



Issue Date: 03 May 2013

Case No.: 2011 SOX 13
In the Matter of

VANESSA GIFALDI,
Complainant

v.

OCTAGON, INC., and
INTERPUBLIC GROUP OF COMPANIES, INC. ("IPG"),
Respondents

Appearances: Mr. Matthew Sarelson, Attorney
For the Complainant

Mr. Robert Niccolini, Attorney
Ms. Crystal Barnes, Attorney
For the Respondents

Mr. Paul Hoss, Attorney
(In-house counsel for Octagon, Inc.)¹

Before: Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER –
DISMISSAL OF COMPLAINTS

This matter arises under the employee protection provision of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C. § 1514A (“Act” or “SOX”) as implemented by 29 C.F.R. Part 1980. This statutory provision, in part, prohibits companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or companies required to file reports under Section 15(d) of the Securities Exchange Act of 1934, including subsidiaries or affiliates whose financial information is reported in the company’s consolidated financial statements, from discharging, or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to alleged violations of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud),

¹In-house counsel did not actively participate in the hearing.

1348 (security fraud), any rule or regulation of the Securities and Exchange Commission (“SEC”), or any provision of federal law relating to fraud against shareholders.

Procedural History

On January 6, 2010, Ms. Vanessa Gifaldi filed a complaint with the Occupational Safety & Health Administration (“OSHA”), U.S. Department of Labor (“DOL”) under the SOX employee protection provisions at 18 U.S.C. § 1514A. Ms. Gifaldi asserted that Interpublic Group of Companies, Inc., and its wholly-owned subsidiary Octagon, Inc. (“Octagon”), violated Section 1514A of the Act by terminating her employment on October 26, 2009 in retaliation for her participation in an internal investigation concerning financial irregularities.

On November 12, 2010, upon completing an investigation, the Regional Administrator, Occupational Safety and Health Administration, dismissed Ms. Gifaldi’s complaint. The Regional Administrator determined that Respondent’s decision to terminate Ms. Gifaldi’s employment was in the works before her participation in the investigation but was delayed until the investigation was completed, and that the preponderance of the evidence did not demonstrate that Octagon management involved in making the decision to terminate Ms. Gifaldi’s employment knew the nature of the information she provided to the investigators. On December 3, 2010, Ms. Gifaldi objected to the findings and requested an administrative hearing.

Pursuant to a Notice of Hearing dated December 20, 2010 (ALJ I),² I conducted a hearing in Washington, DC on July 18 and July 19, 2011. My decision in this case is based on the hearing testimony and the following depositions and documents admitted into evidence: CX 1, CX 11, CX 33, CX 36, CX 40 to CX 42, CX 45 to CX 49, CX 51, CX 53, CX 55, CX 57, CX 58, CX 65, CX 68, CX 69, CX 81, CX 94, CX 99, CX 101 to CX 103, CX 113, CX 125 to CX 129, RX 2, RX 5 to RX 7, RX 9, RX 13, RX 15 to RX 17, RX 23 to RX 25, RX 27 to RX 30, RX 32 to RX 34, RX 37, RX 41, RX 47, RX 48, RX 51 to RX 55, RX 58 to RX 61, and RX 65.

Parties’ Positions

Complainant³

Ms. Gifaldi has established by a preponderance of the evidence that on October 26, 2009, she was terminated by Octagon’s President, Mr. Phil de Picciotto, in retaliation for raising SOX compliance complaints both internally and externally to Octagon’s publicly traded parent company, IPG. The reasons for Ms. Gifaldi’s termination were never explained to her and have changed throughout the litigation. Her termination took place within moments of the termination of her supervisor, Ms. Jenny Klitch. Neither Ms. Gifaldi nor Ms. Klitch was given the contractual four week notice. Ms. Gifaldi and Ms. Klitch had to be fired immediately because Octagon officials were upset about the external complaint to IPG.

²The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

³TR, pp. 8-24 and October 17, 2011 closing brief.

Ms. Gifaldi reasonably believed that Octagon's improper financial control processes breached a fiduciary duty to its clients and would have an adverse effect on IPG's stock price. Due to these concerns, Ms. Gifaldi engaged in three kinds of protected activity. First, Ms. Gifaldi was vocal and active in complaining to her supervisor, Ms. Klitch, about improper invoicing procedures and the mishandling of client escrowed funds that could have significant legal or financial consequences for Octagon. Second, Ms. Gifaldi participated in the investigation conducted by IPG and Deloitte into Ms. Klitch's allegations in her August 25, 2009 e-mail complaint that Octagon had SOX, legal, and accounting compliance issues. Ms. Klitch's e-mail expressly identified Ms. Gifaldi. Third, Octagon retaliated against Ms. Klitch for her e-mail complaint to IPG by firing her, and additionally terminated Ms. Gifaldi because of her close relationship and loyalty to Ms. Klitch. Although Ms. Gifaldi did not write the e-mail, she is within the zone of interest that SOX seeks to protect. Overwhelming evidence establishes that Ms. Gifaldi had to be fired with Ms. Klitch, because they were treated as a packaged deal.

Ms. Gifaldi's protected activity was a contributing factor in her termination on October 26, 2009. No evidence establishes that the decision to terminate Ms. Gifaldi was made prior to the August 25, 2009 complaint. Ms. Gifaldi's performance reviews were excellent, and she was never advised of any performance issues, or given any notice prior to October 26, 2009 that her job was in jeopardy. Mr. de Picciotto's testimony regarding Ms. Gifaldi's termination was highly incredible and contradictory. Shifting explanations for an employee's termination by an employer are evidence of pretext. Octagon has offered a variety of explanations for Ms. Gifaldi's termination, including economic factors, performance issues, work location issues, and her loyalty to Ms. Klitch. Further, Ms. Julie Kennedy, head of Human Resources ("HR"), testified that as of August 25, 2009, no decision had been made to terminate Ms. Gifaldi. Mr. de Picciotto did not advise Ms. Kennedy that he intended to terminate Ms. Gifaldi until September 22, 2009, the same day the Deloitte investigators arrived at the McLean offices to conduct interviews.

Octagon failed to establish by clear and convincing evidence that Ms. Gifaldi would have been terminated on October 26, 2009 absent any protected activity. Only evidence available to Octagon at the time of its decision to terminate Ms. Gifaldi can be considered in establishing that it would have taken the same employment action absent protected activity. Mr. de Picciotto's testimony was inconsistent and unsupported by any written documentation, even though these were significant employment decisions. Unsupported testimony, and the absence of written documentation where such documentation would be expected, weigh heavily against Octagon's argument that the decision to terminate Ms. Gifaldi had already been made. Further, the investigation by Deloitte into Ms. Klitch's allegations was cursory and superficial.

The After-Acquired Evidence Doctrine does not apply to SOX retaliation claims, and would only limit damages, not Respondents' liability. Even if it did apply, invoicing errors discovered after Ms. Gifaldi's termination, when her job was to clean up that same system, do not rise to the level of misconduct that would result in termination if her employer had known of the errors at the time of her discharge.

The testimony of Ms. Klitch is highly credible. Ms. Klitch sent her e-mail complaint to IPG on August 25, 2009, because she had exhausted efforts to resolve her concerns internally,

and it was her only option as Chief Legal Officer ("CLO"). In contrast, Mr. de Picciotto's testimony was highly incredible, inconsistent, unsupported and self-serving, and should be completely discredited.

Several months after her October 26, 2009 termination, Ms. Gifaldi obtained re-employment on May 17, 2010 and consequently does not request reinstatement. She also does not claim any economic damages as of January 1, 2011. However, due to the Respondent's SOX employment discrimination violation in this case, Ms. Gifaldi seeks \$85,824.62 in economic damages (back pay based on her pre-termination annual salary of \$95,000 between November 26, 2009⁴ and December 31, 2009, her \$10,000 bonus for 2009, back pay based on her contracted salary of \$99,000 between January 1, 2010 and May 16, 2010, diminished wages between May 17, 2010 and December 31, 2010, COBRA expenses, and repayment for borrowed funds), and \$50,000 in non-economic damages, plus associated prejudgment interest, attorney fees, and litigation expenses.

Respondent⁵

Ms. Gifaldi is unable to establish a prima facie case of whistleblower retaliation because the undisputed facts demonstrate that: the decision to terminate Ms. Gifaldi was made before her participation in, and was completely unrelated to, the investigation of Ms. Klitch's complaint; Mr. de Picciotto had no knowledge of Ms. Gifaldi's participation in the investigation, including anything she said to investigators; and, Ms. Gifaldi's unreasonable belief that Octagon's client and escrow accounting practices violated generally accepted accounting principles does not meet the standard for protected activity under the Act. Even if Ms. Gifaldi could establish a prima facie case of whistleblower retaliation, Octagon and IPG have shown by clear and convincing evidence that she was terminated due to significant performance problems and errors, not any protected activity. Further, Ms. Gifaldi's termination is justified by additional evidence of performance issues uncovered after her termination.

Ms. Gifaldi's statements to investigators do not rise to the level of protected activity under the Act. The two issues that she raised during her interview with the Deloitte investigators, billing discrepancies and the handling of promissory notes, were actually issues that had been raised by Ms. Klitch and then parroted by Ms. Gifaldi during the interview. Ms. Gifaldi did not have extensive experience with either issue and had never independently identified either practice. Further, Ms. Gifaldi never reported her alleged concerns of SOX violations to anyone else before the investigation. Accordingly, she did not reasonably believe that these practices constituted fraud under SOX. She cannot show that she reasonably believed Octagon was intentionally defrauding its clients or IPG shareholders. To the contrary, the positions of Ms. Gifaldi and Ms. Klitch were created to "clean-up" the invoicing process. Ms. Gifaldi cannot demonstrate that she reasonably believed her statements to investigators rose to the level of protected activity under the Act.

⁴After her October 26, 2009 termination, Octagon paid Ms. Gifaldi one month's salary. As a result, her economic damages did not begin until November 26, 2009.

⁵TR, pp. 24-36 and October 17, 2011 closing brief.

Ms. Gifaldi is unable to demonstrate that Mr. de Picciotto knew she participated in the Deloitte investigation or the substance of her communications to the investigators. She never discussed the interview with other employees, and Mr. de Picciotto was not informed as to who was interviewed or what was said. He knew the Klitch e-mail had raised concerns about the client escrow account and accounting practices, but did not know the specifics. No link existed between the Klitch e-mail and Ms. Gifaldi. Accordingly, Ms. Gifaldi cannot establish that Mr. de Picciotto knew of her alleged protected activity.

Ms. Gifaldi cannot demonstrate that the motivating factor in her termination was her participation in the Deloitte investigation. The motivating factor for Ms. Gifaldi's termination was her poor job performance, demonstrated by her repeated serious errors, including failing to meet two significant corporate billing deadlines. The failed billing deadlines standing alone were a "legitimate and sufficient basis to terminate Ms. Gifaldi's employment." Moreover, the date the decision was made to terminate Ms. Gifaldi preceded the dates of both the Klitch e-mail and Ms. Gifaldi's her interview with the investigators. The only reason Ms. Gifaldi was not terminated earlier was because IPG had instructed Octagon to put everything on hold pending an investigation. Because Octagon had a legitimate non-retaliatory reason for terminating Ms. Gifaldi, and she failed to show that Mr. de Picciotto knew of her alleged protected activity, Ms. Gifaldi cannot show that her alleged protected activity was a contributing factor in her termination.

Even if Ms. Gifaldi were to prevail in establishing a prima facie case, her thoroughly documented and admitted performance issues constitute clear and convincing evidence that Octagon would have terminated her in the absence of any alleged protected activity. The record is full of a variety of significant errors made by Ms. Gifaldi on a regular basis. Ms. Gifaldi's errors began in January 2009, and Mr. de Picciotto decided to terminate her employment prior to the Klitch e-mail and resulting investigation.

Third-party retaliation as applied in Title VII cases under the Supreme Court's recent decision in *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), is not applicable to this case. The facts of this case, which involve a different type of employee relationship and timing, clearly distinguish it from the *Thompson* case. Further, courts are hesitant to impose Title VII precedent in SOX cases, which has its own distinct legal framework.

Octagon would have made the same decision to terminate Ms. Gifaldi's employment based on after-acquired evidence of her serious performance problems which independently justify her termination. If Ms. Gifaldi prevails on her claim, her damages should be limited to the brief period of time between when she was terminated and when the errors were discovered.

ISSUES

1. Whether Ms. Gifaldi engaged in a protected activity under the Act.
2. If Ms. Gifaldi engaged in a protected activity, whether that protected activity was a contributing factor in the Respondents' decision to terminate her employment on October 26, 2009.
3. If Ms. Gifaldi's protected activity was a contributing factor in the decision to terminate her employment, whether the Respondents have established by clear and convincing evidence that they would have terminated Ms. Gifaldi's employment on October 26, 2009 in the absence of her protected activity.
4. Damages.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

Sworn Testimony

Ms. Vanessa Gifaldi
(TR, pp. 36-197)

[Direct examination] Ms. Gifaldi lives in Trophy Club, Texas, near Dallas, where she moved for a job. She is originally from upstate New York, just outside Rochester. She earned a Bachelor's Degree in English and began, but did not finish, a Masters Degree in secondary English. After she left the Masters program around 2003, she moved down to Florida and entered the mortgage business as a loan processor.

Before her employment at Octagon, Ms. Gifaldi worked for Ocwen Loan Servicing ("Ocwen" and "OLS"), a mortgage servicer that services subprime loans. She started off at Ocwen as the billing coordinator with responsibilities similar to the ones she had at Octagon, and was responsible for "kind of getting in there" to address issues with their invoices. She was responsible for getting the invoices in order, and then ultimately outsourced the job to staff in Bangalore. Her second supervisor at OLS was Ms. Jenny Klitch, whom she worked with from February 2005 until the fall of 2007.

Ms. Gifaldi found out about the Octagon position from Ms. Klitch. A position became available at Octagon and Ms. Klitch thought she would be well suited for it, because it involved billing and process improvement. She was hired by Ms. Klitch in October 2008 to clean up and consolidate Octagon's invoicing procedure for each division on the client side and the team billing side, but more importantly, the client side to centralize the invoicing process, because divisions were issuing invoices independently. There were record retention issues with what they were actually invoicing versus the money coming in.

[ALJ examination] Octagon is a sports marketing firm headquartered in McLean, Virginia. Ms. Gifaldi lived in Denver, Colorado when she was hired by Octagon. She moved to McLean for three months, then returned to Denver and worked remotely.

Octagon represents athletes in negotiating deals between the athlete and a team. The athletes are represented by individual agents working for Octagon. The various divisions are categorized by activity or sport, such as baseball, football or hockey.

There are two main ways the money is handled. On the corporate side, the athlete is billed directly to obtain Octagon's portion of its fee based on the athlete's salary with the team that is set out in their contract. The client side is responsible for endorsements that are separate from corporate accounting, and run through a separate escrow account. Initially, when she began working at Octagon, Octagon Financial Services ("OFS"), an offshoot of Octagon that reported to Octagon, was responsible for handling the escrow account and client invoicing.

When she arrived, Ms. Gifaldi took over responsibility for the client invoicing. Later, in June 2009, she and Ms. Klitch started managing the escrow account.

[Direct examination] The hiring process for the Octagon position included a day long interview with Nancy Morton, Julie Kennedy, Jan Plewes, and Ms. Klitch, as well other Octagon employees, including Meg Cerullo. At the time, Ms. Morton was not the Chief Financial Officer ("CFO"), but she was the top financial officer. Ms. Plewes was the managing director of OFS. Ms. Kennedy was the head of Human Resources for Octagon. Ms. Cerullo was a recent college graduate assisting in the legal department.

Ms. Gifaldi did not receive any negative feedback during the interview, and no one questioned her experience or qualifications. It was understood from the time she began working at Octagon that she would work in McLean for the first three months before working remotely from Denver. Ms. Gifaldi, whose title was something like "database manager," only reported to Ms. Klitch, whose title was General Counsel.

[ALJ examination] Although her title was database manager, it didn't really suit what she was doing. Ms. Klitch informed her that her primary purpose was to utilize her process improvement experience and make their invoicing process more efficient, because technically there wasn't a database that was housing the invoices. Ms. Gifaldi received the job requirements for her position from Ms. Klitch, who told her that Octagon wanted to revise the job description, but they wanted to get someone in the job quickly, so they didn't take the time to modify the position.

[Direct examination] Ms. Gifaldi was brought on board at Octagon to clean up the invoicing process. Ms. Klitch explained that Octagon wanted to centralize the invoicing process, make it more efficient, because every division was independently billing third parties for vendors' endorsements, and doing its own record keeping, and some divisions were better than others at keeping the records. Octagon's goal was to implement controls by having one source provide the invoices and maintain the invoice record so that a division could not manipulate the invoices and funnel money into their accounts.

Ms. Gifaldi discussed the invoicing processes a few times with Ms. Morton, as well as the head of the tennis division, in addition to the conversations she had with Ms. Klitch. During one conversation, Ms. Morton made an offhand comment that she was horrified at what was going on with the escrow accounts being handled on the client side by OFS. At the time, Ms. Gifaldi was trying to explain to her all of the data points that she had to keep that weren't there before, and how she was just trying to establish basic metrics, or information slots, for centralizing the invoicing process using a software program. Ms. Morton expressed that she was horrified by all the data points Ms. Gifaldi was tracking in a manual fashion on an Excel spreadsheet. The Excel spreadsheet was being used to manage millions of dollars. On that particular spreadsheet, until June 2009 when Ms. Gifaldi started managing the escrow account, it tracked the amount of money that had been invoiced to a vendor owing money to Octagon's client. A separate spreadsheet was maintained for the escrow account to track receipts.

Between October 2008 and May or June of 2009, Ms. Gifaldi handled the invoicing. Beginning in June 2009, Ms. Gifaldi and Ms. Klitch, who at that time was the Chief Legal Officer, were also responsible for monitoring the escrow account. Ms. Gifaldi's involvement with the escrow account was limited due to her involvement on the front end of the invoicing process.

[ALJ Examination] Ms. Gifaldi was supervised by Ms. Klitch between October 2008 and June 2009. Ms. Klitch was Octagon's General Counsel when Ms. Gifaldi arrived in October 2008. In the spring of 2009, Ms. Klitch's title changed to Senior Vice-President of Operations.

In reviewing the contracts, which was part of the process to centralize the contracts, Ms. Gifaldi uncovered instances where an invoice to a sponsor had not been paid. She was responsible for reviewing the contracts to ensure that an athlete had actually been paid by the sponsor what was specified in the contract.

Ms. Gifaldi started looking at the contracts when she began doing research. The contract review portion of the process was officially implemented in January or February 2009. After a contract had passed through the Legal Department, an executed contract would be delivered to Ms. Gifaldi via a mailbox. She was responsible for reviewing the contract to ensure the invoices had been properly sent out. Ms. Gifaldi also reviewed the spreadsheet maintained for the financials of the escrow log to ensure Octagon actually received payment on the athlete's behalf.

The contract review was a payment issue relating to invoicing, not an escrow issue. Part of her job was invoicing, so she had to look at the contracts to see whether Octagon was billing the sponsors and payments were received.

[Direct examination] During the contract review, Ms. Gifaldi discovered Octagon clients who had not been paid sponsorship money pursuant to the terms of their contract. Some of the invoices had been unpaid for a few years, but she did not find any that had been outstanding for more than three or four years. If paid, the money owed by the sponsor would go in the client escrow account. Some of the athletes knew that money was due to them, but others had no idea.

[ALJ examination] The discrepancy was a non-payment issue or due to an invoice not being issued to the sponsor before Ms. Gifaldi's arrival at Octagon. When she took over, Ms. Gifaldi discovered the discrepancies by comparing what was in the contract to the existing spreadsheet that tracked invoices that had gone out. She tried to match the invoice, if she had the relevant information, with what was coming in the escrow account.

Prior to her arrival, the process was not centralized: each division was responsible for tracking its own invoices. When Ms. Gifaldi arrived, she revamped the spreadsheet by adding 15 to 20 more data points to better track and maintain the information, and have reasonable control. Before she arrived, the person issuing an invoice was supposed to notify, and then send a copy to, the person responsible for maintaining and recording that information. Sometimes that did not happen, and there would be no record of the invoice going out. The quality of the invoicing record depended on the person in charge of each division because some were better than others.

Ms. Gifaldi uncovered the discrepancies when she compared the contract with the spreadsheet and the divisions that kept records. Sometimes if a division had not recorded the invoice, it could produce a copy of the invoice. In some cases, the invoices had actually never gone out; the division could not produce a copy of it. In other cases, a division just did not have a record of the invoice but they were able to produce, after the fact, a copy that went to the vendor. Ms. Gifaldi also received explanations that a division did invoice a sponsor, but it just did not have a copy of the invoice.

[Direct examination] Ms. Gifaldi was concerned about the ramifications for Octagon if the Octagon clients were aware of the invoicing issues, because the clients might leave Octagon and seek representation elsewhere, or there could be legal ramifications. Ms. Gifaldi believed there was an ongoing case about a similar issue.

Ms. Gifaldi believed Octagon had a fiduciary duty to its clients, meaning that they were obligated to act in the clients' best interests. She believed it was a breach of fiduciary duty to not collect on the various outstanding invoices, because "If we're supposed to be acting in the best interest of our clients and there were supposed to be invoices going out and the system itself was flawed, then.... That's why I was there, to fix the system." Ms. Gifaldi raised these issues with others at Octagon.

[ALJ examination] Ms. Gifaldi first became concerned in January or February 2009 when the contract centralization was implemented and she was tasked with reviewing the thousands of contracts to ensure that Octagon received all money owed to a client under each contract. The goal of creating a centralized contract repository was to provide an easy way to access a particular contract.

Over the course of her review of thousands of contracts, Ms. Gifaldi found a problem upwards of 50 times where an Octagon client was owed money by a sponsor. Ms. Gifaldi would verify that it was an issue, and then talk to the person responsible for invoicing in the particular division to learn whether it had been invoiced, and if it had not been invoiced, then it was invoiced.

She was fixing the problem that had existed when she found it. Her concern was that the problem existed, that clients were not receiving money they were owed due to non-payment or an invoice not being issued.

[Direct examination] Ms. Gifaldi raised her concerns about the invoicing process with Ms. Klitch. They spoke about fixing the problem, which was why Ms. Gifaldi was hired. Ms. Klitch answered to Mr. de Picciotto, the President of Octagon.

