller versions of the "blanket exemptions" disapproved by Congress in its 1974 amendment of FOIA. (801 F.2d at 1389)

As the OIG Report on the SEC's FOIA compliance noted, "*The practice of the SEC not conducting a document-by-document review has been challenged and has resulted in censure by the courts on two recent occasions (emphasis added).*"²¹¹ Likewise, the SEC has provided no facts from which it may be reasonably inferred that staff reviewed each document for the purpose of determining whether it contained segregable, non-exempt information that could be released. *Durrani v. United States DOJ*, 607 F. Supp. 2d 77, 88 (D.D.C. 2009)

The SEC also claims its search yielded no records of the meeting between SEC attorneys and Pequot-Samberg attorneys on April 3, 2006, which altered the course of its investigation of Pequot's trading in Microsoft securities. Before addressing this issue, some background may be helpful as it suggests the improbability of the SEC's contention.

As was the case with the SEC's investigation of Pequot's trading in GE-Heller, the turning point in its investigation of Pequot's trading in Microsoft securities occurred during a meeting with defense attorneys, this time with attorneys representing Pequot and Samberg. The CCR tells how the investigation began to unravel in April 2006, but does not explain exactly why.²¹² The OIG Report contains a chronology prepared by the same staff attorneys identifying only one event in April 2006, recorded as follows: "April 3, 2006—Met with attorneys for

²¹¹ OIG Report on FOIA at 15.

²¹² CCR, Ex. 10, at 3.

Samberg and Pequot and were presented with additional information regarding the Microsoft and GE/Heller transactions.”²¹³ The chronology itself states that this new information “called into question whether the information Zilkha provided to Samberg was material nonpublic information.”²¹⁴

The probability that SEC staff created no records relating to this meeting is astronomically low,²¹⁵ as is the possibility it destroyed them or could not find them.²¹⁶ In this light, the SEC offers two conclusions regarding the adequacy of the search:

- 1) “The evidence gathered in the 2005 investigation, including the documents sought in this FOIA request, have been incorporated into the case files of, and are being used in, the reopened investigation;”²¹⁷ and
- 2) “The Commission’s search has identified only email pertaining to scheduling or logistics of this meeting. The responsive documents are being provided to the requester.”²¹⁸

This description provides less information regarding the scope of the search than the search the Court found to be insufficient in *Aguirre v. SEC*, 551 F. Supp. 2d 33, 61 (D.D.C. 2008). Hence, the search was inadequate.

VII. THE SEC CANNOT VALIDLY ASSERT ANY OTHER FOIA EXEMPTION

The SEC’s last minute assertion of Exemptions 5, 6 and 7(C) is procedurally and substantively flawed. To begin with, the SEC did not timely assert these exemptions. *August v. FBI*, 328 F.3d 697, 699 (D.C. Cir. 2003); *Stonehill v. IRS*, 558 F.3d 534, 538 (D.C. Cir. 2009).

²¹³ OIG Report, Ex. 12, at 91; Ex. 17, Pequot Chronology, at AGUIRRE 25973.

²¹⁴ Ex. 17, Pequot Chronology, at AGUIRRE 25973.

²¹⁵ According to emails recently released by the SEC, filed as Exhibit 5, the meeting was likely attended by four SEC staff members and six attorneys representing Pequot and Samberg. The meeting resulted in a decision by the SEC to abandon its theory that Pequot had illegally traded Microsoft securities. Further, it was the invariant practice of Branch Chief Hanson to require the preservation of detailed notes of such a meeting. All of these factors would have caused SEC to generate and preserve information what transpired at this meeting. Aguirre Decl. ¶ 24.

²¹⁶ Defendant’s Partial MSJ, at 7.

²¹⁷ *Id.*

²¹⁸ *Id.*, at 13.

Further, the Court has already ruled on the application of Exemption 6 and Exemption 7(C) in the context of the Pequot investigation in *Aguirre v. SEC*, 551 F. Supp. 2d 33, 61 (D.D.C. 2008). The names of all individuals who participated in the events—Samberg, Zilkha, the Goldman Sachs employees (Segal and Maslow), the SEC attorneys (Kreitman, O'Rourke, Hanson and Eichner), and Pequot's and Samberg's attorneys (Lanny Pedowitz, Ted Levine, Paula Gondon, Audrey Strauss and Brian Sumner)—discussed in the documents which Plaintiff seeks have all been disclosed, except the names of the Microsoft employees, and Plaintiff agrees their names may be redacted. The same public policy interests, recognized in the first FOIA case, outweigh whatever marginal privacy interest, if any, these individuals could have in nondisclosure. Plaintiff knows of no theory under which Exemption 5 could be asserted. In fact, the Court directed the SEC to release exactly the same class of records in the first FOIA case, as the SEC seeks to withhold now: transcripts of testimony, witnesses' statements, and records of meetings with defense counsel. Hence, Plaintiff's motion should be granted on all exemptions the SEC could assert in withholding the records in issue and the SEC should be directed to produce them immediately.

Dated: April 12, 2010

_____/s/_____
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