Ms. Klitch and Ms. Gifaldi were asked to take over the client escrow side of the invoicing process. Ms. Gifaldi's involvement was limited, because she was on the front-end performing the invoicing and they wanted to make sure the people receiving the checks were not the same people doing the invoicing. Ms. Gifaldi's involvement in the escrow account was limited to performing the month end reconciliation of the checks received coming into the escrow account and the money being paid out to clients.

Ms. Gifaldi started working with the escrow account with Ms. Klitch and the assistance of Ms. Cerullo in June 2009. The entire time Ms. Gifaldi was employed by Octagon, she answered to Ms. Klitch. Around June 2009, Ms. Klitch's title was changed to Senior Vice-President of Operations and Chief Legal Officer, but she continued to report to Mr. de Picciotto. Prior to the involvement of Ms. Gifaldi and Ms. Klitch, the escrow account was maintained by OFS, in particular, by Esther King and Dick Schneller. OFS works with clients who choose investment advisor services such as money investing. Money received from sponsors goes into the client escrow account maintained by OFS. At the time, Ms. Plewes was in charge of OFS.

Ms. Gifaldi found discrepancies between the amount of money Octagon was entitled to take out after funds were received, the money dispersed to the client, and what the escrow account held when she started looking at the escrow account in June 2009. In an endorsement deal, the sponsor pays Octagon, and Octagon gets paid a commission off the endorsement deal. Octagon is supposed to get a percentage that is stipulated in the contract.

Ms. Gifaldi noticed where Octagon was taking a greater commission from the escrow account than it was contractually authorized to take. She thought this needed to be fixed.

[ALJ examination] She found out about the discrepancies from Ms. Klitch, whom she spoke with on a daily basis. The amount that Octagon was entitled to depended on the contract language and whether it was an industry or non-industry deal, which required an attorney to make that call. There was confusion about what was industry versus non-industry. There may have been more instances, but she was not as involved as Ms. Klitch.

They received between 25-35 payments each week. Ms. Gifaldi noticed at least five to ten instances of Octagon taking a greater fee than it was entitled to take; the rest of the payments were done correctly. When it was caught at that level, it had been going on for a number of years and they would have to go back and correct it.

Each contract had a specific percentage amount, but there could be multiple percentage amounts. Interpretive disputes would arise because it was not always clear whether a particular

deal fell in the industry or non-industry category. For a tennis player, an example of an industry deal would be a deal with Prince rackets, and an example of a non-industry deal might be Coca-Cola, which is more overarching. The amount that Octagon should receive for its fee could vary based on the type of deal.

It was mostly Ms. Klitch's interpretation that the amounts taken out were incorrect, not Ms. Gifaldi's, because Ms. Klitch was in charge of reviewing the contracts between Octagon and its clients. There may have been instances where the contract stated Octagon would get a certain fee, and Octagon was keeping a higher percent, but Ms. Gifaldi did not see any instances of that particular scenario.

Under the terms of the contract as interpreted and presented to her, Ms. Gifaldi believed Octagon was receiving more than it should. It could have been an instance of someone flipping through the contract initially and setting up a 20 percent fee when it should have been 15 percent. It was a mistake based on how they went through that just carried over until Ms. Klitch identified it. Ms. Gifaldi caught a couple of them, because when she was updating the invoicing spreadsheet she was also tracking the percentage that Octagon should receive. Then, when the payment was received, she would enter it into the spreadsheet. Sometimes there would be a difference between what the billing should be and what was actually being billed. So, Ms. Gifaldi would report the discrepancy to Ms. Klitch as part of her job.

[Direct examination] Sometimes Octagon's agents had their expenses paid out of the client escrow account. Agent expenses were supposed to be paid out of the corporate account. Ms. Gifaldi thought the escrow account was specifically for client funds and nothing else should have been paid out of there.

[ALJ examination] Ms. Gifaldi believed that when the funds were received from the sponsor, Octagon was supposed to take its fee and then transfer that money over from the escrow account to the corporate side, so that the agent would be paid from the corporate account, not directly from the escrow account. Her concern was the process from which pot of money the agents were being paid from, not whether the agents were receiving the correct amounts.

Octagon would sign promissory notes with its client athletes. A promissory note is a promise of a payment to be made, such as when you loan a specific amount of money to a certain individual who promises to pay the money back. Client athletes would borrow money from Octagon and then sign a promissory note to pay it back, usually in situations where an upcoming athlete that Octagon believed would make it to the big time borrowed money until he or she got a paycheck.

[Direct examination] The promissory notes indicated how Octagon would be paid back. Up to a certain time, the money could only be paid back through their salary. But, sometimes Octagon took money coming in from endorsement deals to the escrow account to pay off the promissory note, even though Octagon was not contractually authorized to do so.

[ALJ examination] Ms. Gifaldi was concerned that the promissory notes should be paid off from salary payments, but instead Octagon was repaying the notes from the escrow account.

She was not concerned that the wrong amounts were being paid. Client athletes receive their salaries directly and then are responsible for paying Octagon's fees on the corporate side. Ms. Gifaldi did not know whether there were any side agreements with the athletes concerning how the promissory notes were to be paid back.

[Direct examination] In the spring or summer of 2009, Ms. Gifaldi was on a conference call where Ms. Klitch and Mr. de Picciotto discussed Ms. Klitch's concern that some of the older promissory notes still indicated that the note was supposed to be paid from the athlete's salary and it was instead being taken from the escrow account through the athlete's endorsement deals. Mr. de Picciotto said something like "Just take it from the endorsements that are coming in through the escrow account to pay down the note." Mr. de Picciotto indicated during the conversation that he did not "want money going out".

The improper payment of the promissory notes was identified by Ms. Klitch. After learning about the issue with the improper payment of the promissory notes, Ms. Gifaldi was concerned about what might happen to Octagon if Octagon's clients uncovered the way their escrow money was being handled. She was concerned the clients would seek representation elsewhere, or there could be legal matters or implications. She expressed these concerns to Ms. Klitch. When Ms. Gifaldi was at Octagon, clients did not receive an accounting of their escrow accounts. They only received a tax statement at the end of the year.

Octagon clients were paid from the escrow account by check or money wire, depending on whether the client was domestic or international. Octagon would transfer the money it was entitled to on a weekly or bi-weekly basis from the escrow account to the corporate accounts. Ms. Gifaldi spoke with Ms. Klitch about the invoicing processes and client escrow process on a daily basis. It was "quite an undertaking" that required Ms. Gifaldi and Ms. Klitch to be in constant contact and work closely together to make improvements and give status updates.

To clean up and improve the processes, Ms. Gifaldi suggested comprehensive software that would not require manual invoicing. She also thought the financial portion of the invoicing should be in comprehensive software systems.

[ALJ examination] Ms. Gifaldi received a formal performance review for the October 2008 to March 2009 time period from Ms. Klitch.

[Direct examination] No one at Octagon ever complained about Ms. Gifaldi's performance to her. Ms. Klitch was a demanding boss who expected a lot from her employees and expected things to be done correctly. "She was hard." Ms. Gifaldi also thought Ms. Klitch was fair and enjoyed working for her. No one at Octagon ever complained to Ms. Gifaldi about Ms. Klitch's performance.

[ALJ examination] Ms. Gifaldi became aware of the general mood in the office when she worked onsite in McLean for three months. People told her they were very resistant to change. Making suggestions or trying to improve efficiencies was not well regarded. There was some blow back associated with "trying to get in there and basically do what I was hired to do." Octagon had been in business since the 1980's, and some of the people Ms. Gifaldi was working

with had been at Octagon for a long time. Ms. Gifaldi did not consider the response unreasonable, but at the same time, it was 20 to 25 years later and efficiencies were needed.

[Direct examination] Ms. Gifaldi had a couple one-off conversations with Ms. Plewes, head of OFS, about fixing the invoicing process, and later the escrow system. Ms. Plewes was not upset, but she felt it reflected poorly on her. Ms. Plewes, who had been at Octagon since the 1980's, was disappointed because she had been in charge of escrowing until Ms. Gifaldi and Ms. Klitch took over.

Ms. Gifaldi first learned she was being fired when she received termination phone call on October 26, 2009 from Mr. de Picciotto and Ms. Kennedy, the head of HR. Mr. de Picciotto told her that her position was being eliminated, and thanked her for her service. The phone call only lasted a couple minutes. Ms. Gifaldi was surprised and upset she was being fired. Before the phone call, no one at Octagon, including Mr. de Picciotto and Ms. Kennedy, had dropped any hints that she might lose her job.

Ms. Gifaldi learned after the fact that Ms. Klitch was also terminated within the same hour. She was not aware that Ms. Klitch was going to be fired prior to October 26, 2009. Mr. de Picciotto did not explain why Ms. Gifaldi's position was being eliminated. He did not say what other positions were being eliminated, or mention that it was part of a layoff process or reduction of force in the company. There was no mention of financial difficulties causing the company to have to scale back.

During the call, both Mr. de Picciotto and Ms. Kennedy became very quiet when Ms. Gifaldi asked what would happen to her employee, Mr. Vikas Gaddale. Then one of them said "thank you for bringing that up. If you have any transitional items that we need to know about, please let us know." Mr. Gaddale was Ms. Gifaldi's subordinate, and was responsible for inputting the information into the invoices that would be sent to the vendors or sponsors.

When she received the termination call, Ms. Gifaldi was working in Fort Lauderdale, Florida, and Ms. Klitch was working out of her home in West Palm Beach, Florida. Mr. Gaddale was working from India.

Ms. Gifaldi learned that Ms. Klitch had complained to IPG when Ms. Klitch called her the day she made the complaint to inform her. Ms. Klitch told Ms. Gifaldi she was concerned and had a fiduciary duty to protect the clients' interests. She repeated to Ms. Gifaldi over the phone "You don't know the half of it. You don't know the half of it." Ms. Gifaldi did not know what the other half meant until she saw the e-mail. Ms. Klitch said she was scared she was going to lose her job because she went to IPG.

Ms. Klitch never sent the e-mail to Ms. Gifaldi, and Ms. Gifaldi did not see the e-mail prior to the litigation.

[ALJ examination] Ms. Klitch did not say specifically that she had sent an e-mail to IPG, just that she had complained to IPG. Ms. Klitch had called Ms. Gifaldi a day prior to making her complaint. She had recently assumed the duty of managing the escrow account in June. Ms.

Klitch said she was struggling with what to do. She wanted to resolve some issues with Octagon, but she was not getting the assistance that she needed to address the issues with the escrow account. Ms. Klitch said she was up all night, could not sleep and did not know what to do. Ms. Klitch was scared for her bar license.

[Direct examination] Sometime in September, Ms. Kennedy told Ms. Gifaldi that someone was going to interview her about the invoicing and escrow processes. She said IPG was coming to McLean to ask questions about the escrow and invoicing processes.

[ALJ examination] Ms. Gifaldi felt scared and feared for her job because Ms. Klitch, who had brought Ms. Gifaldi to Octagon, had made a complaint to IPG. Ms. Gifaldi was interviewed by two men. At the time of the interview, Ms. Gifaldi thought it was an internal audit for IPG doing the investigation.

[Direct examination] The 45 minute interview was conducted over the phone. The interviewers focused their questions on the invoices and controls in place for the invoices. They asked a lot of questions about the spreadsheet Ms. Gifaldi was maintaining, how the invoices were generated and about the account itself. They asked Ms. Gifaldi about the specific account that she did not have day-to-day involvement in and so did not have answers to those questions. There was never any follow-up from Deloitte. The interview occurred in early to mid-September, sometime after Ms. Klitch told Ms. Gifaldi she had made a formal complaint to IPG.

The only other person Ms. Gifaldi was aware of also being interviewed was Mr. Gaddale, her direct employee. HR contacted her for his Skype address. Ms. Gifaldi did not talk to any other employees about their prospective interviews. The only person she discussed the fact that the interviews were going on with was Mr. Gaddale.

[ALJ examination] Ms. Gifaldi explained to the interviewers the changes she was making to the invoicing process by consolidating the invoicing that had previously taken place independently by all the different divisions in a centralized location. The interviewers asked for specific information about who had access to the invoices, which people had access to the spreadsheet, and whether Ms. Gifaldi had interoffice conflicts with anyone. They also asked general questions specific questions related to the escrow account, but she wasn't involved in the day-to-day of the escrow account.

Ms. Gifaldi did not remember whether she specifically told the interviewers about the discrepancies with the industry versus non-industry deals, but she told them about the promissory note issue and what had been going on before she and Ms. Klitch assumed the escrow duties. She told them about finding the discrepancies between what was on her log and what Octagon was taking. The interviewers' questions mainly related to Ms. Gifaldi's invoicing duties.

[Direct examination] At the time of her termination, Ms. Gifaldi's salary with Octagon was \$95,000 with a \$10,000 discretionary bonus. As of January 1, (2010), it was supposed to increase to \$99,000 with a discretionary bonus of \$10,000 or \$15,000 depending on what was in the contract. Octagon did not give Ms. Gifaldi the 30 day notice it was contractually obligated to provide, so it paid her for 30 days post-termination.

Ms. Gifaldi started a new position on May 17, 2010 as Assistant Vice-President, Risk Management at American Home Mortgage Servicing, located in Coppell, Texas outside of Dallas. Her starting salary was \$81,000 with a 15 percent bonus. Since her start, she has been promoted to Vice-President, Origination Compliance. Her current salary is \$98,000 with a 20 or 25 percent bonus.

Ms. Gifaldi was unemployed between her termination from Octagon in October 2009 and starting her new position in May 2010. During that time, she paid between \$160 and \$180 per month for COBRA payments. She borrowed about \$10,000 to live on and took between \$5,000 and \$7,000 out of her 401k.

In her current position, Ms. Gifaldi is responsible for anything legal relating to compliance with originations. She has not received any bad performance reviews in her new job. Octagon is the only job she was ever fired from. Other than that, Ms. Gifaldi has never had a negative performance review at a job.

Ms. Gifaldi felt sad when she was fired, because it was the first job she had been fired from. She did not do anything wrong during her employment with Octagon. She was acting in Octagon's best interests during her employment there.

Ms. Gifaldi had a constant discussion with Ms. Klitch about doing things in the best interests of Octagon. Sometimes Ms. Gifaldi would throw her hands in the air and say to Ms. Klitch "I don't think they realize the seriousness or the significance of what's occurring. I realize that we're here to fix it." And Ms. Klitch just kept saying "We're doing the right thing."

Being fired affected her dignity and reputation. Ms. Gifaldi had never been fired before. She applies a type A personality to her employment. She was always willing to do whatever it took to make anything work and is very conscientious about her work product. Ms. Gifaldi feels scared that she is going to have to explain the employment gap and acknowledge the fact that she was terminated from a job in the future.

The termination caused Ms. Gifaldi personal stress, because she had to leave her friends and family in Fort Lauderdale and move her partner to Dallas after they had just relocated from Denver. They had been planning to settle down in Florida.

[ALJ examination] Ms. Gifaldi received unemployment benefits during her unemployment. Through the state of Colorado, she received \$400 per week less taxes, for the duration of her unemployment beginning after the 30 day salary from Octagon. She experienced problems sleeping and gained some weight, but did not see any medical doctors or counselors.

[Cross examination] The Octagon Business and Database Manager Position Description, RX 2, shows that one of the required qualifications for the position is a B.S. or B.A. in business finance or accounting, qualifications that Ms. Gifaldi, who holds a B.A. in English, does not possess. The position description indicated that the McLean office location was "highly preferred." Ms. Gifaldi moved to McLean for three months, and then worked remotely. One of

the required qualifications was being deadline and results oriented with the ability to juggle multiple projects in urgent timeliness. Ms. Gifaldi felt she was able to juggle multiple projects in urgent timeliness.

Upon being hired, Ms. Gifaldi's duties included centralizing and overseeing client invoices, and reviewing the contracts after they had been centralized in the repository.

On January 22, 2009, Ms. Gifaldi sent an e-mail to Michaela Levatino, RX 5, an employee in the football division, indicating that effective January 26, 2009 Ms. Levatino was to complete the client invoice form and submit it to the web address because invoices were no longer being generated by the football division directly. As of January 26, the football division would be sending forms to complete the client invoices to Ms. Gifaldi by way of an e-mail mailbox that she was responsible for checking.

Ms. Gifaldi sent similar e-mails to all the other division heads. As of January 22, 2009, Ms. Gifaldi was responsible for issuing the invoices. She instructed all the different divisions to complete the forms and send them to the client invoice mailbox if they needed invoices issued. She was going to be the centralized person for invoicing. Once the forms reached the mailbox, she would take the information and invoice the sponsor.

On January 28, 2009, Ms. Gifaldi sent an e-mail, RX 6, to Chris Emens, a basketball agent, and Jeff Austin, head of the Basketball Division, indicating that they should send any invoice requests to the e-mail box. Also, all executed contracts needed to be sent to Legal for review by submitting them to the contracts mailbox. She explained that she needed the contracts as part of the invoicing process, but also all executed contracts needed to be sent to the mailbox for Legal to review. As of January 28, 2009, Ms. Gifaldi had specifically informed the Basketball Division that they were to send invoice requests to her. At that time, Ms. Gifaldi was responsible for handling the basketball invoices.

There were problems after January 2009 with issuing invoices in a timely manner and with invoice errors, including invoices being issued in the wrong currency, for incorrect amounts, and being issued outside the time period required by contract.

Mr. Dick Schneller was a part of OFS, and was partially responsible for the money coming in and going out of the escrow account before Ms. Gifaldi arrived. Ms. Esther King was also a part of OFS and had been responsible for client invoicing prior to Ms. Gifaldi taking over those duties. On March 10, 2009, Mr. Schneller sent an e-mail to Ms. Gifaldi, copying Ms. Klitch and Ms. King, asking about the February client recurring invoices not having been updated in the division folders. Client recurring invoices are invoices for contracts that stipulate payment should be received monthly, bi-monthly or quarterly on a particular endorsement deal. Over 50 percent of the contracts Ms. Gifaldi was responsible for invoicing had recurring invoicing obligations.

[ALJ examination] At the time, Ms. King was still responsible for generating the recurring invoices, because they had not moved into the next phase addressing the recurring invoices. The invoices Ms. Gifaldi was addressing were requests for incentive based payments,

things that were coming through and then going forward, setting up new contracts, any recurring payments. Ms. Gifaldi became responsible for the recurring payments in March or April 2009.

[Cross examination] Ms. Gifaldi was not responsible for issuing the recurring invoices because they were still being mailed, but she and Mr. Gaddale were responsible for breaking the recurring invoices down from bulk form and placing them in the specific client's invoice folder.

[ALJ examination] Mr. Schneller was asking why the February recurring invoices had not been updated in the division folders, meaning taking them from bulk and chopping them up and putting them in the division folders. Mr. Schneller was correct that it had not been done. At that time, they had training going on and were still sorting through the process they had just started the month before. They were going through "some of the kinks of creating that process." It wasn't a high priority at the time.

[Cross examination] In her e-mail response to Mr. Schneller, she indicated that she would have the task completed by the end of the week.

Ms. Morton was the head of corporate accounting for Octagon, the person responsible for financial reporting, including reporting to IPG. On May 6, 2009, Ms. Morton sent Ms. Gifaldi an e-mail asking why none of the NBA team billing had gone out for April. Ms. Morton indicated the failure to issue the April NBA billing made a huge difference in the financials for the month, and that the change would linger in her financial analysis through May 2010. Ms. Morton would have to report the missing invoices to IPG.

Ms. Gifaldi responded that the NBA billing had been overlooked and was never billed for April. It was her fault and she took full responsibility for it. Ms. Gifaldi wasn't responsible for actually billing; she was responsible for submitting a request form to the Resource AP mailbox because the invoices for the team billing were generated by their shared services.

[ALJ examination] It was Ms. Gifaldi's fault because in addition to managing the client side, for certain divisions, she was also responsible for the team billing, but the team invoices had to go through a process on the corporate accounting side. She had to send a request form to have the shared services group process her request to generate an invoice, and then she had to review the invoice to make sure it was correct.

The billing did not get done in the time frame, and it was Ms. Gifaldi's fault. Ms. Morton was expressing the significance of the mistake in her e-mail.

[Cross examination] Ms. Gifaldi understood that the NBA invoices for April 2009 amounted to over \$600,000.

Ms. Eva Conforti is the administrative assistant to Mr. de Picciotto. Ms. Conforti submitted a contract on behalf of Mr. de Picciotto on March 11, 2009 for an invoice with due dates in February, March and April. When Ms. Conforti e-mailed Ms. Gifaldi on June 23, 2009 to see if the March contract had ever been invoiced, Ms. Gifaldi responded that if they hadn't billed for it, they would, and she would look into it more thoroughly later on. Ms. Gifaldi was

unaware at that time whether the invoices had been billed. When Ms. Conforti responded the following day that Mr. de Picciotto was leaving for London and really needed an answer, Ms. Gifaldi responded that a draft would be created shortly and sent to her, and an internal invoice would be created for the amount already paid. Ms. Gifaldi believed the amounts for the contract were invoiced on June 24, 2009. The invoices should have been issued on February 27, March 27, and April 27, although the contract wasn't received until March 11, which was after the February date.

Mr. Ben Morrill was in the Action Olympics division. On July 8 and 9, 2009, Mr. Morrill e-mailed Ms. Gifaldi to ask whether invoices had been created for a certain agreement. Ms. Gifaldi responded on July 10, 2009 saying it was in the queue and to expect it early the following week. The hold-up with the contract was that she was going back and forth with Ms. the legal department about the terms of the contract. Sometimes Ms. Gifaldi was dependent on the legal department to make those decisions.

When she told Mr. Morrill to expect the invoice early next week on July 10, it was dependent on work being done by the legal department. She did not update Mr. Morrill on the issue and inform him of the delay. When Mr. Morrill e-mailed her a week later for an update, and Ms. Gifaldi responded that she had just spoken with the legal department and invoice would be processed shortly.

On July 13, 2009, Ms. Mikella Pedretti in the Baseball Division e-mailed Ms. Gifaldi about whether the new credit card process was holding up the invoicing for the baseball team billing. Ms. Pedretti indicated that she hoped the invoices would go out that day, the beginning of the All-Star break. Ms. Gifaldi responded that she was working on the invoices and would send invoices back within five days. Ms. Gifaldi was aware that as of a month later, in mid-August 2009 the invoices still had not gone out. There were e-mails from baseball division directly to Ms. Morton, and Ms. Morton had to step in. Ms. Gifaldi knows that the delayed invoices involved another \$600,000 in invoice money.

On July 16, 2009, Mr. Morrill asked Ms. Gifaldi about an \$80,000 invoice to Coca-Cola and the status of the invoice request sent July 7. Ms. Gifaldi responded that it was her fault and apologized. During her employment at Octagon, Ms. Gifaldi did have an issue with a back log of contracts.

[ALJ examination] She had a back log of contracts, because a thousand contracts came in at once when the central repository was created, and she was responsible for reviewing each contract. She worked on them as quickly as possible. When she was terminated, she still had a backlog of a couple hundred contracts.

Mr. Gaddale was an independent contractor located in India who reported to Ms. Gifaldi. On April 2, 2009, Ms. Gifaldi indicated to Mr. Gaddale that she needed him to take over the processing of client invoices, and that she was falling behind and could not catch up. She fell behind due to the influx of contracts. She never had a baseline from which to judge how many invoices would actually be coming through client invoice. It was "quite a bit" once it was centralized, and she had also assumed responsibility for the team billing on the corporate side.

On August 10, 2009 Ms. Gifaldi indicated to Mr. Gaddale that she did not have time to process the track and field invoices.

Ms. Meg Cerullo worked in the legal department. When they assumed responsibility for the escrow account in June of 2009, part of Meg's duties were to receive the checks and disperse the payments. Ms. Gifaldi remembered telling Ms. Cerullo in late August or early September that she was 200 to 300 contracts behind in the contract review process. She told Ms. Cerullo she hoped Ms. Klitch didn't find out, because she did not want Ms. Klitch to know how overwhelmed they were. Ms. Gifaldi admitted that by late August or early September, Ms. Gifaldi was overwhelmed by her work.

There was a one-time issue concerning Ms. Gifaldi cutting off information access to other employees. She received complaints from Mr. Schneller. On January 29, 2009, Mr. Schneller asked her why a particular invoice was not recorded on the client invoice log. Ms. Gifaldi responded that she was not aware that he ever looked at the client invoicing log. Mr. Schneller informed her that he, Ms. King and Ms. Kelly Wolf were always looking at the log. As of January 29, 2009, Ms. Gifaldi was aware that Mr. Schneller and others were looking at the client invoice log.

Copies of the invoices and the client invoicing log were maintained on the M Drive. Ms. Gifaldi cut off other employees' access to the M drive on March 4, 2009 because she had gone into the tennis folder and noticed that invoices had been deleted. Mr. Schneller indicated that he needed access to that information and suggested making the files read only instead of a blanket cut-off without notice if there were file deletion problems. Ms. Gifaldi responded that not everyone should have access to that folder because she and Ms. Klitch wanted to separate the divisions' access to each other division's financials. It was tough because they didn't have software with varying levels of security that they could use. They were unable to achieve the appropriate level of security. There should have been access to certain folders on the M drive for some people, but the way the spreadsheet was maintained, there was no way to restrict the spreadsheet to one division. Gifaldi cut off Mr. Schneller's access to the M drive because she did not know who was deleting the invoices, and she would do it again today.

The GIS Service Desk is the IPG help desk for IT support. On March 20, 2009, Ms. Gifaldi told the IPG help desk she was creating a new subfolder on the M drive entitled "Client Invoicing Master Log" and asked that access be limited to herself and Mr. Gaddale. Mr. Schneller and Ms. King still had "read only" access to the client log information. There was a live link from that spreadsheet to the read only spreadsheet, which was an exact copy. Ms. Gifaldi did this so no one could manipulate the data. She specifically told the IPG help desk to grant read/write access only to herself and Mr. Gaddale.

Ms. Gifaldi assumed responsibility for reconciling the escrow account in June 2009. Ms. Alice Burns was with Octagon shared accounting services. On August 6, 2009, Ms. Burns sent Ms. Gifaldi an e-mail indicating she thought there was a problem with her escrow reconciliation. Ms. Gifaldi believed that there may have been a problem initially, then she took a second look and the account could have reconciled. At the time of her termination the escrow account was

still off by at least a couple hundred dollars. About \$50 to \$60 million went in and out of the escrow account a year.

Ms. Gifaldi was interviewed as part of the investigation following Ms. Klitch's August 25, 2009 complaint. She never complained about financial issues to IPG. The interviewers asked Ms. Gifaldi questions, and she answered them. Ms. Klitch did not tell Ms. Gifaldi that the complaint directly involved her or named her, but it turns out that the complaint did name her.

Ms. Klitch had suspicions prior to administering the escrow account that the money was not being handled properly. Ms. Gifaldi did not remember if Ms. Klitch used the exact term, "stealing", but she had her suspicions about employees tampering with funds in the escrow account. Ms. Gifaldi reviewed Ms. Klitch's deposition, and was aware that Ms. Klitch denied she ever used the term "stealing".

Ms. Gifaldi had no idea whether anyone else at Octagon besides Ms. Kennedy, who arranged the interview with the Deloitte investigators, knew that she was involved in the investigation. She would assume Mr. de Picciotto knew, but she did not have any proof of that.

In terms of her alleged damages for emotional distress, Ms. Gifaldi felt sad and that her reputation had been harmed when she was fired, because she had never been fired before. She never saw a religious provider for counseling. She found another job within seven months, where she has been employed since then, and received a promotion. Her reputation has been damaged, because she will always have to explain the gap in employment to future employers. People, and friends, knew she was employed with Octagon, and then all of a sudden she wasn't.

[Redirect examination] In the position description, under office location it says McLean, Virginia "highly preferred." Ms. Gifaldi never hid the fact that she was not in the McLean area when she was applying for the position. Octagon hired her even though she did not have a B.A. or B.S. in business, finance or accounting despite the qualification requirements on the position description. During her interview, no one discussed that she did not have a degree in finance, business or accounting.

Ms. Gifaldi took responsibility for invoices that went out late or not at all as of January 2009. Some of the invoices went out late because the degree of undertaking was underestimated. The process changed from a dozen different division heads doing it independently, and there was never a baseline to see how many invoices were actually being issued relative to payment amounts. It was estimated that one person could do the job but they did not realize the scope and magnitude of the issues relating to the invoicing. Also, before an invoice was ever issued, a contract had to be reviewed. "It was quite an undertaking." When Ms. Gifaldi took over the invoices, there were 12 division heads handling the invoices separately, which was then centralized so that Ms. Gifaldi was handling all of them.

When Mr. Schneller commented about invoicing problems, there wasn't any sense that the company was concerned about the accuracy of the invoices. The goal was to get the invoices out as quickly as possible regardless of contract review.

Ms. Klitch and Ms. Gifaldi were asked to take over because there was very little oversight or reconciliation of the invoices when they were being handled by the division heads. Octagon had recognized issues with the invoicing and wanted to correct the process and put some internal controls and procedures in place. Her job to increase the quality control and the reconciliation process “absolutely” contributed to a backlog, because it took time to make sure the invoices were created properly. No one realized the issues or the scope of what had happened prior to Ms. Gifaldi’s arrival, and what she was trying to do. The goal was to take steps towards an IT solution, instead of having a manual process, to increase efficiency. Before Ms. Gifaldi arrived, the division heads generated invoices by manually typing in a Word document for millions of dollars. The escrow account had between \$50 and \$60 million coming in and out every year, and Ms. Gifaldi reconciled it to within a few hundred dollars.

Before Ms. Gifaldi made changes to access, a lot of people had access to the M drive. Ms. Gifaldi cut off access, because she was tasked with managing the invoices and implementing controls, and invoices were missing. She believed cutting off access was directly or indirectly asked of her by Ms. Klitch. When she received complaints about access to the M drive, they reviewed the level of access for the staff and made some changes. Ultimately, the people who complained were given back access to the M drive.

Ms. Gifaldi believes that everything she did was in the best interests of the company and directed from her superiors.

[ALJ examination] The issues with inaccuracies or wrong currency on the invoices would have happened by Ms. Gifaldi incorrectly inputting information in a manual fashion on the PDF document that would be sent to the vendor or sponsor. Regarding the baseball invoices not going out at a particular time, even after she said would take corrective action to get them done, Ms. Gifaldi’s only excuse is that depending on the situation and what was going on she had to prioritize.

The team billing that went through corporate accounting fell thru because Ms. Gifaldi was more focused on the issues client side invoicing. Ms. Gifaldi was providing a service for Octagon. Some Octagon employees were relying on her. Regarding the baseball invoices, after she gave the person who inquired an estimate of when the baseball invoices would be ready, she may have called her to let her know they wouldn’t be ready at that time because of other circumstances, but she did not have a record of that.

Ms. Gifaldi’s explanation for the difficulty she was confronted with was an underestimation of how much effort would be required for a duty they gave to just one person.

Ms. Klitch was fair, but she was still a hard supervisor. Ms. Gifaldi did not want Ms. Klitch to find out about the contracts backlog, because she didn’t want her to know they had an issue with staffing. Ms. Klitch was able to get her a contract employee to assist so they could get caught up, and the next phase was to hire another person. Meanwhile, they were looking for software solutions. It did not make sense to staff up if they were going to implement software that could be handled by one person.

Ms. Gifaldi had difficulty getting the work done. She addressed staffing with Ms. Klitch throughout her time at Octagon based on certain levels and metrics, such as her average turn-around time for issuing invoices. Ms. Gifaldi did not tell Ms. Morton that the reason she was unable to get the \$600,000 in team billing out was because she was understaffed. If she did not tell other people at Octagon besides Ms. Klitch that the reason the invoices did not make it out was because they were understaffed, not because she wasn't doing her job, they wouldn't know.

Ms. Gifaldi also relayed her concerns regarding the differences between what was on the escrow log and what was on the spreadsheet to the investigators during the interview. She explained to them that there were discrepancies, such as when the invoices had been going out for years at 20%, and then when she reviewed the underlying contract and recorded it in the spreadsheet and found that the correct fee rate was actually 15%. She explained to the investigators the difference between what she had and what was in the actual escrow log.

Ms. Gifaldi believed that the discrepancies speak for themselves as a concern. She had heard of SOX from her prior job, and was aware of it, because Octagon/IPG was a public company.

Ms. Gifaldi never said the words "Sarbanes-Oxley" in her discussions with Ms. Klitch or the investigators. In her mind, her concerns related to SOX, because under SOX, certain internal controls are needed. She did not know all of the nuances behind SOX, but whether it's SOX or not, if she's supposed to be taking 15 percent from a client and they are taking 20 percent, it's an issue that needs to be corrected.

Ms. Nancy Morton
(TR, pp. 207-262)

[Direct examination] Ms. Morton is currently Octagon's Chief Financial Officer. One to two years ago, her title changed from Senior Vice-President ("SVP") to CFO. When she had the title of SVP, she was still the most senior financial person at Octagon. Ms. Morton reports to Mr. de Picciotto, Octagon's President. She also serves as the CFO for a variety of companies that fall under the Octagon worldwide brand name, including Octagon Financial Services and Octagon Worldwide Limited.

Octagon was first known as Advantage International before it was rebranded and became Octagon around 2000, at which time it was already owned by IPG. Ms. Morton started working for Octagon's predecessor in 1983, when it was founded by Mr. de Picciotto and several other men. She has been continuously employed by Octagon and Mr. de Picciotto since 1983.

Ms. Morton did not have any prior knowledge of the terminations of Ms. Gifaldi and Ms. Klitch. No one gave her any indication specific to their terminations before they occurred. Octagon receives some checks from sponsors through the mail, and some via wire transfer. Some of the payments to its athletes are sent out by wire transfer.

Ms. Morton's duties as CFO include SOX compliance, because Octagon is owned by IPG, a publicly traded company. Ms. Morton and her department take SOX compliance very seriously.

Ms. Klitch was General Counsel at one point, but Ms. Morton was not aware of her title of Chief Legal Officer. Ms. Klitch and Ms. Morton both worked on the 14th floor in McLean, and Mr. de Picciotto was on the 15th floor. At times, Ms. Klitch and Ms. Morton discussed SOX issues. At some point, Ms. Klitch came to Ms. Morton to discuss how Octagon was invoicing its sponsors and expressed her concerns.

[ALJ examination] Ms. Klitch was asked to take over the area of invoicing sponsors, because Mr. de Picciotto had general concerns about controls in that area. Ms. Morton was aware of his concerns and was part of a discussion, but she was not responsible for that area of invoicing. Ms. Klitch came to Ms. Morton seeking advice on how the client invoicing process should work.

[Direct examination] Ms. Morton shared some of Ms. Klitch's concerns. Ms. Klitch spoke to her about problems with invoices going out without written contracts in place. Octagon does not have written contracts for all of its clients. The word of an Octagon employee is one source to confirm the amount of money owed to Octagon. Ms. Morton never took the issues raised by Ms. Klitch to Mr. de Picciotto, because she had been informed by Mr. de Picciotto that Ms. Klitch's responsibility was to identify the problems and correct them. She felt her role was just to give some advice.

Ms. Klitch told Ms. Morton that she was not getting the support, meaning the underlying contract, that she needed prior to sending out certain invoices. One of Ms. Klitch's jobs was to have quality control over the invoices for accuracy. At one point, Ms. Klitch told her that Mr. de Picciotto was not responsive to her inquiries. Ms. Klitch told Ms. Morton that she was not getting the support she needed in the area of documentation prior to sending out invoices.

Ms. Morton received Ms. Klitch's August 25, 2009 e-mail complaint from Ms. Marge Hoey, an attorney at IPG on August 27, 2009. This was the first time she saw the e-mail. Ms. Morton was shocked when she read the e-mail. Ms. Hoey asked her to respond to the points brought up in Ms. Klitch's e-mail. Her response was written solely by herself. Ms. Morton never spoke to Ms. Klitch either about the complaint or her response. Ms. Morton received a call from Mr. Dowling before she received the Klitch e-mail on August 27, 2009. Ms. Morton discussed the e-mail with Mr. de Picciotto at some point after the call from Mr. Dowling.

She never looked at the e-mail together with Mr. de Picciotto. Ms. Morton took Ms. Klitch's complaint seriously. In her response, Ms. Morton indicated there was some "push back" or resistance from some of the people at Octagon to the new procedures. Ms. Morton was interviewed by Deloitte as part of an investigation, and she also received some questions from Mr. Frank Okunak, the CFO of Octagon Worldwide, and there was a review of procedures by the CMG (Constituency Management Group) accounting staff.

The interviewers from Deloitte asked Ms. Morton about the escrow. The questions stemmed around gathering and understanding the account, the process and what it was for, what type of activity when on in that account. The interview lasted for about two hours. During the interview, Ms. Morton highlighted some of her concerns about the controls, especially centralizing the invoicing function, which would ensure invoices were actually sent and the

funds received. The centralization of the invoicing process was, actually, what Ms. Klitch was supposed to be doing. Ms. Klitch brought Ms. Gifaldi on to be her right hand in centralizing the invoicing process.

She has a friendly professional relationship with Mr. de Picciotto, whom she has worked for over 30 years. Ms. Morton is loyal to Mr. de Picciotto, having stayed with the company over the years.

[Cross examination] In Ms. Morton's opinion, Ms. Klitch was not a good manager of the people that worked for her, because she was unreasonable. Very few people out of the entire office liked working with her, because of how she controlled situations. She was often rude to people she felt were beneath her, and was difficult to get along with. In one instance, Ms. Klitch required her entire staff to work over the Thanksgiving holiday for work which was not that urgent. When her staff raised the issue with HR and Mr. de Picciotto, it was decided they did not need to work through the holiday.

When Ms. Morton interviewed Ms. Gifaldi for the job, she did not recommend that she be hired. Ms. Gifaldi would not be located in McLean, and Ms. Morton felt the person filling that position needed to be in the office, not off-site. Also, Ms. Morton felt the overall function of the position required a financial background, which Ms. Gifaldi did not possess. Ms. Morton expressed these concerns to Mr. de Picciotto.

The first instance of an issue with the timeliness of issuing invoices involving Ms. Gifaldi occurred in early May 2009. Ms. Gifaldi had not generated any corporate invoices April 2009, which was her responsibility, for the Basketball Division. Ms. Morton sent an e-mail to Ms. Gifaldi and Ms. Klitch to find out what had happened to the missing basketball invoices. She was surprised the invoices hadn't gone out, because the invoicing cycles are very scheduled. The missing invoices represented \$800,000, a significant amount of money to Octagon. The failure to generate the basketball invoices affected Ms. Morton's financial reporting to IPG, and the year to year comparisons. The budgeting cycle was thrown off into the next full year. Ms. Morton had a conversation with Ms. Gifaldi and Ms. Klitch, during which she expressed that the invoicing had to be done on time, and there could be no exceptions. She explained that the invoicing could not be overlooked; it was of critical importance to Octagon.

In late summer 2009, Ms. Morton became involved with an issue related to baseball invoices not going out. Mr. Steve Hilliard is the head of one of the baseball divisions. Mr. Dan Shaffrey is one of Ms. Morton's employees. Ms. Pedretti is Mr. Hilliard's administrative assistant. On August 12, 2009, Ms. Morton learned that Mr. Hilliard had not received his corporate invoices for the first half of the baseball season. Ms. Morton was a little suspicious because of the previous problems with the basketball invoices. Mr. Hilliard was concerned because the baseball players were set up to be billed at mid-season and at the end of the season, but it was already two-thirds through the season and he had not seen any of the baseball invoices yet. A significant amount of money, more than half a million dollars, was not being invoiced and collected. The failure to generate the baseball invoices had the same impact on the financial reporting to IPG as the basketball invoicing issue.

In Ms. Morton's opinion, the failures to generate the basketball and baseball corporate invoices are terminable incidents, but not until the second time. After the first incident, they had a conversation and talked about the problem and why it was important it didn't happen again, but then a few months later, it was the same situation.

In 2009, Ms. Klitch asked Ms. Morton about some general SOX requirements for the corporate books. However, invoicing as a service to Octagon's clients does not necessarily fall under the same umbrella, because SOX relates to a publicly traded company and the financial statements of that company, whereas the escrow account and client invoicing are not reflected on the financial statements. Client invoicing is a service provided to Octagon athletes. Octagon negotiates endorsements, sponsorship, appearance arrangements for the athletes, and one of the services provided is to invoice the companies to collect the money owed to the client. The invoicing is actually an invoice from the client to these endorsement companies.

Ms. Morton never told Ms. Klitch or Ms. Gifaldi that she was horrified by Octagon's invoicing or escrow practices. She never felt horrified by Octagon's invoicing or escrow practices. Over the course of her many years at Octagon, Ms. Morton is not aware of any theft or fraud involving the client invoicing or escrow account practices.

Ms. Morton sent her response addressing the issues raised in the Klitch e-mail to Ms. Hoey. Ms. Hoey forwarded it to Mr. Harris Diamond, the head of CMG, Octagon's reporting entity within IPG. Mr. Diamond forwarded it to Mr. Martin Franken, CMG's CFO, who forwarded it to Mr. Okunak. Mr. Okunak then forwarded it back to Ms. Morton.

Ms. Klitch did not raise any legitimate SOX issues in her complaint. In her response e-mail, Ms. Morton wrote the first paragraph specifically to make sure that Ms. Hoey and Mr. Dowling understood the difference between client accounting and the client invoicing process in Octagon's corporate books. She wanted to be sure Mr. Dowling understood the issues raised were not issues reflected in any way on Octagon's financial statements, because information related to the escrow or invoicing did not appear on Octagon's financial statements.

[ALJ examination] The only reflection of the escrow on their financial statement is a bank balance at the end of every month; it's shown as assets held in reserve and then there's a corresponding liability. The other type of invoice, corporate invoicing, or invoices sent to clients owing Octagon a fee, would be shown on the financial report as assets and revenue.

[Cross examination] Ms. Morton did have some conversations with Ms. Klitch about some general questions, but Ms. Morton was shocked by how detailed her e-mail was and how she had so many questions about issues when many of those issues could have been handled by just asking questions within her own office.

Ms. Morton did not have any issue with Ms. Klitch's concern about taking fees without a rep agreement. This happened quite a bit. Ideally they would have signed agreements for all clients, but some clients refuse to have a contract, preferring to have a handshake deal. For example, Octagon has had a very famous football player client for years who will only work on a

handshake contract. In some instances working with a client in good faith while a contract is still being finished is necessary to preserve the relationship with the client.

Occasionally, Octagon would take its fees from marketing or endorsement monies received. Octagon was trying to encourage this practice as a more routine procedure as it made it easier for the client to pay an outstanding bill. There were no client problems with that issue.

Ms. Morton believed Ms. Klitch could have resolved her issues without bringing them to IPG's attention. It would have created a more helpful atmosphere for her and for other people in the office if she had raised some of the concerns and they had worked through them on an in-house level. Ms. Klitch's concern about taking third party fees and fee-splits with other agents highlights the fact that she did not understand the process, because fee-splitting did not have anything to do the amount of money being taken from the client. Ms. Morton did not understand such a simple thing as that would be highlighted in "an e-mail of this sort."

[ALJ examination] Ms. Morton had heard some of Ms. Klitch's concerns raised in the e-mail directly from her. She felt that Ms. Klitch was not getting the issues resolved the way she wanted to get them resolved. Ms. Klitch's responsibility was to get the issues resolved, but "you can't handcuff the company from doing business with our athletes just for the sake of having a signed contract", because in some cases, there would never be a signed contract.

Regarding controls on the contracts, sending an invoice is not recorded as a receivable; it's an invoice from a client to an endorsement company. At Octagon, once the bill was paid to the client and deposited in the escrow account, Ms. Klitch was concerned that Octagon was taking a fee in an amount that it could not be certain it was entitled to, because there was no underlying written contract, only a handshake deal. Octagon, to be conservative, in the case of an athlete with only a handshake deal, would continue to take the same fee from that athlete they had been taking for years, but to ensure Octagon was not taking more than it was due, there would be a three-month holding period during which the fee was not counted as revenue. That provided the client with time to receive its portion and determine whether it was correct. Actually, PWC decided the three month holding period was too conservative because no client had ever asked for a fee back, and told Octagon they could eliminate the holding period.

If there's a handshake agreement, the athlete and the person on the other side of the handshake know what the agreement is. The agreement then gets documented through an e-mail. Ms. Klitch's critique in her e-mail was not about functions in Ms. Morton's area. Ms. Morton is the CFO of Octagon, but she is not in charge of client accounting. She did not feel embarrassed, because she knew the items weren't the problem Ms. Klitch was stating. Ms. Morton was concerned because she did need to report to the Chief Risk Officer at IPG about it. Even though the e-mail wasn't about her functions, Ms. Morton would be reporting it, which she tried to explain in the first paragraph of her response e-mail. Ms. Klitch and Mr. de Picciotto were responsible for these functions. Basically, Ms. Klitch wrote an e-mail about herself. She was writing about an area that she had taken over and thought needed to be changed in certain ways.

Embarrassed was not the right word, but the e-mail caused concern for Octagon with IPG, because it was not the kind of exposure Octagon wanted with IPG.

Ms. Gifaldi's response to the missing April 2009 invoices was that it was an oversight. Ms. Gifaldi said it was her fault for not getting it done. Ms. Morton spoke with Ms. Klitch and Ms. Gifaldi again after the baseball invoicing issue.

Ms. Morton found out Ms. Klitch had been terminated after the fact. She was aware there were problems with Ms. Klitch, but she did not know she was going to be terminated when she was. It was difficult not to be aware of the problems in the office involving Ms. Klitch; there were problems in every area. Ms. Klitch wasn't well thought of, and when she took over the invoicing, the problems just continued to mount.

On several occasions, Ms. Morton spoke Mr. de Picciotto regarding Ms. Klitch's performance. She told Mr. de Picciotto about Ms. Klitch's lack of cooperation and the corporate invoicing problems. As a senior manager, Ms. Morton felt it was her responsibility to let Mr. de Picciotto know that people had come to her about the way Ms. Klitch treated them in the office.

Ms. Morton was not involved in Ms. Gifaldi's termination, but she did speak with Mr. de Picciotto about her performance. Ms. Morton told him about the specific instances of invoicing, the corporate invoicing. She learned of Ms. Gifaldi's termination after the fact.

[Redirect examination] Between sending her response to the Klitch e-mail to Ms. Hoey on August 28, 2009, and Ms. Hoey forwarding it to Mr. Diamond on September 29, 2009, Ms. Morton did not have any further conversations with Ms. Hoey. Later Ms. Morton talked about her response to Ms. Klitch's e-mail with Mr. de Picciotto because of the internal investigation conducted by Deloitte. They had a conversation that Deloitte was coming down, and also when it was decided to look at the escrow account and surrounding process.

One of the issues in Ms. Gifaldi's interview was the fact that she was not working on-site. Ms. Morton did not know that the job posting stated McLean, Virginia, preferred.

The only thing that appears on the IPG balance sheet is the cash balance and a corresponding liability; the receivables, or the invoicing, do not appear there. Octagon's profits flow up to IPG. The more profitable Octagon is, the more profitable potentially is IPG. A financial loss for Octagon has a corresponding financial loss for IPG. If Octagon suffers a loss, it is conceivable, depending on the materiality, that it could adversely affect IPG's share price.

Ms. Klitch was a demanding boss. Before Ms. Klitch and Ms. Gifaldi arrived, Ms. Morton had concerns about lax controls in the invoicing process. She mentioned these to Ms. Klitch and they talked about them. Ms. Klitch, as General Counsel, was not getting the answers she wanted to get from Mr. de Picciotto.

Mr. Phil de Picciotto
(TR, pp. 271 to 422)

[Direct examination] Mr. de Picciotto has been president of Octagon for about 10 years. Octagon is a global sports entertainment and music management and marketing company with three core lines of business: representation of individual personalities, athletes, and other artists; consultation services with companies on how to use sports, entertainment and music to posture their own businesses; and event management. Octagon's Athletes and Personalities Division ("A & P") is headquartered in McLean, Virginia.

Octagon is a subsidiary owned by Interpublic Group of Companies. IPG owns Advantage International Holdings, and Advantage International Holdings owns Octagon. IPG is a New York Stock Exchange publicly traded company.

Mr. de Picciotto met Ms. Klitch decades ago when she was a professional tennis player. In fall 2007, he hired her as General Counsel of A & P. Mr. de Picciotto had two issues with Ms. Klitch's performance at Octagon; first, she was combative and aggressive and there were interpersonal issues with the staff, and second, she did not always understand the business.

In 2008, while Ms. Klitch was Octagon's General Counsel, Mr. de Picciotto received complaints about her from virtually every division head, and most, if not all, of the people in the legal department. Generally, the division heads complained Ms. Klitch did not understand they were her clients and that she was there to help them to properly conduct their business, and that she was heavy-handed, combative, and not a team player.

Mr. de Picciotto transitioned Ms. Klitch out of the General Counsel role during a between fall 2008 and May 2009. As early as October 2008, Mr. de Picciotto had conversations with Ms. Klitch, and decided to hire a Deputy General Counsel who would eventually take over the General Counsel role. By early May 2009, they announced that Mr. Ho Shin, the new Deputy General Counsel hired in November 2008, had been promoted to General Counsel.

Mr. de Picciotto told Ms. Klitch he was considering terminating her employment as she was transitioning out of the General Counsel role. He did not terminate her, because he wanted to start centralizing Octagon's services. Ms. Klitch persuaded him that she had the operations and organizational skills for the role, and he eventually moved her into the role of Senior Vice-President of Operations and Chief Legal Officer. Ms. Klitch did not have any legal role or legal duties after Mr. Shin took over as General Counsel in early 2009. Mr. de Picciotto gave her the Chief Legal Officer title because she asked for it and was persistent. She did not want to be embarrassed and be perceived as being demoted. The business rationale for the title was that the consolidation of a database of all the client contracts with third parties was necessary to achieve operating efficiencies, and related to the Legal Department.

At Octagon, titles are important to individuals, but not terribly important to the group. The office is very open; none of the offices on the 15th floor have doors, including Mr. de Picciotto's office. Titles are used mainly to enable employees to do their jobs externally.

In an e-mail dated May 5, 2009 to everyone in the A & P Division, Mr. de Picciotto clarified staffing changes. He announced that Mr. Shin was the new General Counsel, and that Ms. Klitch would be updating the systems and invoicing procedure. Although Ms. Klitch had started in that role at the beginning of 2009, Mr. de Picciotto held off on an announcement until May 5, because Ms. Klitch did not want him to make an announcement, as staffing changes usually are not announced. He sent the e-mail because his staff was confused and he felt changes were important and worth mentioning.

Mr. de Picciotto approved Ms. Klitch's hiring of Ms. Gifaldi, but he had reservations. He was concerned that she did not have industry experience, or the financial background the position required. Mr. de Picciotto was also concerned that Ms. Gifaldi was not McLean based, and no one besides Ms. Klitch knew her. After he consulted with Ms. Klitch, he was persuaded that she knew Ms. Gifaldi and he supported her decision, deferring to her as the department head.

The same performance issues when Ms. Klitch was General Counsel continued in her new role. People complained to Mr. de Picciotto and Human Resources about her.

On March 23, 2009, Mr. de Picciotto spoke with Mr. Alan Nero, head of the Baseball Division, regarding the invoicing process, because Ms. Gifaldi would not issue invoices without a valid contract. Mr. de Picciotto e-mailed Ms. Klitch that they would discuss this issue next week. Ms. Klitch responded, explaining the invoicing issue and informing Mr. de Picciotto that the invoicing process would not require another hire, but may require shifting some tasks.

RX 23 is an e-mail that Mr. de Picciotto remembered receiving from Ms. Plewes with a subject line "office affairs" at the end of April or beginning of May 2009.⁶ Mr. de Picciotto recalled that Ms. Plewes and the staff were concerned and confused about the invoicing system.

Mr. de Picciotto frequently travels internationally as Octagon's president. He traveled in Europe between June 26 and July 10, 2009, and was in Africa from July 14 to July 29, 2009.

Mr. de Picciotto met with Ms. Plewes and Ms. Kennedy on August 7, 2009 to discuss terminating Ms. Klitch's employment. He told Ms. Plewes and Ms. Kennedy that he had decided to terminate Ms. Klitch, and was considering terminating Ms. Gifaldi. During the meeting, he asked Ms. Kennedy to back up Ms. Gifaldi's and Ms. Klitch's computers and asked Ms. Plewes to investigate who had access to the invoicing system, because he was concerned that only Ms. Klitch and Ms. Gifaldi had access to the invoicing system. Once Ms. Klitch was terminated, he would have to decide whether to terminate Ms. Gifaldi, and that depended partly on who else could access that system.

Prior to August 7, 2009, an issue arose because no one besides Ms. Gifaldi and Ms. Klitch had full access to the invoices, requiring everyone to go through Ms. Gifaldi or Ms. Klitch to get invoice information, and causing inefficiencies and ill-will. Mr. de Picciotto wanted to ensure they had document retention because he was going to terminate Ms. Klitch and was considering terminating Ms. Gifaldi.

⁶The "sent line" was missing a date, which Mr. de Picciotto testified could be due to the email system reconfiguring their archived emails. However, Mr. de Picciotto remembered receiving this email.

On August 12, 2009 Ms. Plewes informed him that she was not comfortable with the availability of the information in the invoicing system. Mr. de Picciotto suggested that she speak directly with Ms. Gifaldi.

On August 18, Mr. de Picciotto asked Mr. Atiq Abdullah, the head of Octagon's IT Department, to give him and Ms. Plewes access to the M drive. Mr. de Picciotto informed Ms. Klitch and Ms. Gifaldi that it made sense for McLean based senior management to have access to the files and to have it in advance of a telephone conference scheduled later in the week.

Mr. de Picciotto decided to terminate Ms. Gifaldi sometime between Ms. Plewes' e-mail on August 12 and asking for additional people to have access to the invoicing system on August 18, because he had been informed by Ms. Morton during that time frame about the problem with the baseball invoicing that had caused Octagon to miss the July numbers by a substantial amount. He was back from his travels and was able to focus on the matter and thought with the backup requested on August 7 and the additional access to the invoicing systems that would be granted as of August 17 or 18 to others, Octagon would not suffer harm from the potential destruction of documents and it was time for a change.

Mr. de Picciotto informed Ms. Plewes of his decision because responsibility for the invoicing system would be transferred back to her. He told her that he had "made the decision to terminate Ms. Klitch as you know. Based on the information I now have, I have made the decision also to terminate Ms. Gifaldi and I want to make sure that you are prepared to take this process over again."

Mr. de Picciotto became aware of Ms. Klitch's complaint when Ms. Kennedy called to tell him that Ms. Klitch had sent an e-mail to IPG complaining or asking questions about some of their processes and systems. She did not say anything about what would happen with the terminations at that time. He did not actually see Ms. Klitch's e-mail complaint until the conclusion of the investigation in late October.

After the call from Ms. Kennedy, Mr. de Picciotto spoke with Ms. Hoey. Ms. Hoey told him that IPG would handle an investigation into the complaint and any planned terminations should be postponed until after the investigation.

Prior to August 25, 2009, Ms. Klitch had never complained to Mr. de Picciotto that any of Octagon's financial procedures were legally non-compliant, violated the Sarbanes-Oxley Act, or violated accounting rules.

Between August 29 and September 13, 2009, Mr. de Picciotto traveled to New York. He traveled to Tokyo, Singapore, Johannesburg, Zurich and other places between September 27 and October 15. From October 22 to October 26, he traveled to Moscow and London.

Mr. de Picciotto was interviewed by Deloitte on October 20. He answered their questions about all of Octagon's systems and processes with "complete transparency as to how each process was created and what its intended purpose was and how it operated."

Prior to Ms. Gifaldi's termination on October 26, 2009, Mr. de Picciotto did not know that she had been interviewed by Deloitte, or that she had been involved in any investigation related to Ms. Klitch's complaint. He was unaware of what Ms. Gifaldi said, or did not say, to anyone at Deloitte or IPG regarding Ms. Klitch's complaint.

Mr. de Picciotto sent Ms. Kennedy an e-mail on October 26 at 2:53 p.m. informing her that he was ready to proceed with terminations of Ms. Gifaldi and Ms. Klitch, because Mr. Shin had informed him that morning upon his return from London that the Deloitte investigation was complete, and there was no finding of wrongdoing. Before terminating Ms. Gifaldi, Mr. de Picciotto checked with Ms. Hoey, who told him he could proceed with the terminations.

Ms. Gifaldi and Ms. Klitch were terminated on October 26, 2009 by phone. Ms. Gifaldi was terminated because of performance issues. Her first major error was missing a whole batch of basketball invoices. There were other errors after Mr. de Picciotto gave her a second chance, including the error with the baseball invoices which was an error of high magnitude and significance, and was the triggering event for the termination.

After Ms. Gifaldi was terminated, Ms. Plewes oversaw the client invoicing and escrow account function. Within a few days of Ms. Gifaldi's termination, Ms. Plewes made Mr. de Picciotto aware of errors in Ms. Gifaldi's work, including errors in the amounts being invoiced, errors in the currency of the invoices which translated into errors in amounts, and errors in the reconciliation of the escrow account going back to when Ms. Gifaldi took over that responsibility. Ms. Plewes informed him of Ms. Gifaldi's failure to invoice a large endorsement deal, an error involving about a million dollars. The additional errors discovered after Ms. Gifaldi's termination would have been sufficient grounds to terminate her.

[Cross examination] An attorney in the Tennis Division, and an employee from the Hockey Division were also terminated for performance reasons around the same time as Ms. Klitch and Ms. Gifaldi. Mr. de Picciotto believed that Octagon hired new people in the second half of 2009.

Mr. de Picciotto did not think it was important to put in writing his explanation for the two terminations, even though he did so in his e-mail to Ms. Kennedy on October 26. The e-mail to Ms. Kennedy specifically stated that the terminations were unrelated to Ms. Klitch's complaint to IPG, which Ms. Kennedy already knew that from the August meeting. He put it in writing, because he had gotten off his flight from London, and in Customs he was not allowed to use a phone. He probably tried to call Ms. Kennedy when he got out, but could not reach her, and with many pending tasks, he put it in writing. He included the information about the complaint in the e-mail, even though it had nothing to do with the complaint, because he had just spoken to Ms. Hoey and was writing his thought stream.

Mr. de Picciotto had just spoken with Ms. Hoey before he sent the e-mail at 2:53 p.m. He came through customs between 10:00 a.m. and noon. He had tried to call Ms. Kennedy in her office, and he couldn't use the phone for a period of time in the morning, so he wrote the e-mail when he had a moment because he could not reach her.

The October 26, 2009 e-mail was about both Ms. Gifaldi and Ms. Klitch. When Mr. de Picciotto cannot reach someone by phone he will write e-mails letting the person know he is on the way to the office. When he sent the e-mail at 2:53 p.m. he intended to be at the office within an hour and would perform the terminations after receiving the “green light” from Ms. Hoey.

The e-mail specifically states that he was conducting two “positional eliminations.” In the e-mail, Mr. de Picciotto made a point of indicating that the idea of keeping Ms. Klitch’s title as Chief Legal Officer was her idea, not his. His intent in writing the e-mail was to outline the circumstances more for his sake than Ms. Kennedy’s, but he could not reach her by phone.

[ALJ examination] He is aware of Ms. Klitch’s SOX concerns, because he eventually read her written complaint after October 26, when he first saw her statement after the completion of the investigation. He first became aware of her SOX concerns at the end of August 2009 when he heard about the complaint from Ms. Kennedy.

[Cross examination] Mr. de Picciotto received his law degree from the University of Pennsylvania.

Generally, IPG does not get involved in Octagon’s hiring and firing decisions. In late August 2009, IPG’s legal department asked them to hold off on terminating Ms. Gifaldi and Ms. Klitch. IPG allowed them to terminate Ms. Klitch at the end of October. IPG may have also approved her termination. The only way in which IPG was involved in hiring Ms. Klitch was that they had to approve her salary.

In February or March 2008, Mr. de Picciotto gave Ms. Klitch the only written performance review she received at Octagon. The review was generally positive. Mr. de Picciotto subsequently met with Ms. Klitch for performance reviews, but there were no other formal written reviews. Ms. Klitch received two spot bonuses in March and May 2009, after her title changed to Chief Legal Officer. No announcement of her title change was made, but the announcement of her role was communicated in the May 5, 2009 e-mail without mention of title.

It was Ms. Klitch’s idea to use the Chief Legal Officer title. Mr. de Picciotto never told Ms. Klitch to stop using that title. He approved use of the title, but he could not recall whether he encouraged Ms. Klitch to use it.

In an April 13, 2009 e-mail, Ms. Klitch discussed the title of Chief Legal Officer and stated she wanted to avoid stepping on Mr. Shin’s toes as General Counsel. She also stated that she was not big into titles and that she wanted to make clear that it was not a demotion or a lateral move. In his response on April 14, 2009, Mr. de Picciotto said her title should be Senior Vice-President and CLO, which she could use singularly or together as she preferred, and that she should not be shy about including the title on communications, giving the example of Ms. Morton, who was both Senior Vice-President and CFO. In the e-mail, Mr. de Picciotto was encouraging Ms. Klitch to use the CLO title as she deemed appropriate.

Mr. de Picciotto was reluctant to let Ms. Klitch use the CLO title, but she wanted it and was persistent over a period of months. She convinced him and he finally relented. Ms. Klitch

then wrote the e-mail documenting what she wanted, and Mr. de Picciotto said “yes, feel free to do that.” Mr. de Picciotto acknowledged that his response did not indicate anything about her being demoted or promoted, or it being a lateral move.

Ms. Klitch was removed from her role as General Counsel. Mr. de Picciotto came to this agreement with Ms. Klitch so that it would hopefully not be perceived as a demotion, because she was concerned it might be perceived as a demotion, but it was certainly not a promotion. Regardless of how it was perceived, in Mr. de Picciotto’s opinion it was a demotion. Ms. Klitch’s demotion did not come with any decrease in salary.

In early 2009, the role of Ms. Klitch and Ms. Gifaldi was to centralize the client invoicing system and connect it to their legal systems. At that time, each division maintained responsibility for collecting revenues on their deals. The divisions would initiate the invoicing process, either creating the invoices themselves or asking their headquarters to create the invoices. As they continued to grow, Mr. de Picciotto thought there would be value in centralizing all of it, and specifically gave the task to Ms. Gifaldi and Ms. Klitch.

In early 2009, the escrow account was handled by OFS, Octagon’s sister company. Also in early 2009 there was some confusion among Octagon employees about the transition of Ms. Klitch and Ms. Gifaldi to their new roles and responsibilities. Mr. de Picciotto had not communicated clearly at that point. There were issues with not knowing individual responsibilities and methods of communicating. Ultimately, as Octagon’s President, he was responsible for the confusion and misunderstanding.

In Ms. Plewes’ response on April 21, 2009 to Mr. de Picciotto’s proposed e-mail to the staff about personnel changes, she is concerned that his message will create more confusion with regard to roles and responsibilities. At least as of April 21, Ms. Plewes expressed concern that there was already confusion and there would be more confusion the way they intended to do it.

In the e-mail exchange between Mr. de Picciotto and Ms. Klitch in March 2009 regarding invoicing without an underlying contract, Mr. de Picciotto told Ms. Klitch something like “Don’t worry about it, it’s not a big deal. Just bill for it.” This was not a cavalier approach to the problem; he thought they had the documentation in other ways. In that e-mail, Mr. de Picciotto stated “But the most important thing for us will always be to get the money in.”

Ms. Gifaldi’s mishandling of the basketball invoices was a significant cause of her termination. Before Ms. Gifaldi took over, they always collected the money that was due. One of the first divisions used in the centralization process was basketball, because the division head was in McLean and it was easy to manage the transition and it was a microcosm of their whole business. The basketball invoices that didn’t go out were from around March, April, and May of 2009. This was several months in advance of the August 2009 decision to terminate Ms. Gifaldi.

Mr. de Picciotto spoke with Ms. Morton about the invoicing problems when she brought Ms. Gifaldi’s problems to his attention. In 2009, the only invoicing issues were those brought to him by Ms. Morton concerning Ms. Gifaldi.

In a March 23, 2009 e-mail, Ms. Klitch expressed her concern that verbal deals are higher risk. Mr. de Picciotto agreed that verbal deals are higher risks, because without written proof of the terms of an agreement, there's more possibility that a limitation or dispute could arise.

Mr. de Picciotto did not e-mail anyone in mid-August 2009 to communicate his decision to fire Ms. Klitch. He does not have any evidence other than his testimony that he told others to support his assertion that he decided to fire Ms. Klitch in early August 2009. He never memorialized in writing his decision to fire Ms. Gifaldi in August 2009.

Terminating the Senior Vice-President of Operations/CLO and former General Counsel is a significant employment decision for Octagon internally. Octagon has policies and procedures for terminating employees. No steps were taken to initiate the terminations of Ms. Klitch in early August 2009 and Ms. Gifaldi in mid-August 2009. There is no written evidence indicating his intent to terminate Ms. Gifaldi or Ms. Klitch prior to October 26, 2009.

Mr. de Picciotto's plans for international travel in August, September and October were made several months in advance. His steps to terminate Ms. Gifaldi and Ms. Klitch prior to leaving for his international travel were to communicate to others what they were going to do.

[ALJ examination] He did not terminate them before he left, because they were looking to back up all the information, and because IPG told him to hold off on the terminations shortly after August 25, 2009. He didn't fire them in mid-August, before he got the notice from IPG, because they were backing up all of their information and needed to provide access to others to continue the jobs so there would be a seamless transition. While that process was going on, he got the notice from IPG to stop.

[Cross examination] Mr. de Picciotto had Ms. Kennedy and IT handle the back-up externally, without informing Ms. Klitch and Ms. Gifaldi. Ms. Klitch and Ms. Gifaldi needed to remain employed during the back-up because otherwise all the information would have been vulnerable. He was concerned that they might destroy or change some of the information.

Mr. de Picciotto did not memorialize his concern that the data was vulnerable in an e-mail. Prior to the terminations on October 26, 2009, Mr. de Picciotto had not given Ms. Gifaldi or Ms. Klitch any prior notice of the impending terminations.

Ms. Kennedy notified Mr. de Picciotto of the complaint by phone, but she did not say what the complaint was about. Mr. de Picciotto cannot recall whether he asked what it was about. He agreed that it is likely that if the CLO of his company sent a complaint to the publicly traded company that he would be curious as to its contents. It would be reasonable to conclude that he asked about the contents of the e-mail, but he would be speculating.

[ALJ examination] Ms. Kennedy told Mr. de Picciotto that Ms. Klitch had sent an e-mail to IPG, but she did not know anything more. Ms. Kennedy called him, because she thought he should be aware it had been sent to IPG. Mr. de Picciotto's recollection is that Ms. Kennedy said "Ms. Klitch has sent an e-mail to IPG and I'm calling to let you know" and then hung up.

[Cross examination] Before leaving for his trip, Mr. de Picciotto called Ms. Hoey and said “I understand your department has gotten an e-mail from Ms. Klitch. Can you tell me about it?” Ms. Hoey told him there was a complaint they were going to handle and would not tell him anything. Mr. de Picciotto felt “completely un-communicated with.” He specifically asked her about the contents of the complaint and she affirmatively refused to tell him. Ms. Kennedy never forwarded the e-mail to him. During his conversation with Ms. Hoey, he brought up whether they could proceed with the planned terminations, and Ms. Hoey told him to put them on hold.

Mr. de Picciotto never sent an e-mail to Ms. Hoey to confirm that the plan all along had been to terminate Ms. Gifaldi and Ms. Klitch. Mr. de Picciotto spoke with Ms. Hoey twice about the complaint, once right after it was filed, and again after the investigation was completed. He did not speak with anyone else at IPG about the complaint.

Mr. de Picciotto exchanged e-mails with Ms. Hoey regarding Deloitte interviewing him on October 20, 2009. He knew when a number of his employees were also interviewed by Deloitte. He never spoke with any of his employees about their respective interviews.

[ALJ examination] The purpose of his interview with Deloitte was to follow-up on Ms. Klitch’s e-mail complaint. IPG specifically chose Deloitte to conduct the investigation, because Deloitte is independent of IPG’s own accounting firm, PWC. The interviewers asked him about invoicing, the escrow account, the control environment, contract, storage, retention and filing, data registration, and who had access to certain processes. By October 20, Mr. de Picciotto had some inclination of what was in Ms. Klitch’s e-mail.

[Cross examination] Mr. de Picciotto did not interact with Mr. Dowling, IPG’s chief risk officer. The only person at IPG Mr. de Picciotto spoke with regarding the complaint was Ms. Hoey. He could not explain why in CX 40, an e-mail from Mr. Dowling to Ms. Kennedy on September 16, 2009, Mr. Dowling would write that Mr. de Picciotto was going to update Ms. Kennedy on the “plan for next week.”

The e-mail from August 19, 2009 between him and Ms. Klitch discussing access to the invoicing files was written after he decided to fire Ms. Klitch. There is nothing in the e-mail that tells Ms. Klitch she is being fired or that her job is in jeopardy.

Mr. de Picciotto was eager to have the investigation end, and wanted it resolved as quickly as possible. He became frustrated with the investigation when he heard he was scheduled to have his interview with Deloitte on October 20, because he had not been interviewed when Deloitte came to McLean a month earlier.

Other than the two phone calls with Ms. Hoey, Mr. de Picciotto also had some e-mail exchanges with her regarding scheduling his interview with Deloitte, including the e-mail exchange on October 9, 2009, CX 113. When he wrote “I appreciate the update” he was not referring to a phone update. The update was not on content, it was on scheduling.

The four weeks advance notice of termination required by Ms. Gifaldi and Ms. Klitch’s employment contracts was not honored by Octagon. Mr. de Picciotto was eager to terminate Ms.

Gifaldi and Ms. Klitch, so he disregarded the notice requirement and gave them four weeks' pay, because he had decided to fire them, and that was the first time he was able to implement it.

[ALJ examination] The contract says employees will be given four weeks' notice, not employees will be paid for four weeks. Contracts with people are important. Mr. de Picciotto honors verbal contracts. He felt that they were honoring Ms. Klitch and Ms. Gifaldi's contracts by paying them for four weeks.

[Cross examination] Mr. de Picciotto believed that Octagon had implemented Deloitte's recommendations. Of the eight observations/recommendations in Deloitte's September 25, 2009 draft high level observations, CX 103, of which Mr. de Picciotto only became aware after the conclusion of the investigation, observation 7 indicated that risks exist related to the invoices being tracked by a large excel spreadsheet, which Ms. Klitch and Ms. Gifaldi also thought was a problem. Observation 3, that Mr. Shin's approval process did not confirm the validity of the wire transfer payments, was also consistent with Ms. Klitch and Ms. Gifaldi's concerns regarding client funds representing valid payments.

One of the issues was that some invoices to sponsors had not been generated or had never actually been collected, resulting in Octagon losing money. In part, Ms. Gifaldi and Ms. Klitch were responsible for consolidating the systems already in place to make them more effective and efficient for collecting money.

Octagon has a fiduciary duty to all of its clients.

Mr. de Picciotto was annoyed when he found out that Ms. Klitch had sent the e-mail to IPG, because she went to IPG rather than him. It could have been handled had she spoken with him or Ms. Morton about the problems. He was not embarrassed that it was escalated up to IPG. It did not make Octagon look good in front of IPG, its parent company, but Mr. de Picciotto was not concerned about any wrongdoing. Mr. de Picciotto told Ms. Hoey he had no concerns about wrongdoing.

[ALJ examination] He did not see Ms. Morton's response to the Klitch e-mail until after the investigation. He did not speak with Ms. Morton about her response before she sent it. Ms. Hoey apparently contacted Ms. Morton directly about creating a response to send to IPG.

[Cross examination] Within one or two days after his interview with Deloitte, Mr. de Picciotto received a brief follow-up call asking one or two follow-up questions. The sum total of his interaction with Deloitte was the interview and then the follow-up phone call.

CX 125 is an e-mail exchange between Mr. de Picciotto and Mike Rossen, a Deloitte employee, on October 11, 2009. Mr. de Picciotto acknowledged this was a communication with someone at Deloitte other than the interview and follow-up call.

In CX 126, an October 16, 2009 e-mail from Mr. de Picciotto to Ms. Hoey, copying Mr. Rossen, his statement that "Marge, it won't make me crazier than I've already become" refers to getting crazy because of the timing of the interview.

During the investigation, Mr. de Picciotto asked Ms. Kennedy over the phone or in person to be prepared to go ahead with the terminations when they were allowed to do so. It was around the time that Deloitte first came to their offices for interviews, possibly the same day Deloitte started the interview process.

He never felt a need to terminate Ms. Klitch or Gifaldi in person. Ms. Klitch and Ms. Gifaldi were told Octagon was eliminating the positions because it was the best way to enable them to find new employment. The conversations lasted just a couple of moments. When Mr. de Picciotto transitioned Ms. Klitch to Chief Legal Officer, he encouraged her to get out of the McLean office and work more frequently at her home in West Palm Beach. Because Ms. Klitch and Ms. Gifaldi both were working remotely, Mr. de Picciotto could have called them from anywhere during his traveling and fired them.

IPG encouraged Octagon to make the recommendations suggested by Deloitte. The invoicing and client escrow function currently is handled by Octagon with some assistance from CMG, a shared services company that does back office work for different IPG companies, on the corporate accounting side. To some extent, some of the functions handled by Octagon have been taken away and given to a separate company, CMG.

[ALJ examination] Mr. de Picciotto selected Ms. Klitch because she was the best candidate based on her background as a lawyer and an athlete, and was the only candidate who had been a professional athlete. He met her 20 years earlier and had two phone conversations with her prior to hiring her. Others in the interview process told him that Ms. Klitch may have interpersonal problems.

Ms. Gifaldi was brought in as a key hire to centralize the invoicing. Mr. de Picciotto had not met her before, so he relied on the person who would be supervising her.

Mr. de Picciotto went on several trips after he was informed by Ms. Morton and Ms. Plewes that there were problems with the invoicing process, resulting in revenue not being recognized. He told Ms. Klitch he was giving Ms. Gifaldi a second chance after she missed the basketball billing. She had missed invoicing for every department in the company, the most significant being the basketball billing, and then the baseball billing a few months later.

The function of their Human Resources department is to hire staff, handle intra-staff issues and terminate staff or otherwise handle their departures.

Mr. de Picciotto spends time and money investing in people who work for him. Poor performance of employees is addressed by their policy manual or the HR experts headed by Ms. Kennedy. Employees are supposed to be notified of their poor performance. There tend to be dialogues on a relatively continual basis, not just once per year in performance reviews. Ideally, they are documented, and then the termination can become effective.

There is no formalized warning letter or last chance letter. Employees are able to understand the significance of their underperformance from communications generated by the

HR department. Ms. Gifaldi has a personnel record, but he has not seen it, because he was told by so many people what they reported to HR that he didn't feel like he needed to look at her file.

Ms. Kennedy, the head of HR, advised Mr. de Picciotto to terminate Ms. Gifaldi. When Ms. Gifaldi and Ms. Klitch were terminated, he returned their functions to the person who had it before. Returning it to the persons previously responsible was not a problem because the problems lay in the systems, not the people. Then, they had a good system, but the wrong people, so they tried to get a good system with the right people. Mr. de Picciotto was responsible for putting the good system in place, but it was implemented by Ms. Klitch and Ms. Gifaldi.

Mr. de Picciotto was not aware that Ms. Gifaldi had any issues concerning the integrity, accuracy or accounting of the invoice system. She never complained to him and he never saw anything in writing from Ms. Gifaldi about those concerns.

When Ms. Gifaldi came to McLean, Mr. de Picciotto would speak to her occasionally to say hello. Between February and May 2009, he told Ms. Gifaldi in person that "We have to do better than this" at one point when she was visiting, but he did not tell her what would happen if things did not improve. She already knew there were problems with invoicing. She was always completely honest and genuine, because she would admit the fact that there were errors to her supervisor or other people who asked. She did not explain why there were invoicing problems to Mr. de Picciotto. She did not indicate that she was under-staffed. Ms. Klitch did not share Ms. Gifaldi's concerns with him.

Mr. de Picciotto had no reason to think at the time he was interviewed that Ms. Gifaldi had any input in the e-mail complaint. He first became aware that Ms. Gifaldi had complaints and shared some of Ms. Klitch's concerns at the hearing.

Mr. de Picciotto considered Ms. Gifaldi hardworking. She needed to go at the same time as Ms. Klitch, because she was the only person with access other than Ms. Klitch, and the errors had cost all of them real credibility, and they had to start anew. He did not just replace Ms. Klitch, because there were errors in the invoicing, which was Ms. Gifaldi's direct responsibility. They were not downsizing in October 2009. Eliminating the positions was their way of softening the blow, and they did not replace the positions.

[Cross examination] Mr. de Picciotto characterizes his September 12, 2009 e-mail to Ms. Gifaldi, CX 42, as a polite e-mail appreciating that Ms. Gifaldi incorporated his changes. It was a follow-up to a meeting that took place on the phone on August 2, after which Ms. Gifaldi made some corrections, and he e-mailed her back. There is nothing in the e-mail that he had a month prior decided to terminate Ms. Gifaldi or Ms. Klitch.

Ms. Julie Kennedy
(TR, pp. 423 to 499)

[Direct Examination] Ms. Kennedy is Vice-President of Human Resources at Octagon, Inc. She is the most senior person in HR at Octagon A & P. She was the HR person in charge when Ms. Klitch and Ms. Gifaldi were employed and terminated.

Ms. Kennedy currently reports to Mr. de Picciotto. At one point reported to Ms. Klitch who was General Counsel. Ms. Kennedy started with Octagon in July 2008, when Ms. Klitch was the General Counsel. Ms. Klitch was a demanding boss who worked a lot of hours and was very tough on her staff. Ms. Kennedy received many complaints about her. Ms. Klitch's subordinates had to work long hours.

In May 2009, Deputy General Counsel Shin was promoted to General Counsel, and Ms. Klitch was promoted to Chief Legal Officer. Ms. Kennedy considered it a title change and a promotion. Ms. Kennedy indicated on the Employee Change Form that the title change to CLO was a promotion. Around December, Mr. de Picciotto had encouraged Ms. Klitch to work more frequently off-site from West Palm, but it wasn't part of the promotion.

When Ms. Klitch was the General Counsel, she oversaw the legal department and reported to Mr. de Picciotto. After Ms. Klitch's promotion to CLO, Mr. Shin oversaw the legal department, but he still reported to Ms. Klitch, who continued to report to Mr. de Picciotto.

After receiving the e-mail complaint from Ms. Klitch on August 25, 2009, Ms. Kennedy spoke with Mr. Dowling about receiving the complaint, and Mr. Dowling told her that IPG would handle it and she should not reply. He told her Ms. Klitch's termination would need to be postponed. Ms. Kennedy does not know Mr. Dowling well enough to say whether he seemed concerned, but she is "sure he was." That same day, Ms. Kennedy called Mr. de Picciotto, and told him they had received a complaint from Ms. Klitch regarding the invoicing and escrow account. The phone conversation lasted a couple of minutes. She did not tell Mr. de Picciotto what was in the complaint, she told him they had received it and they were planning to terminate Ms. Klitch and would have to hold off on that. He never asked her what was in the actual complaint. Ms. Kennedy did not forward the e-mail to him, he did not ask for it to be forwarded, and she never showed it to him in hard copy.

Ms. Kennedy also talked to Ms. Hoey at IPG a couple of times about the complaint. Ms. Hoey made the initial contact to ask Ms. Kennedy about Ms. Klitch's background and her position at Octagon. Ms. Kennedy forwarded Ms. Klitch's employment agreement to Ms. Hoey a few days after receiving the complaint. There was another e-mail exchange regarding the four weeks' pay for Ms. Klitch. Ms. Hoey did not ask about Ms. Gifaldi's employment agreement or discuss Ms. Gifaldi with Ms. Kennedy. The complaint was only by Ms. Klitch.

Ms. Kennedy told Mr. de Picciotto that IPG would be handling the investigation and they would need to hold off on terminating Ms. Klitch, which was frustrating, because they had been receiving complaints about her. Mr. de Picciotto was not happy about postponing her termination.

Ms. Kennedy and Mr. de Picciotto discussed terminating Ms. Klitch, but he did not send her any e-mail or correspondence to that effect. As of August 25, 2009, there was nothing in writing from Mr. de Picciotto that indicated that Ms. Klitch or Ms. Gifaldi was being terminated. They had discussed the possibility of letting Ms. Gifaldi go in early August. When she told Mr. de Picciotto they had to hold off on the termination, she was referring to Ms. Klitch's termination. She was not aware at that time that Ms. Gifaldi was going to be terminated.

Ms. Kennedy found out about the decision to terminate Ms. Gifaldi when Mr. de Picciotto called her from the office on September 22 and told her he had decided to eliminate the positions of Ms. Klitch and Ms. Gifaldi due to economic, performance, and work location reasons. Mr. de Picciotto asked her to create a document at that point, during the investigation, so that it was ready in the event that the investigation was completed and no issues were found. The terminations were conditioned on IPG's determination that the investigation was successfully completed.

[ALJ examination] By successful completion of the investigation, Ms. Kennedy meant that they were planning on terminating Ms. Klitch and had talked about terminating Ms. Gifaldi, but they put Ms. Klitch's termination on hold when they received Ms. Klitch's complaint until the investigation was completed. They needed to wait until the investigation was completed and IPG was satisfied that they could move forward.

[Direct examination] As the Director of Human Resources, about 185 employees fall within her purview. Ms. Kennedy is a member of SHRM, Society for Human Resource Management. As Director of HR, she has written policies and procedures for terminating employees. Octagon's policies and procedures for terminating employment are written so they have flexibility in handling Human Resources situations, because most of Octagon's employees are at-will employees. With a position elimination, the position may be eliminated immediately, or if there was misconduct, an employee could be terminated immediately. In some situations, they may have performance improvement plans. Theft, violence or the elimination of a position due to economic reasons because a division isn't doing well justify immediate termination.

An employee who is going to lose his or her job due to economic reasons is not necessarily given any advance warning. Octagon does not have a progressive disciplinary process as a matter of policy. Octagon has used corrective action notice from time to time, but it is not a policy. There is no written policy or procedure for informing an employee that their job is on the line. They use performance improvement documents where they write something informing the employee of issues with their performance. Typically, it is documented in some way, but it is not always included in their personnel file. Ms. Kennedy would prefer as a matter of best practice that there be written documentation when an employee was told "one more time and you're out of here".

Ms. Kennedy never told Ms. Klitch or Ms. Gifaldi prior to August 25, 2009 that their jobs were on the line or that they were going to be terminated soon. The first time Ms. Klitch and Ms. Gifaldi knew they were terminated was on October 26, 2009. When an employee is terminated, a Personnel Action Form needs to be filled out. October 26, 2009 is the last day worked for Ms. Gifaldi and Ms. Klitch.

As of August 25, 2009, Ms. Kennedy had discussed the terminations of Ms. Gifaldi and Ms. Klitch with Mr. de Picciotto, but there was no written directive to start the termination process.

Ms. Klitch and Ms. Gifaldi were terminated by phone by Ms. Kennedy and Mr. de Picciotto. Ms. Klitch and Ms. Gifaldi were told they were being fired because the creation of their positions was not working out and they were being eliminated. On Ms. Klitch's call, Mr. de Picciotto said "It's not working out that we created this position for you, it's not working." When Ms. Klitch asked why it wasn't working, Mr. de Picciotto said "We've been over this. We've discussed it, we discussed the issues."

Ms. Kennedy believed that if Ms. Klitch was terminated, Ms. Gifaldi would also have to be terminated. They worked hand-in-hand together, with Ms. Gifaldi answering to Ms. Klitch. Both Ms. Klitch and Ms. Gifaldi seemed surprised when they were terminated, and Ms. Gifaldi was angry.

Octagon had the authority to make personnel decisions as a separate company, but Ms. Hoey told Ms. Kennedy that IPG was aware that the investigation had been concluded and Ms. Kennedy could proceed with the planned termination of Ms. Klitch. IPG was also aware of Ms. Gifaldi, because Ms. Kennedy had talked about it with Ms. Hoey shortly before the termination.

The day before the terminations, Ms. Kennedy consulted with Abby Gold, Senior Vice-President of Human Resources for CMG. CMG did not have to approve or authorize the termination of Ms. Klitch or Ms. Gifaldi. Octagon makes its personnel decisions independently.

There was more pressure to dot the i's and cross the t's with the terminations of Ms. Klitch and Ms. Gifaldi than most other employees because of the complaint. Ms. Kennedy was not aware of any other Octagon employee ever raising any kind of complaint to IPG, or anyone in the legal department raising an internal complaint like the one Ms. Klitch raised.

Octagon conducts performance reviews of its employees. At Octagon, there is not a direct correlation between the performance review and salary increases. Overall performance and economics is taken into account, but a certain type of performance review does equate to a certain salary increase.

Bad employees do not always get bad performance reviews. Some managers only have positive things to say about everything while some managers are extremely critical, so it's subjective. Ms. Klitch's performance reviews were satisfactory, meaning not negative. There were no negative performance reviews of Ms. Gifaldi when she was employed.

Ms. Kennedy coordinated the interviews with Deloitte's investigators. The first time the Deloitte investigators were in McLean was September 22, 2009, the same day Mr. de Picciotto called Ms. Kennedy indicating he wanted to terminate Ms. Gifaldi and Ms. Klitch. The context of that conversation was that he wanted to communicate the information about terminating the positions that they would use in the eventual communication. When he sent the final e-mail to her, the document was supposed to be the basis of that.

There are notes from the August 7 meeting between Ms. Kennedy, Ms. Plewes and Mr. de Picciotto where they discussed the fact that Ms. Klitch was being terminated and they needed a transition plan to handle the client invoicing with Ms. Klitch's departure.

September 22, 2009 was the first time Ms. Kennedy was aware of Mr. de Picciotto's final decision to let Ms. Gifaldi go, although it was discussed at the August 7 meeting. There was no doubt that Ms. Klitch was going to be terminated on August 7, but whether Ms. Gifaldi was also going to be terminated was still being discussed.

After the Deloitte investigators were in the office on September 22, 2009, they wanted to talk to more people, so they set up interviews with more people, including Ms. Klitch and Mr. de Picciotto.

Ms. Kennedy had no contact with Mr. de Picciotto about the investigation or the Klitch complaint during the investigation. She spoke to General Counsel Ho Shin about it. Ms. Kennedy explained to the employees chosen to be interviewed that there was an audit and she needed to set up an interview for them. Employees in the office knew there were auditors in the office, which was not unusual.

The extent of Ms. Kennedy's involvement in the investigation was coordinating interview dates. She never put her instruction to Mr. de Picciotto to postpone firing Ms. Klitch in writing.

Ms. Kennedy agrees that terminating Ms. Klitch right after the completion of the investigation so soon after the complaint would look bad for the company, but she was confident there was no merit in Ms. Klitch's complaint.

[ALJ examination] The recommendation to hold off on terminating Ms. Klitch was made by Mr. Dowling and Ms. Hoey, not Ms. Kennedy. Once the investigation was finished, Ms. Klitch was going to be terminated. Ms. Kennedy did not advise Mr. de Picciotto not to engage in the actions, because they had already made the termination decision and the IPG attorneys felt they could proceed, but she was concerned it was done too soon.

Ms. Kennedy did not think the timing of Ms. Gifaldi's termination right after the investigation was an issue in terms of her involvement, because Ms. Gifaldi did not make the complaint.

[Direct examination] Ms. Kennedy had an initial conversation with Mr. de Picciotto informing him of what the complaint was generally about, and then another conversation about

whether the investigation was complete and they could proceed with the termination. He never spoke to her about the plan or course of action Deloitte was taking in the investigation.

Ms. Kennedy had a couple of conversations with Mr. Dowling initially when she received the complaint and then later about scheduling interviews for the Deloitte investigation. Mr. Dowling sent her an e-mail on September 16 telling her that Mr. de Picciotto would update her. Ms. Kennedy believes he was referring to updating her about that process. A few days before the audit, the Deloitte team came into the office. Mr. de Picciotto never contacted Ms. Kennedy to update her, and she never reached out to Mr. de Picciotto for the update, because Mr. Dowling contacted her and provided an update on what was happening, that the Deloitte auditors were coming in.

[Cross examination] Ms. Kennedy did not recommend Ms. Gifaldi for hire after her interview in October 2008, because she was not a good fit for the position. She did not have the requisite interpersonal skills to effectively interact with everyone. During the interview, she did not make eye contact, she mumbled, and was not direct. Ms. Kennedy did not think Ms. Gifaldi would be able to effectively interact with the staff, which was a position requirement. Ms. Kennedy expressed to Ms. Klitch her reservations about Ms. Gifaldi, but Ms. Gifaldi was hired anyway. Ms. Klitch told Ms. Kennedy that everyone else loved Ms. Gifaldi, which Ms. Kennedy later found out was not true.

Ms. Kennedy received complaints about Ms. Klitch. In December 2008, Ms. Kennedy met with Jim Di Lorenzo, Associate General Counsel at that time and the most senior person after Ms. Klitch. He was very concerned about the legal staff, and said that the staff was continuously complaining to him about Ms. Klitch's reign of terror, that she was hypercritical of everyone, and small mistakes were blown out of proportion. The whole staff was walking on eggshells. Ms. Klitch would talk about employees and their issues to other employees, which was demoralizing. The staff was expected to work extremely long hours without an end in sight.

On December 1, 2008, Ms. Kennedy also met with Niki Sollinger, a staff attorney working for Ms. Klitch. Ms. Salinger reported they were working excessive hours without any work/life balance, and their efforts were never enough. She was concerned about her colleagues, because they were working really hard, and Ms. Klitch was supercritical of them, nothing ever seemed to be good enough. There was a lot of confusion about what was a priority

On December 5, 2008, Ms. Cerullo was really upset because Ms. Klitch told her that her performance had declined over the last six months, but had given her a promotion and a raise two weeks before. Ms. Cerullo did not think she could stay if the situation with Ms. Klitch did not change. When she left Ms. Kennedy's office, Ms. Klitch was outside and asked whether she should follow up with Ms. Cerullo. Ms. Kennedy told her not to speak with Ms. Cerullo at that time, but Ms. Klitch went and confronted her, and she could be heard crying in her office.

Later that day, on December 5, 2008, Ms. Kennedy met with Ms. Klitch to discuss the staff's concerns. Ms. Kennedy spoke with Ms. Klitch alone before they spoke to the staff together, one staff member at a time. Ms. Salinger said she was very unhappy, not as unhappy some of the others, but she did not have a work/life balance. Ms. Salinger thought it was

demoralizing because there was no end in sight to the hours they were expected to work, and that Ms. Klitch was overcritical, over-punishing for even small mistakes and did not give clear priorities. Because everything was always a priority, they did not know where to focus.

After the meetings, Ms. Kennedy contacted Mr. de Picciotto about the complaints. Mr. de Picciotto said he was aware of the issues because others had already complained to him, and as a result he was going to move Ms. Klitch into an operations role without day-to-day staff management responsibilities. Mr. de Picciotto said he hoped that would help some of the issues, and that Ms. Klitch would be moved from day-to-day oversight of the legal department to the more independent operations role. Mr. de Picciotto indicated that Mr. Shin would assume the General Counsel position and take over the day-to-day management of the legal department.

On April 30, 2009, Ms. Kennedy met with Mr. Schneller, a 20-year employee of the Client Financial Services division, who reported that Ms. Klitch had changed the enjoyable atmosphere at Octagon. He was concerned about Ms. Cerullo being thrown into the client invoicing role, a demanding job that she was expected to perform in just a few hours a day.

On May 1, 2009, Mr. Schneller returned to Ms. Kennedy with more concerns about Ms. Cerullo. He told Ms. Kennedy that Ms. Cerullo had been thrown into it, and was already overwhelmed before assuming all of the responsibilities associated with the job.

On May 11, 2009 Ms. Cerullo expressed her concerns to Ms. Kennedy about the new client invoicing process, about which she had not received any instruction from Ms. Klitch, who would get upset if the process was not followed. Ms. Cerullo reported that it was difficult with Ms. Gifaldi and Ms. Klitch working remotely while she was the only one in the main office in McLean. She had to constantly update and keep Ms. Gifaldi and Ms. Klitch in the loop.

On May 15, 2009, Kelly Wolf, Director of Client Services for tennis, complained to Ms. Kennedy about issues with Ms. Klitch and Ms. Gifaldi. Ms. Wolf reported that the invoicing process was very cumbersome and Ms. Gifaldi was not easily reachable, because she was not in McLean. Ms. Wolf was concerned that Ms. Gifaldi did not understand how they did business.

On August 5, 2009, Ms. Cerullo and Kelly Wilson came to Ms. Kennedy. Ms. Cerullo was in tears and very upset. She said that Ms. Klitch was an awful person and she couldn't work for her any more. Ms. Cerullo said that Mr. Schneller was trying to gain access to a check log that was readily accessible on the G drive to all employees. Ms. Klitch told Ms. Cerullo that she would not respond to Mr. Schneller's e-mail, because he wasn't on her level. Ms. Cerullo complained that Ms. Klitch had said many inappropriate things to her, and constantly complained about other groups, particularly the basketball division.

Ms. Kennedy met with Mr. Schneller the same day regarding the check log access issue. Mr. Schneller was concerned because he needed access to the information, and also wanted to ensure it was being tracked. Mr. Schneller felt that he deserved a response from Ms. Klitch and did not think it was right that Ms. Klitch told Ms. Cerullo that she wouldn't respond to him. Ms. Kennedy and Mr. Schneller decided to wait a day and see if Ms. Klitch responded.

On that same day, August 5, 2009, Mr. Shin came to Ms. Kennedy and indicated he was very concerned about the staff, because there were periodic flare-ups and it was very obvious when Ms. Klitch was in McLean as the atmosphere in the office would completely change. The staff was very stressed, nervous and on edge and Mr. Shin thought the only way to solve the problem was to fire Ms. Klitch. He had considered leaving because of his interactions with Ms. Klitch and was waiting for the right time to speak with Mr. de Picciotto. Ms. Kennedy encouraged him to speak with Mr. de Picciotto.

On August 6, 2009, Ms. Kennedy met with Ms. Plewes in follow-up to her two previous meetings with Mr. Schneller. Instead of replying to Mr. Schneller's e-mail, Ms. Klitch had e-mailed Ms. Plewes that she did not want to deal directly with Mr. Schneller, that she would deal with Ms. Plewes, and that Ms. Plewes' staff should not be questioning her. Ms. Klitch didn't question Ms. Plewes or let her staff question Ms. Plewes. Ms. Plewes indicated that she, Ms. Morton and Mr. Schneller felt that Ms. Klitch's defensiveness prevented them from asking her questions about the processes, which Ms. Klitch did not even seem to understand. Ms. Plewes was concerned about retaliation, because she thought Ms. Klitch would become very nasty if Ms. Klitch thought she was going against her.

As a result of these meetings, Ms. Kennedy arranged for a meeting on August 7, 2009 with Ms. Plewes and Mr. de Picciotto. Mr. de Picciotto discussed the transition plan for Ms. Klitch's eventual departure. He felt Ms. Plewes' group would be the best group to handle the client invoicing process. It was very clear Ms. Klitch was going to be terminated.

Mr. de Picciotto asked whether Ms. Gifaldi was loyal to Ms. Klitch. Ms. Plewes did not know, but she did not think so. Ms. Kennedy thought Ms. Gifaldi was loyal to Ms. Klitch and recommended that she be terminated as well. Mr. de Picciotto's question about Ms. Gifaldi's loyalties was raised several weeks before Ms. Klitch made the complaint to IPG.

Mr. de Picciotto asked Ms. Plewes to get more information about the invoicing process, what was being done and how it was being done. He specifically asked Ms. Kennedy to have IT back up Ms. Klitch's and Ms. Gifaldi's files and e-mails, which she did.

Ms. Kennedy worked with Deloitte to arrange interviews in McLean on September 22, 23, and 24, 2009. Ms. Gifaldi was working remotely in Florida at that time, and was interviewed by Deloitte over the phone. Ms. Kennedy never told Mr. Picciotto that Ms. Gifaldi was interviewed by Deloitte, and was not aware of anyone telling him that Ms. Gifaldi was interviewed by Deloitte.

[ALJ examination] On August 25, 2009, Ms. Kennedy told Mr. Picciotto that the Klitch complaint was about the client invoicing and escrow account. He did not ask her anything else.

A Performance Improvement Plan is a document given to employees to counsel them on performance issues. Ms. Gifaldi did not receive one because her position was eliminated. She was terminated due to performance issues. Performance Improvement Plans are usually initiated by the supervisor if there is a performance issue, but Ms. Klitch never brought any performance issues to Ms. Kennedy's attention. It would not be a normal practice for someone other than the

supervisor to initiate a Performance Improvement Plan. Ms. Kennedy felt Ms. Gifaldi should be terminated for both her performance and loyalty issues.

Ms. Klitch never brought performance issues with Ms. Gifaldi to Ms. Kennedy's attention or created any adverse performance documentation, and Ms. Kennedy never discussed Ms. Gifaldi's performance with Ms. Klitch. However, Ms. Wolf had issues with Ms. Gifaldi, Ms. Cerullo felt Ms. Gifaldi was constantly out of the loop and was not supporting her, and another employee complained about Ms. Gifaldi's lack of responsiveness, reporting that he waited for weeks without getting a response to his calls and e-mails.

Ms. Kennedy took the complaints about Ms. Gifaldi's performance to Mr. de Picciotto instead of Ms. Klitch, Ms. Gifaldi's supervisor, because Ms. Klitch was very retaliatory and had twice threatened to fire Ms. Cerullo when Ms. Cerullo complained about her to Ms. Kennedy.

Ms. Kennedy agreed Ms. Gifaldi won't understand she has performance issues if no one talks to her about it. However, people had gone to Ms. Klitch, and Ms. Klitch did not take any action.

[Re-Direct examination] Ms. Kennedy does not have any notes from her interview with Ms. Gifaldi, and she never e-mailed Ms. Klitch or Mr. de Picciotto that Ms. Gifaldi was not a good hire. Often when interviewing staff, the feedback is a verbal exchange discussing impressions of the candidate. There is nothing in writing memorializing Ms. Gifaldi's poor interview.

Ms. Kennedy does not have any written policies or procedures for taking notes. She tries to take notes, but does not always do so. She takes notes if she feels it is relevant and she'll need to refer to the information later. She does not usually save the notes she types up on the computer, but prints out a hard copy and then puts it in a file. There is typically no electronic copy saved that would indicate when the documents were actually created.

Sometimes there's a family atmosphere at Octagon. Sometimes it's referred to as the "family." Ms. Klitch and Ms. Gifaldi did not fit in.

Ms. Janet Plewes
(TR, pp. 499 to 556)

[Direct examination] Ms. Plewes is the Managing Director and President of OFS, Octagon's sister company, that provides financial planning services to athlete clients. Octagon and OFS are both owned by a holding company that is owned by IPG. As Managing Director, Ms. Plewes is responsible for the operations of the division, the management of the staff, and the financials for producing numbers for the division.

Ms. Plewes reports to Mr. de Picciotto. She obtained her CPA in 1986 and is licensed in Maryland and Virginia. She is also a certified financial planner ("CFP") and holds a Series 7 mortgage license and a Series 65 investment advisor's license. Ms. Plewes began working for Octagon in 1985.

Prior to Ms. Klitch and Ms. Gifaldi taking control of Octagon's client invoicing service in the fall of 2008, the client invoicing function was handled by Dick Schneller and Esther King, who reported to Ms. Plewes. Prior to the beginning of 2009, Mr. Schneller and Ms. King were also responsible for the client escrow account and reconciliation. During the 20 years Mr. Schneller and Ms. King handled those functions, there were no allegations of client fraud or theft or complaints from clients about the handling of their money.

The intention was for Ms. Klitch to take over and improve the process. When Mr. Schneller and Ms. King handled these functions, each division did their own invoicing and Mr. Schneller and Ms. King processed the invoices as they came back. Performing these functions took 15 percent of Mr. Schneller's time and 40 percent of Ms. King's time.

Her group was happy and excited when they learned they would no longer be responsible for the client invoicing and escrow account functions, because those functions were not part of their core business. They preferred to have someone else handle it. In the fall of 2008, Ms. Klitch changed positions and took over invoicing operations. She did not report to Ms. Plewes.

Ms. Plewes had interpersonal issues with Ms. Klitch while she was employed at Octagon. Ms. Klitch is not a very pleasant person and they butted heads in a few instances. The first time was after Ms. Plewes had interviewed Ms. Gifaldi for the invoicing position and she was trying to tell Ms. Klitch that she did not think Ms. Gifaldi was a good candidate because she was not qualified, and Ms. Klitch kept saying what a wonderful candidate Ms. Gifaldi was and would not listen to Ms. Plewes. In another instance, when Ms. Plewes tried to correct Ms. Klitch's explanation of the old invoicing process during a meeting in December 2008, Ms. Klitch kept making her same point, just more loudly to get it across.

In late 2008 and 2009, Ms. Plewes received a few complaints about Ms. Klitch. Mr. Atiq Abdullah, Director of IT, reported that Ms. Klitch was extremely rude and demanded he give her requests priority because she was General Counsel, and important. Ms. Klitch also had a couple of run-ins with Mr. Schneller, one involving him questioning her about the check log, which caused Ms. Plewes to contact Mr. Picciotto. Ms. Cerullo also complained that Ms. Klitch had a very aggressive style in dealing with her.

Ms. Gifaldi was not qualified for the position because she did not have a financial background, and she would be working on financial processes and records, which she was not qualified to do. Ms. Gifaldi was extremely nervous, which made Ms. Plewes uncomfortable. She did not have a good feeling about Ms. Gifaldi, but Ms. Klitch hired her anyway. Ms. Plewes believed Ms. Klitch's intention was to hire Ms. Gifaldi no matter what anyone else said.

In 2009, Ms. Plewes learned from several people that Ms. Gifaldi was having performance problems, including being unresponsive to invoice requests and e-mails, missing entire sets of invoices, and issuing invoices in the wrong currency. When OFS managed the client invoicing there was never a time when a whole division of invoices were not issued.

Mrs. Plewes sent an e-mail to Mr. de Picciotto in March or April 2009 informing him that she did not know what was going on, and changes that were supposed to be made by Ms. Gifaldi and Ms. Klitch were not in place, that things had “come to a screeching halt.”

In August, there was an issue when Mr. Schneller he could not find a check for a former client in the check log, which tracks the disposition of incoming checks. Ms. Klitch had instructed Ms. Cerullo not to record the check in the check log. Ms. Klitch told Mr. Schneller that it was her responsibility to decide whether to include the check in the check log. Ms. Klitch did not want Ms. Plewes to be involved, but Ms. Plewes stressed to her that it was important for her to be involved and to have all the checks on the log, because otherwise they would lose control of a major internal control procedure. Ms. Klitch indicated that she kept her own log, and Ms. Plewes could ask her if she had a question, and if Mr. Schneller had a question, he should direct his questions through Ms. Plewes.

The discussion with Ms. Klitch led Ms. Plewes to explain to Ms. Kennedy that she felt they had a major problem with someone skirting an internal control, which led to the August 7 meeting with Mr. de Picciotto to discuss the situation. At the meeting, Mr. Picciotto indicated he had reached his breaking point with Ms. Klitch and was going to let her go. He was also ready to let Ms. Gifaldi go at that point. Ms. Kennedy agreed that Ms. Gifaldi should go, but Ms. Plewes hesitated and was afraid because the responsibilities of Ms. Gifaldi and Ms. Klitch would be transferred to her. She wanted to be sure they understood what was in place so that they could operate without Ms. Gifaldi and Ms. Klitch.

During the meeting Mr. de Picciotto asked Ms. Plewes to find out where the information was located, whether they had access to it, and if they could function without Ms. Gifaldi as well as Ms. Klitch. Ms. Plewes looked at the files she could access and observed some of them were very incomplete. When she informed Mr. de Picciotto that she did not feel comfortable with the available information, he instructed her to go ahead and involve other people.

Ms. Plewes’ office is right next to Mr. de Picciotto’s office. The McLean office is very open, with no doors. Ms. Plewes and Mr. de Picciotto often have conversations in the hallway or they walk over to the other’s office. A couple days after Mr. de Picciotto instructed her to involve other people in her investigation, Mr. de Picciotto and Ms. Plewes had a couple of casual conversations about Ms. Gifaldi’s employment, including one about IT. In a follow-up conversation after meeting with Ms. Cerullo, Ms. Plewes told Mr. de Picciotto she felt comfortable they had access to the information. She had looked at the client invoice mailbox and a lot of other documents and felt comfortable going forward without Ms. Gifaldi. At that point, Mr. de Picciotto said something to the effect of “Okay, then, we’re ready”, which Ms. Plewes understood to mean that the decision to terminate Ms. Gifaldi had “been made for sure.”

Ms. Plewes was not involved in the terminations of Ms. Gifaldi and Ms. Klitch. Following the terminations, Ms. Cerullo and a new hire assumed responsibility for the client invoicing and escrow account, with Ms. Plewes overseeing them.

Ms. Plewes uncovered numerous errors made by Ms. Gifaldi after she was terminated. The escrow accounts had not been reconciled since Ms. Klitch and Ms. Gifaldi took control in

June, which was a huge problem because the reconciliation, balance and account are reported to CMG and IPG, and all the money in the escrow account belongs to clients. Ms. King, who had previously held that responsibility, had never failed to reconcile the account. When Ms. Gifaldi was fired, everything on the reconciliation of the account was off. The list of outstanding checks in one month was off by more than \$100,000. Ms. Gifaldi had been plugging in the un-reconciled amount each month.

Ms. Plewes also discovered that Ms. Gifaldi had repeatedly issued invoices in the wrong currency, had invoiced fees at the wrong percentage, had a huge backlog of contracts that needed to be added to the recurring invoices chart, and had incorrectly entered invoices involving millions of dollars for all future payments for a large client. At one point, Ms. Plewes stopped notifying Mr. de Picciotto of the errors because they were so numerous.

[Cross examination] Prior to Ms. Gifaldi and Ms. Klitch taking over the escrow account it was handled through OFS by Mr. Schneller and Ms. King, neither of whom has an accounting background. Ms. Klitch was a demanding boss who worked a lot of hours and made her staff work long hours. Ms. Plewes received complaints that Ms. Klitch was unreasonable.

At the meeting in early August 2009 with Ms. Kennedy and Ms. Picciotto, Mr. de Picciotto had definitely decided to let Ms. Klitch go, but the timing of the termination was unclear. Mr. de Picciotto did not explain at the meeting why he was firing Ms. Klitch, which Ms. Plewes did not find odd, because it was well understood that she needed to go based on all the problems and her personal and performance issues.

Ms. Plewes found out that Ms. Klitch and Ms. Gifaldi had been fired after the fact. She did not have prior knowledge of any concrete, pending terminations.

With a verbal contract, the agent negotiator knows what the fee is supposed to be for the commission. Octagon has to rely on the agent's word regarding the correct fee. As a matter of best practice, as an accountant, it would be better if there were written contracts instead of verbal agreements.

Ms. Plewes learned about Ms. Klitch's e-mail to IPG from Ms. Kennedy when they saw each other in the hall the same day the e-mail was sent. Ms. Kennedy informed her Ms. Klitch had sent a complaint to IPG, but did not discuss the substance of the complaint. Ms. Kennedy did not explain why she was telling her, so Ms. Plewes assumed she was involved in some way.

Ms. Plewes never spoke with anyone else about Ms. Klitch's complaint. She learned about the substance of the complaint when she read it last week. Within the last few months, Mr. Paul Hoss, her in-house counsel, gave her some indication of the substance of the complaint.

[ALJ examination] Ms. Plewes was interviewed by Deloitte. Deloitte told her they were doing a process audit, but Ms. Plewes assumed it was due to Ms. Klitch's complaint. They asked her some specific questions about her processes and operations. Based on some specific questions about processes and operations, Ms. Plewes assumed Ms. Klitch had made a claim about their process. She had some idea of what might have been in the complaint based on the

questions, which she believed were tied to the complaint. Ms. Plewes never spoke with anyone at IPG about the complaint.

The interview with Deloitte lasted an hour and a half. They did not explain why they were there and she did not ask. They said they were there to do a process audit. Ms. Plewes was curious about what they were doing, but did not ask anyone about it.

It was important to document what she found after Ms. Gifaldi and Ms. Klitch were terminated. She forwarded the e-mails to Ms. Kennedy or Mr. de Picciotto because he wanted her to keep them informed.

Ms. Plewes did not take any notes of the meeting with Mr. de Picciotto in early August where they discussed terminating Ms. Klitch or create any written documentation memorializing Mr. de Picciotto's intention to terminate Ms. Klitch. She did not receive any written documentation from Mr. de Picciotto that stated he was firing Ms. Klitch or Ms. Gifaldi.

The commission fee is different for an industry deal versus a non-industry deal, with an industry deal having a lesser commission. In the absence of a written contract, a person would have to take someone's word for the correct commission.

Octagon and OFS are two separate companies, but there was overlap in how processes are handled. For example, Ms. Morton is the CFO of Octagon, but is essentially the CFO of OFS, even though she doesn't actually hold that title. When the money came in on invoices, it would go to an Octagon account, but OFS employees worked on the invoicing process.

One of the issues Ms. Klitch raised in an October 6, 2009 e-mail was that she was not comfortable with processing the Octagon Financial Services through the client escrow. Ms. Klitch was big on trying to keep an actual separation between OFS and Octagon, Inc.

There was a transition period of several months to transition the escrow account from Ms. Plewes' department to Ms. Gifaldi, which was not a minor undertaking. Handling escrow funds is significant and important for the company. Octagon is essentially a fiduciary to its clients, especially OFS, because OFS provides investment advisory services to clients. The timeline for the transition of the escrow funds was between late April and the end of July 2009.

After the meeting with Mr. de Picciotto in early August 2009, Ms. Plewes looked for documents stored on one of the drives. In an August 12, 2009 e-mail from Ms. Plewes to Mr. de Picciotto and Ms. Kennedy, Ms. Plewes explained what she had been able to figure out so far, CX 65. Nothing in the e-mail says anything about impending terminations. Ms. Kennedy's response also did not mention Ms. Klitch or Ms. Gifaldi's imminent terminations, but Ms. Plewes believed the terminations were imminent, that Mr. de Picciotto was waiting for her to get back to him regarding file access and the process.

Ms. Plewes described herself as a loyal employee to Mr. de Picciotto.

Ms. Jenny Klitch
(April 8, 2011 Deposition, CX 1)

[Direct examination] Ms. Klitch has been a lawyer since she graduated from the University of Michigan Law School in 1994 and a member of the Florida bar since 2004. After graduating from law school, Ms. Klitch performed litigation at private firms. She did not receive any negative performance evaluations from the law firms. After her law firm work, she was the founder, creator and owner of Elite Recruiting, a legal search firm for one to two years before accepting a legal position at Ocwen, a loan servicing company. She reached the position of assistant general counsel at Ocwen, located in Florida, where she performed mainly litigation work and some corporate and regulatory work, which may have included Sarbanes-Oxley compliance.

Ms. Klitch worked at Ocwen until she was hired by Octagon in 2007. Ms. Klitch had known Mr. de Picciotto for many years from the tennis tour. At one point, she had been a ranked tennis player. Several weeks after she had contacted Mr. de Picciotto about an unrelated matter, he informed her about the general counsel position. At that time, she was working in West Palm Beach, Florida.

Ms. Klitch was required to move to McLean for the position. She maintained homes in Florida and McLean, and worked in McLean, where she had a physical office. For the first six months she was employed, she was primarily in McLean. Over time, her primary location did not change, but she spent more time in West Palm.

She started at Octagon as General Counsel. Octagon is a subsidiary of IPG, which is a larger company with many subsidiaries. Ms. Klitch was general counsel of Octagon A & P. Throughout her employment with Octagon, her immediate supervisor was Mr. de Picciotto. When she started as General Counsel in 2007, her responsibilities included all legal matters.

While at Octagon, her title changed to Senior Vice President of Operations and Chief Legal Officer. Mr. de Picciotto approved the title change. Ms. Klitch does not recall whether the title was her idea, but there was a collaborative discussion regarding the duties between her and Mr. de Picciotto. She did not object in to the change in title and duties, and did not consider the change to be a demotion.

As a result, her direct reports changed. Mr. Shin reported to her. She never reported to him. She is not sure if titles were changed, but functionally, Mr. Shin reported to her, several people reported to him, but there were functions that still reported to her, even if the order chart reporting changed.

After the change-over, the HR department functionally reported to Ms. Klitch, but she is not sure whether it did on an organizational chart. Her recollection is that HR did not report to her before the change-over. There were functions of client accounting for A & P that reported to Ms. Klitch after her change to Chief Legal Officer. The head of accounting was Nancy Morton, the CFO for Octagon A & P. There were people who did functional work supervised by Ms. Morton that reported to Ms. Klitch, including Ms. Gifaldi and some of Ms. Cerullo's tasks.

Ms. Klitch's new responsibilities involved invoices where the client was owed money. The invoices were generated by Octagon A & P and sent to third parties.

After she became the CLO, Mr. de Picciotto tasked her with evaluating the current legal and regulatory framework for the invoices, assessing it, and improving it. To improve the legal and regulatory framework of the invoicing, Ms. Klitch initially performed an assessment of how it was currently functioning and identified areas that could be improved.

Ms. Klitch sent an e-mail in August 2009 to Julie Kennedy and Tom Dowling concerning Octagon's compliance with SOX. At the time, Ms. Kennedy was head of HR for Octagon A & P, and Mr. Dowling worked for IPG as a compliance person. She sent the e-mail to Mr. Dowling, because it was her understanding that he was the person to escalate compliance issues to.

Ms. Klitch had informally complained to Ms. Kennedy, Mr. Shin and Mr. de Picciotto about concerns similar to those in the e-mail, but did not recall when or whether the conversations were in person. She had raised the issues with Mr. de Picciotto before she sent the e-mail.

By her second sentence of the e-mail "I've shared with you in various conversations that I feel I am being asked to approve either improper, or not fully compliant, actions in regard to my oversight of the client invoicing escrow functions,, Ms. Klitch was referring to the items discussed later in the memo. The improper or not fully compliant actions referred to her discussion with Ms. Kennedy regarding the bank signature card issue on the second page of the e-mail. The issue was that she was asked to add herself as an additional signatory without going through IPG. Mr. de Picciotto asked her to effectuate the changeover from the person managing the account before, and a necessary step in accomplishing that task was to get the signature cards changed. To change the bank signatories, notification and approval of IPG personnel was required. The signature cards were never signed, and the task was never completed.

In the second sentence of the e-mail, "client invoicing" refers to third party invoicing. "Escrow functions" was a shorthand term used to describe the account monies that were deposited when they were received from a third party. Depending on the contract, the third party vendor will write the check out to the athlete, or Octagon. Client funds received from third-parties were deposited into a BB & T bank account.

Ms. Klitch identified ensuring that the bank account was actually an escrow account as an issue she wanted to address with IPG. She had concerns about Mr. de Picciotto's request not to reveal to IPG the nature of the client account. Mr. de Picciotto indicated that he preferred that IPG not be managing that account, because he believed they did not understand the unique issues associated with their sports clients and would run it in a way that was harmful to the business.

Prior to her e-mail, Ms. Klitch did not speak to IPG about Mr. de Picciotto's instruction. She did tell Ms. Morton, the CFO, about her conversation with Mr. de Picciotto. Ms. Klitch and Ms. Morton had an ongoing conversation prior to the August 25, 2009 e-mail that probably was not in writing. Ms. Gifaldi may have been present when the issue of Mr. de Picciotto's

instruction not to run it by IPG was discussed with Ms. Morton. Ms. Klitch does not recall when the conversation with Ms. Morton and Ms. Gifaldi occurred.

In her e-mail, the example Ms. Klitch provides of Tom George screaming at her on the phone does not involve Mr. de Picciotto. The incident with Mr. George arose when some fees had come in for an athlete client and Mr. George wanted the client's portion released to the client immediately, but they did not have documentation of the percentage of the client's portion and were trying to obtain it to do the calculations properly. Money must be held for a certain period of time before it is released to make sure it actually clears.

In the second paragraph, Ms. Klitch stated "It is to the point where I believe we need to bring in someone from CMG/IPG." Ms. Klitch believed CMG was a structure created by IPG that managed a select group of subsidiaries. It created shared services, including accounting services. CMG managed functions for the subsidiaries to centralize them, including accounting. CMG provided accounting services to Octagon A & P.

In the e-mail, she wrote "CMG/IPG" instead of just "IPG" because she wanted to access some subject matter expertise. She stated in the e-mail that she would like to "run the practices by them and they can approve of them, suggest helpful modifications or require more controls, which I welcome", because she wanted to make sure she was "doing it right" and wanted to "access expertise in people to make sure we were doing it right." Ms. Klitch wanted to be able to use CMG/IPG's expertise in maintaining a legally and regulatory compliant accounting system.

When she wrote in the e-mail that Octagon was a "fiduciary of our clients' money", she did not mean fiduciary in a legal sense. She wanted to take good care of clients' money. She wanted to do it right for the sake of the client and the company. When she wrote in the e-mail that she "would welcome CMG/IPG's assistance to guide how we should be doing the right thing in each situation from a legal, SOX, and accounting perspective", SOX refers to Sarbanes Oxley. When she wrote the e-mail, she was not sure that things were being done correctly from a legal, SOX, and accounting perspective, so she wanted to solicit expertise from someone. At times she was implementing changes that were strenuously objected to, and Ms. Klitch wanted to determine whether they were required. She did not want to be overly strict and she did not want to have lax control, so she needed expertise in those areas to get it right.

Mr. George objected strenuously. It was difficult for some people to have change. People asked for explanations of why things had to be done differently, because "whenever anything changes, people tend to have questions." Some people who asked for explanation of the changes wholeheartedly adopted them after the changes were explained.

When she stated in the e-mail: "We are well aware that there are many controls that still need to be implemented. The ongoing internal resistance has slowed our efforts", ongoing internal resistance refers to the objection to change by some individuals.

OFS is a subsidiary of Octagon, Inc. OFS offered optional financial services to clients they could take advantage of, such as asset management, wealth preservation, bill paying services, and tax filing assistance.

Ms. Klitch had oversight authority over the litigation involving an Australian tennis player. She could not recall whether any other clients of Octagon A & P were involved in litigation against Octagon for money mismanagement while she worked there.

“Jan’s group” refers to Jan Plewes, who supervised client accounting. Ms. Plewes was primarily an OFS employee, and Ms. Morton was primarily an Octagon employee.

The bullet point in the e-mail that says “Involved Octagon taking fees without checking the fee agreement or proper documentation in place” reflects Ms. Klitch’s concern that the documentation was not always checked before the fee was taken. It did not mean the documentation did not exist; sometimes the agent contacted to confirm the fee would have the documentation. Ms. Klitch “wanted the client accounting function itself to personally verify the agreement and make sure neither too little, nor too much was taken from those proceeds.”

Her statement in the e-mail that “I am suggesting involving CMG/IPG in the escrow process with great trepidation, as I have been advised not to do so” refers to her previously mentioned conversation with Mr. de Picciotto, not anything else. Ms. Klitch’s next statement that “The reason I was given was that they would want to take it over and would not be able to handle the complexity of the myriad of transactions and our business would be harmed”, is essentially what Mr. de Picciotto told her in that conversation. Mr. de Picciotto explained he felt the business would be harmed because they had experienced a situation where CMG had managed funds without understanding the underlying sports and specific nuances. Also, CMG’s management of the funds was inefficient. In Mr. de Picciotto’s experience, there was more work when CMG managed the transactions.

Her statement in the e-mail that “Until recently, I truly believed that was the reason. I have doubts now” was prompted by the fact that Mr. de Picciotto had gone to IT and was granted access to the client invoicing function. Ms. Klitch did not understand why Mr. de Picciotto went to IT to gain access to the client invoicing function. He gave a justification at the time during a phone conversation, but Ms. Klitch did not remember what it was.

Her statement that “The decision to ask CMG/IPG involvement has been incredibly stressful,” reflects her being stuck because she did not feel she could sign the signature card to effectuate the transition and needed to go to IPG to do that.

The following sentence “one that I have been led to believe will have negative consequences for me” reflects her concern that her boss would not be happy about her going to CMG/IPG. She was concerned for her job. The retaliatory treatment she was referring to in her statement that “I feel I have already experienced retaliatory treatment and fear more” was Mr. de Picciotto’s action in having IT grant him access to the files. She cannot recall what else she was referring to in that sentence.

Ms. Klitch wrote the e-mail at 11:00 a.m. on Tuesday, August 25, 2009, because she had a conversation with Ms. Morton, where she felt she had exhausted efforts to resolve the signature card issue and was at a stalemate. She did not feel like she could sign it, and she did not feel like she could go to IPG.

She received a response to her e-mail from Mr. Dowling fairly quickly. The initial contact was to set up a time to discuss the e-mail with her. Within a couple of days after sending the e-mail, Ms. Klitch had a 10-15 minute phone conversation with Mr. Dowling and Ms. Hoey.

Ms. Klitch was interviewed for an hour or more about the substance of her allegations in Boca. Between the initial conversation with Ms. Hoey and Mr. Dowling and her interview, Ms. Klitch had at least one conversation with Ms. Hoey regarding the substance of her allegations, but did not have conversations with anyone else.

Ms. Klitch believed the two men she met with in Boca were with the accounting firm. She was told they were meeting with her at IPG's request.

She was informed on or around October 26, 2009 that her position was being eliminated by Mr. de Picciotto and Ms. Kennedy over the phone. The reason they gave was that "it wasn't working out." Ms. Klitch asked for explanation of what that meant, but they declined to provide any further detail. Their conversation was brief. She did not have any indication by Octagon that she was going to lose her job or her position was going to be eliminated prior to that conversation. She had not been aware that the position of Chief Legal Officer, Senior Vice-President of Operations, was going to be eliminated or restructured in any way.

During the two years she worked at Octagon, no one ever raised any performance issues with her other than regular coaching and counseling. Ms. Klitch received one written performance review, which was very positive.

The last time she spoke with Ms. Gifaldi was shortly after the October time frame. Ms. Klitch was informed by Ms. Gifaldi on October 26 that she had also lost her job.

Ms. Klitch knew Ms. Gifaldi from working with her at Ocwen, where Ms. Gifaldi had some duties in the legal department. Ms. Klitch contacted Ms. Gifaldi about the job at Octagon. She wanted Ms. Gifaldi to help with the initial legal and regulatory framework, and then later hopefully manage the day-to-day invoicing function tasks. Ms. Gifaldi reported directly to her at Ocwen. Ms. Klitch was not aware of any performance issues with Ms. Gifaldi during the time they both worked at Ocwen, nor when Ms. Gifaldi was at Octagon.

The only other person Ms. Klitch knew of whom the accounting firm talked to regarding the issues raised in her August e-mail is Ms. Gifaldi.

She remembered Ms. Morton saying in a conversation with her something along the lines of she shouldn't have asked that question or please don't ask that question, but she is not sure of the exact phrasing. It was in reference to Ms. Klitch's question about how she could get the transfer of the accounts and the signature cards without contacting IPG.

Ms. Klitch did not recall Ms. Morton ever saying she was horrified by the way the escrow accounts were being managed. She did not tell Ms. Gifaldi she thought some of the employees were stealing from the escrow account.

Mr. Jim Lombardo
(June 24, 2011 Deposition, CX 129)

[Direct examination] Mr. Lombardo is a director with Deloitte Financial Advisory Services LP. In that position, he provides consulting services which include forensic investigation services and antifraud programs and controls. Mr. Lombardo supervised Mr. Mike Rossen, a Deloitte senior manager, during the investigation into Octagon's escrow accounts. Mr. Lombardo spent 25 to 30 hours on the investigation, while Mr. Rossen worked in the field and conducted the interviews, spending 100 to 150 hours on the investigation. A senior associate also worked on the investigation in the field with Mr. Rossen.

Mr. Lombardo has handled more than 100 similar assignments for IPG. Mr. Dowling asked him to send a team to conduct interviews and get an understanding of how the escrow accounts were managed in connection with an allegation that had been received. Mr. Lombardo has reviewed the allegations in Ms. Klitch's e-mail. The only task assigned to him was to get an understanding of how the escrow accounts were managed. In addition to Mr. Dowling, Mr. Lombardo also interacted with Ms. Hoey and Mr. Nick Camera.

IPG never asked for, and Deloitte never performed, an audit. IPG never asked, and Deloitte never looked, for any wrongdoing with respect to Ms. Klitch's allegations. Deloitte never reached any conclusions with respect to the investigation, but recommended that management analyze and understand the origin of a several hundred thousand dollar balance in a second escrow account. Deloitte did not clear Octagon of wrongdoing in this matter.

All communication with the employees interviewed was conducted by Mr. Rossen and the other associate. Mr. Lombardo did not know what was discussed in the interviews. The document summarizing Deloitte's high level observations after the September interviews was sent to Mr. Dowling as the final version.

Mr. Dowling did not want a final report, so Mr. Lombardo submitted a summary of the work performed by Deloitte via e-mail. It is not unusual for a company to not want a final report to finalize the investigation. It was common for Mr. Dowling to not require a report from time to time if he felt the matter did not require a report, which costs money.

During the course of the investigation, Sarbanes Oxley compliance never came up.

Mr. Michael R. Marra
(June 29, 2011 Deposition,⁷ CX 127)

Mr. Marra is IPG's corporate representative. He has been a lawyer in IPG's legal department since 2004.

IPG (Interpublic Group of Companies, Inc.) is a publicly traded and publicly listed company on the New York Stock Exchange. IPG owns 100 percent of Advantage International Holdings, Inc. ("AIHI"), which owns 100 percent of Octagon, Inc. AIHI also owns 100 percent of Octagon Financial Services. There is no corporate relationship between Octagon Financial Services and Octagon, Inc., other than that they are both wholly owned by AIHI. Constituency Management Group ("CMG") is a part of Interpublic. It has its own business in public relations and also provides additional services to agencies in the CMG umbrella.

Octagon, Inc. must comply with the requirements of Sarbanes-Oxley, because it is a wholly-owned subsidiary of a company that is a wholly-owned subsidiary of IPG.

IPG's involvement with the IPG investigation included bringing in Deloitte, approving Deloitte's scope of work, and then having Deloitte conduct its investigation. The investigation was not an audit. Under the scope of work, Deloitte decided what was necessary to look into Ms. Klitch's allegations. The scope of work was initially proposed by Deloitte and was approved by Mr. Dowling, who discussed it with Ms. Hoey and Mr. Camera, IPG's General Counsel. Deloitte was selected to perform the investigation because Deloitte is independent of IPG, and performs investigatory and audit services for IPG and its related entities on various occasions.

IPG first learned of Ms. Klitch's August 25, 2009 complaint when she communicated it to Mr. Dowling sometime in August. Ms. Klitch and Ms. Hoey then had a conversation and also exchanged e-mails.

Deloitte conducted walk-throughs to obtain an understanding of Octagon's two escrow accounts that were used to manage clients' earnings, financial investments, and payment of client expenses to third parties, which related to issues raised in Ms. Klitch's complaint.

Mr. Marra is not aware of anyone at IPG looking at the interview notes of the people interviewed by Deloitte. IPG did not access Deloitte's materials used in connection with the interviews. As a result of the interviews, Deloitte provided written recommendations relating to changes that could be made in Octagon's handling of those accounts.

IPG concluded that Deloitte's investigation cleared Octagon of any wrongdoing suggested by Ms. Klitch's complaint. Based on the results of Deloitte's investigation, there was no specific evidence of wrongdoing with respect to the allegations in Ms. Klitch's complaint.

⁷This is the first part of Mr. Marra's deposition. The second part of Mr. Marra's deposition was completed on July 6, 2011.

Mr. Marra does not believe they received an opinion from Deloitte on whether the investigation cleared Octagon of wrongdoing with respect to taking client fees for marketing payments without documented representative fee arrangements.

Mr. Marra is aware Ms. Hoey and Ms. Klitch had a conversation in late August 2009 about the allegations in Ms. Klitch's complaint. He believes that during that conversation, or in a follow-up e-mail, Ms. Klitch indicated she wanted to ensure she was not being retaliated against.

Mr. Marra is not aware of anyone at IPG besides Mr. Dowling and Ms. Hoey receiving Ms. Klitch's e-mail.

IPG is not involved in the hiring, firing, or termination of Octagon, Inc. employees. IPG gives legal advice on some hiring and firing decisions to its subsidiaries, such as a major force reduction, or the hiring and firing of the senior-most person at an agency that is part of IPG. Otherwise, the agencies under the IPG umbrella make their own decisions on whom to hire and fire. Agencies receive support from IPG if an issue comes up. IPG has internal guidelines that require approval for some compensation packages.

IPG was not involved in hiring Ms. Gifaldi. It was Octagon's responsibility to make the decision to fire Ms. Klitch. IPG would not tell Octagon whether or not to fire her. IPG was involved in the investigation of Ms. Klitch's allegations, but was not involved in the decision to fire her. In regards to Ms. Gifaldi, no one at IPG said she should or should not be fired based on her job performance, which IPG was not evaluating, as it was not IPG's role to do so.

Octagon has a no retaliation policy, so it would not be unusual if Mr. de Picciotto had notified someone at IPG that he was going to terminate Ms. Klitch before he did so. It is responsible to ask IPG legal whether termination of an employee who had already been chosen for termination could take place if that employee later filed a complaint.

Mr. Marra is not aware of Mr. de Picciotto or anyone else at Octagon communicating to IPG that he was about to terminate Ms. Klitch, but then she made a complaint. He first became aware of Ms. Gifaldi's termination when she brought a complaint around December 2009. IPG had no input into the decision to terminate Ms. Gifaldi or Ms. Klitch.

Mr. Michael R. Marra
(July 6, 2011 Deposition,⁸ CX 128)

Ms. Hoey told him that after she received Ms. Klitch's e-mail complaint, she forwarded the e-mail to Ms. Morton and asked her to provide responsive information in order to gain more information about the issues raised in Ms. Klitch's claim. Ms. Hoey had a call with Ms. Klitch in which they discussed the issues raised in Ms. Klitch's complaint. Ms. Klitch e-mailed Ms. Hoey a thank you note for speaking with her the week prior and sent an attachment of the reconciliation of some of the accounts at Octagon. Ms. Hoey informed Mr. de Picciotto of the complaint, and that she was going to be talking to Mr. Dowling about how IPG was going to

⁸This is a continuation of Mr. Marra's June 29, 2011 deposition.

handle it. Ms. Hoey, Mr. Dowling and Mr. Camera decided Ms. Klitch's allegations should be referred to Deloitte. Ms. Hoey informed Mr. de Picciotto that IPG had retained Deloitte to look into the matter.

During one of the early conversations, either their first or second, Mr. de Picciotto told Ms. Hoey that he had intended to terminate Ms. Klitch due to performance issues. Ms. Hoey advised him not to terminate Ms. Klitch until the matter was reviewed and her allegations were tested. She later advised him not to terminate Ms. Klitch while the result of the Deloitte investigation was still pending.

Mr. Marra is not aware of any written documentation of Mr. de Picciotto's preexisting intent to terminate Ms. Klitch. At the outset, there was no discussion of terminating anyone else or reorganizing the department. IPG, specifically Ms. Hoey, did not know about Ms. Gifaldi's termination until the day before she was terminated.

After Deloitte's investigation wrapped up and Ms. Hoey, Mr. Dowling and Mr. Camera had discussed the investigation with Deloitte, they concluded there had been no wrongdoing at Octagon, and Ms. Hoey informed Mr. de Picciotto he could "do whatever he felt was necessary from a performance reorganization, et cetera, point of view without Interpublic telling him he could not." This occurred a few days before Ms. Klitch was actually terminated.

After all the interviews had been completed, Ms. Hoey, Mr. Dowling, and Mr. Camera had an initial conversation with Deloitte in which Mr. Lombardo indicated that some controls needed to be improved, but there was no evidence of cheating, dealing or wrongdoing of that nature. Deloitte told IPG there was no evidence of problems beyond the various control and efficiency issues. There was no evidence of improper profit, overbilling client, keeping two sets of books, issues Ms. Hoey thought were raised by Ms. Klitch in her complaint.

Mr. Dowling told Mr. Marra that after forwarding Ms. Klitch's e-mail to Ms. Hoey, he had a conversation with her about Ms. Klitch's complaint. He decided along with Ms. Hoey and Mr. Camera to bring in Deloitte, but Mr. Dowling was the point person in retaining Deloitte. After the first round of interviews, Mr. Dowling spoke with Mr. Lombardo, and then collaborated with Ms. Hoey and Mr. Camera to authorize more interviews. Mr. Dowling handed Deloitte's recommendations to Mr. Franken, who handled the matter diligently and effectively. Mr. Dowling told Mr. Franken that the Deloitte investigation resulted in findings about control environment issues, not issues of serious misconduct.

IPG was only involved with the termination of Ms. Klitch to the extent that once Mr. Dowling received Ms. Klitch's complaint, IPG advised Octagon not to terminate her while the results of the Deloitte investigation were pending. There is no contemporaneous written documentation confirming this.

IPG takes any complaint that comes to chief risk officer relating to financial matters seriously. Sending the case to Deloitte is a professional and serious response.

The relevant best practice related to the method of communication used to communicate that any employment action involving Ms. Klitch would need to be put on holding pending the investigation is to ensure that the advice is communicated and that it is followed. If Ms. Hoey believed that verbal communication was enough to ensure that it would be done that would be sufficient.

IPG concluded that Mr. de Picciotto's reasons for terminating Ms. Klitch were legitimate and non-retaliatory, but it did not assess the basis of Mr. de Picciotto's reasons for why she should be terminated.

On August 28, 2009, Ms. Hoey discussed the e-mail complaint with Ms. Klitch to understand what she was saying.

Ms. Hoey indicated to Mr. Marra that Ms. Gifaldi was not a "blip on the radar" at IPG before she learned about her termination.

In early November, Mr. Dowling discussed the recommendations from the investigation with several persons from CMG and Octagon, including Mr. Franken and Mr. Okunank, with Mr. Franken being the point person to handle the next steps. As of early December, Mr. Dowling advised Ms. Hoey that no further steps were needed at IPG because CMG/Octagon were diligently handling the next steps.

Documentary Evidence⁹

Ms. Klitch Deposition Exhibits (CX 1)

Klitch deposition exhibit 3 is a copy of an October 26, 2009 letter signed by Ms. Kennedy terminating Ms. Klitch's employment. "We have decided to discontinue our employment relationship, effective October 26, 2009. You will be paid through November 23, 2009. We appreciate your service to Octagon and wish you the best of luck in your future endeavors."

Resume of Vanessa Gifaldi¹⁰ (CX 11)

Ms. Gifaldi holds a B.A. in English. Prior to her employment at Octagon, Ms. Gifaldi began working at Ocwen Loan Servicing, LLC in 2005. She held several titles while at Ocwen, first as a billing coordinator/loan analyst, then as a litigation process manager, and finally as manager of default management outsourcing. At various times during her tenure at Ocwen, Ms. Gifaldi's responsibilities included creating and implementing processes and procedures of the

⁹While I have read and considered every admitted document, I have only summarized relevant portions of the exhibits.

¹⁰This is a copy of Ms. Gifaldi's resume submitted to Ms. Klitch for the position at Octagon, TR, p. 41.

electronic billing system, reviewing and processing legal invoices, working with accounting and investor reporting while being responsible for the disbursement of millions of dollars, managing employees with regard to billing, and managing department cash flow in regards to the General Ledger. Prior to working at Ocwen, Ms. Gifaldi held the position of loan processor at Liberty Mortgage for one year.

E-Mail Chain, October 6, 2009
(CX 36)

Ms. Klitch informs Mr. Schneller that she will log the tax refund check for a prior OFS client that Mr. Schneller delivered to Ms. Cerullo, but will then return it to him, because Octagon client escrow should not be processing the check. Ms. Klitch has said all along that she is not comfortable processing OFS payments through client escrow. There is no reason for this check to go through escrow because they were not taking a fee and it didn't relate to Octagon. Ms. Klitch explained this was the same reason OFS does not need access to their intake log, because they needed to keep OFS and Octagon separate, which has been Ms. Klitch's consistent position. They will continue to try to fully separate the two.

E-Mail, September 16, 2009
(CX 40)

Mr. Dowling notifies Ms. Kennedy that he will call her the following morning to discuss the Internal Audit Process. He believes that Mr. de Picciotto was going to update her that day on the plan for next week.

Ms. Klitch E-Mail Complaint, August 25, 2009
(CX 1¹¹ and CX 41)

In a two-page e-mail addressed to Ms. Julie Kennedy, Vice-President of Human Resources at Octagon, with a copy to Mr. Thomas Dowling, IPG's Chief Risk Officer, Ms. Klitch made a formal complaint setting out numerous concerns related to her efforts in implementing proper controls in the client invoicing procedure and escrow account. As she had shared with Ms. Kennedy in various conversations, Ms. Klitch felt she was "being asked to approve either improper or not fully compliant actions in regard to my oversight of the client invoicing/escrow functions." Mr. de Picciotto had asked her "to do or not do things about which I have concerns." Ms. Klitch noted she had shared examples with Ms. Kennedy, such as the incident involving Mr. Tom George screaming at her on the phone in regards to certain client fees.

Ms. Klitch asked that Ms. Kennedy consider the e-mail her formal complaint of the incident with Mr. George and how she had been treated as she tried to put proper controls in place for the client invoicing procedures/escrow account. Ms. Klitch believed they needed to bring someone in from CMG/IPG, and wanted to run the practices by them, so they could "approve of them, suggest helpful modifications, or require more controls." Ms. Klitch would welcome more controls.

¹¹The email complaint was also admitted as deposition exhibit 2 in Ms. Klitch's April 8, 2011 deposition, CX 1.

Practices that Ms. Klitch wanted to run by CMG/IPG included, but were not limited to: taking client fees from marketing payments without documentation of rep/fee agreements; paying corporate (non-marketing) receivables off/down with marketing funds without client authorization where the representation agreement does not permit or address; paying certain consultant fees through the client escrow account; processing tax refunds/OFS payments through the account with/without client authorization; permitting client managers to back date invoices; solutions to negative reactions regarding attempts to limit access to client confidential information; and, implementation of more strict payment/check authorization procedures.

As fiduciaries of their clients' money, Ms. Klitch indicated she would welcome assistance from the experts at CMG/IPG to guide them in doing "the right thing in each situation from a legal, SOX, and accounting perspective." They had only been trying to implement certain controls since June 1 when they took over the payment application process, and to a certain extent had acquired some preexisting systems. Ms. Klitch was aware that many controls still needed to be implemented, but ongoing internal resistance had slowed their progress.

Ms. Klitch expressed her shock from the prior week at learning that Mr. de Picciotto had gone to IT to grant him and Ms. Plewes access to the drive where the client invoicing/escrow information was maintained without consulting her, after she had indicated to Mr. de Picciotto that Ms. Plewes was not an appropriate person to have access to this information going forward, because Ms. Plewes was an OFS employee. One of Ms. Klitch's major goals was to ensure the separation of Octagon and OFS, which was a distinct, highly regulated investment and financial services entity. Maintaining the distinction between the two entities seemed particularly important in light of their position in recent litigation that OFS was not a party in that case.

Ms. Klitch was concerned because she had learned the previous day that Ms. Plewes was contacting "Vanessa" (Ms. Gifaldi) without involving her, making Ms. Gifaldi "very uncomfortable" even though Ms. Klitch was Ms. Gifaldi's direct supervisor and responsible for managing the process. In Ms. Klitch's opinion, reinserting Ms. Plewes into the invoicing/escrow process was inappropriate and counterproductive to her efforts to implement controls, because Ms. Plewes had been the prior supervisor of the invoicing/escrow processes that reflected some lax controls and they had a long-term plan to address. In particular, the process acquired from Ms. Plewes' group:

- afforded OFS employees access to significant amounts of confidential non-OFS client financial information (this is still going on today, despite attempts to change);
- lacked control over outgoing invoices – individuals who wanted to send an invoice would request invoice numbers, and the numbers were handed out with inadequate follow-up;
- lacked control over where invoiced money was directed via the invoice – individuals who wanted to invoice were allowed to input information on the invoices, including one employee who directed payments from a vendor to his personal banking account;
- maintained a 2009 account with undistributed funds dating back to 2007;
- involved Octagon taking fees without checking the fee agreement and/or proper documentations in place

Ms. Klitch asserted it was necessary to add certain signers to the BB&T accounts to “fully implement our controls and disengage OFS from this process” because the signers at that time were Mr. de Picciotto, and two OFS employees, Ms. Plewes and Mr. Schneller. Ms. Klitch had been advised not to run the additional signers by senior CMG/IPG people or see if BB & T would provide signature cards to change them, which she understands does not comply with IPG policy. She was told that her supervisor did not want the account drawn to the attention of CMG/IPG. Ms. Klitch called the BB & T representative, who offered to send her the signature cards, but Ms. Klitch had delayed in taking any action, because she was concerned it did not comply with IPG policy. Ms. Klitch stated “I need advice in this regard and fear retaliation simply for asking.”

Ms. Klitch acknowledged that the current client escrow process was in the beginning stages and was not perfect, but that they are “committed to implementing controls and doing the right thing with our clients’ funds.” They had identified many improvements that they had not yet been able to complete, but they “have a plan and each day it gets better.” Ms. Klitch would welcome working under CMG/IPG’s guidance to “ensure a culture of compliance and fiduciary maintenance of our clients’ funds.” They were “very open” to seeking others’ expertise to make improvements, as evidenced by their consultation with more experienced accounting personnel on the issue of client managers’ requests to back date marketing related invoices, the result of which led them to understand that despite their initial discomfort, this practice was accepted by Octagon Corporate Finance from an accounting perspective.

Ms. Klitch’s suggestion to involve CMG/IPG in the escrow process was made with great trepidation as she had “been advised not to do so,” because CMG/IPG would want to take over the escrow process, which would result in harm to the business because CMG/IPG could not handle the complexity of the process. While she had until recently truly believed that was the reason, she now had doubts.

In Ms. Klitch’s view, the new controls were not welcomed by everyone, and they were not being fully supported by senior management. More controls were necessary, but her interactions with Mr. de Picciotto and the reinstatement of Ms. Plewes’ involvement with the process led her to believe that increased controls were not welcome.

Ms. Klitch’s decision to ask for CMG/IPG involvement had been “incredibly stressful”, having negative effects on her physical and mental health, as she had been led to believe it “will have negative consequences for me.” She felt that she had already experienced retaliatory treatment, and she feared more. Ms. Klitch asked Ms. Kennedy to ensure the matter would be investigated by CMG/IPG without her experiencing retaliation or adverse consequences.

In her opinion, the best course of action was to escalate her concerns to CMG/IPG so they could become involved quickly, which was why she copied Mr. Dowling on the e-mail, even though she was not sure he was the proper person to address her concerns.

E-mail, September 12, 2009
(CX 42)

Ms. Gifaldi forwarded to Mr. de Picciotto Client Invoicing Dashboard Reports from "010109-083109" which related his requested changes, which she noted were time-consuming to make.

In response, Mr. de Picciotto gave "many thanks" to Ms. Gifaldi for incorporating his requested changes in the August 2009 Client Invoicing Dashboard. He considered the new order and placement of charts, coupled with the removal of unnecessary charts to be "very helpful improvements." At the same time, Mr. de Picciotto stated, "Sorry it took longer than expected for you to make these changes but they were every worthwhile."

E-Mail Chain, October 22, 2007
(CX 46)

Ms. Abby Gold, EVP/Human Resources at CMGRP, Inc. asks Mr. Jeff Mook at IPG to approve Ms. Klitch's hire offer. Ms. Klitch will be hired in the role of "fully dedicated general counsel", replacing the former Associate General Counsel and General Counsel who had recently left. Mr. Mook approves the new hire offer.

E-Mail Chain, October 2, 2007 to October 22, 2007
(CX 47)

On October 3, 2007, Vibha Miller, Vice President for Human Resources at Octagon, explained to Mr. Bill Twomey, Controller at Octagon Worldwide, that Ms. Klitch's hire would be incorporated into an upgrade and restructure of the legal department and tennis business, with roles and duties previously held by the former General Counsel and Associate General Counsel being distributed among Ms. Klitch and others.

On October 4, 2007, Mr. Twomey explained to Abby Gold and Ed Powers that hiring Ms. Klitch would reinstate a dedicated General Counsel with the departure of the former Associate General Counsel. Additionally, the previous General Counsel had been scaling back his duties for several years in anticipation of retirement at the end of 2007, and his duties would be reallocated to other people in the Athletes and Personalities division.

Resume of Jenny Klitch¹²
(CX 1¹³ and CX 48)

Ms. Klitch graduated with a BA from the Ohio State University summa cum laude and Phi Beta Kappa. She earned her J.D. from the University of Michigan Law School in 1994. She worked at law firms for about eight years between 1994 and 2002, before serving as President/Counsel of a national legal search firm for a couple years. Beginning in 2004, Ms.

¹²This is a copy of Ms. Klitch's resume submitted to Mr. de Picciotto for the Octagon position, TR, pp. 322-24.

¹³Ms. Klitch's resume was also admitted as an exhibit to her April 8, 2011 deposition, CX 1.

Klitch worked at Ocwen Federal Bank as Assistant General Counsel, serving as a key member of Ocwen's Risk Management and Strategic team, whose duties included certifying "SOX legal processes." She also worked to "ensure delivery of legal services to achieve company's strategic objectives." Her sports law experience included being part of a national law firm's Sports Representation Practice Group, co-drafting state athlete-agent legislation, counseling a NFL owner through disputes, assisting in defense of Olympic athlete in drug test dispute, and authoring sports law article published by the American Bar Association. Ms. Klitch was formerly a Women's International Tennis Tour Player.

E-Mail, August 5, 2007
(CX 49)

Ms. Klitch advised Mr. de Picciotto that she was "very interested in the opportunity you mentioned."

Mr. de Picciotto asked Ms. Klitch for her resume. Shortly thereafter, she sent him her resume.

After forwarding Ms. Klitch's resume and indicating that he knew Ms. Klitch "a bit," Mr. de Picciotto advised Ms. Vibha Miller and Mr. Mike Liut that Ms. Klitch's background "could not be more perfect." He pointed out that Ms. Klitch had "substantial experience with two major law firms plus extensive and broad experience in sports, understanding of SOX compliance, at least some background with ERISA and employment contracts . . . and she had super undergrad grades and then went to a top law school." Mr. de Picciotto informed Ms. Miller and Mr. Liut that he would advance the matter preliminarily by phone regarding salary and "if all is in line with our interests, arrange for her to come to McLean for interviews."

E-Mails, April 13-14, 2009
(CX 51)

In her April 13 e-mail to Mr. de Picciotto, Ms. Klitch addressed a range of topics related to her transition from General Counsel to Operations, and other staffing changes relating to the new Client Invoicing Department. Mr. Shin was pleased with the idea of assuming the General Counsel title.

In response to Mr. de Picciotto's request that she propose titles for her new role, as well as the new department, Ms. Klitch suggested the new department be called the Client Invoicing Department. She wanted to change Ms. Gifaldi's title from Business and Database Manager to Director, Client Invoicing, to better describe Ms. Gifaldi's role and "alert people to contact her for client invoicing."

For herself, to avoid stepping on Mr. Shin's toes as General Counsel, Ms. Klitch proposed the abbreviated title of CLO, to stand for Chief Legal Officer, reasoning that few people would understand what CLO stands for outside of the legal world, and would rarely be used, allowing the title to reflect the "hopefully" decreasing legal portion of her role and emphasize her Operations role. "For me, I think the ultimate goal is to emphasize my Ops role

(which I am really enjoying), and I am finding that I need to try to minimize the legal role internally so that folks see me as the Ops/fixer that I think we both envision.” She would use the CLO title only when acting in a legal capacity. To reflect the Operations portion of her role, Ms. Klitch’s preference was COO¹⁴ unless Mr. de Picciotto felt the title “is not earned/warranted.” Ms. Klitch was “not big into titles unless they serve a functional purpose,” but acknowledged a lot of resistance from people “on the Ops front” and observed that her initiatives were being observed as legal rather than Ops-related.

Because Mr. Shin was assuming the General Counsel position, Ms. Klitch preferred that people think she was advancing “and not being demoted or moving laterally” and hoped that Mr. de Picciotto thought she was advancing. She planned to only emphasize a title when it served a functional purpose, and would leave her titles off her signature block unless they “advance the cause.”

Ms. Klitch proposed her transition from General Counsel to Operations be explained in an announcement to staff members as: “Ho Shin is being promoted to General Counsel, with responsibility for the day-to-day management of the Law Department. Jenny Klitch will continue to expand her operational responsibilities, which will include the newly named Client Invoicing Department responsible for invoicing third parties on behalf of and for fees due to our clients.”

On April 14, 2009, Mr. de Picciotto answered some of Ms. Klitch’s questions. Ms. Klitch’s proposed title for Ms. Gifaldi was “okay.” Ms. Klitch’s title “should most appropriately be SVP (or maybe SVP-Operations) and CLO,” which she could “use singly or together as you prefer and the situation requires.” Mr. de Picciotto encouraged Ms. Klitch to “not be shy about including the title on communications.”

E-Mail, April 21, 2009
(CX 53)

Ms. Gifaldi reviewed the timeline for the transition of functions from Ms. King to Ms. Cerullo and herself with Ms. King, Ms. Cerullo, Ms. Klitch, and Ms. Plewes. For payment processing, Ms. King and Ms. Cerullo would meet every afternoon for two hours between April 27 and May 22 while Ms. Cerullo transitioned into the job. Beginning May 25, Ms. Cerullo would officially take over the process. For the Month End reconciliation, Ms. Gifaldi would watch Ms. King prepare the April Month-End using Live Meeting. Ms. King would supervise Ms. Gifaldi for the May and June Month-End reconciliations, and then Ms. Gifaldi would complete the Month-End reconciliation on her own beginning in July.

E-Mail, June 1, 2009
(CX 55)

Ms. Gifaldi confirmed to Mr. Schneller that effective June 1, they were now generating and tracking “ALL” Octagon invoices on their new system, and there was no longer a need to maintain endorsement records on the Great Plains system.

¹⁴Chief Operations Officer

E-Mails, April 9-10, 2009
(CX 57)

Ms. Plewes indicated the transition of the escrow and invoicing processes would begin the following Monday (April 13), and urged Ms. Klitch that they “should try to get something out today if we’re going to start this transition on Monday.”

E-Mail, December 16, 2008
(CX 58)

Ms. Plewes responded to Ms. Gifaldi’s e-mail from earlier that day forwarding documentation related to the new client invoicing process. Ms. Plewes thought the documentation looked great and was organized and clear. Ms. Plewes thanked Ms. Gifaldi for her “efforts to get this together” and told her to “Keep up the good work!”

E-Mails, August 12-13, 2009
(CX 65)

Ms. Plewes reported her progress to Mr. de Picciotto and Ms. Kennedy on her investigation into the current invoicing and escrow process to Mr. de Picciotto and Ms. Kennedy. Some files on the M: drive were accessible to Ms. Plewes, Mr. Schneller and Ms. King, including the Client Invoicing Master, which was current through the day before. There were files by division with copies of what looked to be non-current invoices, and other files by division she could not access, which may be where copies of all the invoices were stored. The escrow log was accessible to anyone with access on the G: drive. It had been available to everyone on Outlook, but that was removed.

Ms. Plewes did not “feel at all comfortable with the availability of the information.” She did not know where all the invoices were kept, who generated them, or how future payments were scheduled, among other things. Ms. Plewes felt that the “best way forward” was to meet with Ms. Gifaldi to find out if she was familiar with the entire process and could access everything. She asked Mr. de Picciotto to let her know if he wanted her to dig deeper, which would require involving others.

On August 13, Ms. Kennedy responded with “Thank you for the update Jan. If I can assist with the further collection of information, please let me know.”

E-Mails, April 20-21, 2009
(CX 68)

On April 20, Mr. de Picciotto asked for comments from Ms. Klitch, Ms. Morton and Ms. Plewes regarding a draft e-mail he planned to send “worldwide” to give a business update and address changes related to “rolling out” various operations improvements. In his proposed message, Mr. de Picciotto expressed his appreciation for the constructive comments Ms. Klitch, Ms. Gifaldi and Ms. Cerullo had received and indicated that this feedback was being incorporated into adjustments, such combining the two intake processes. Mr. de Picciotto

explained that “In light of Jenny’s focus on these important operational initiatives, Ho Shin will assume the role of General Counsel, with responsibility for the day-to-day management of the Law Department.”

In her response on April 21, Ms. Plewes was concerned that the message would create more confusion than they already had regarding roles and responsibilities. She advised Mr. de Picciotto to clearly define Ms. Klitch’s role, as the message did not make it clear.

E-Mail, March 23, 2009
(CX 69 and RX 16)

Mr. de Picciotto informed Ms. Klitch that he had heard from Alan Nero that she and Ms. Gifaldi had decided not to issue invoices without a valid underlying contract. Mr. de Picciotto proposed they discuss this the following week “As there will be lots of situations when we will not have a contract, but the most important thing for us will always be to get the money in, we should add this to our discussion list next week if Alan’s version is right to make sure we have all the situations covered.”

E-Mails, August 18-19, 2009
(CX 81)

Mr. de Picciotto and Ms. Klitch engaged in a back and forth e-mail discussion about access to all the files and reports as follow-up to an earlier telephone conference on August 18. To clarify, Mr. de Picciotto asked Ms. Klitch whether anyone other than her and Ms. Gifaldi had overall access to all the files in the client invoicing/escrow/collections, which was where he had asked Mr. Abdullah to add access for himself and Ms. Plewes.

Ms. Klitch responded that if Mr. de Picciotto wanted another senior management person in McLean to have access to reports and files, she would suggest that be Ms. Morton, to preserve the legal distinction between OFS and Octagon, and not spread client confidential financial information “to a sub beyond that of a sub’s clients.” Ms. Klitch wanted to “do the right thing legally and respect the corporate separateness.”

In response, Mr. de Picciotto expressed a need for multiple layers of access and back-up. He understood Ms. Klitch’s point on the separation between OFS and Octagon, but indicated that Ms. Plewes would only use her access in an Octagon role, not an OFS role. Mr. de Picciotto decided to keep Ms. Plewes as the McLean senior back up for the time being, but would consider her suggestion going forward.

E-Mails, July 22, 2009
(CX 94)

Ms. Morton forwarded an e-mail exchange to Ms. Klitch discussing the process for the French invoices. Ms. Morton indicated this was an “example of where Vanessa’s help is needed.” She explained “these basketball guys are helpless. They need someone who will be proactive with them rather than reactive. I don’t know what is going on here, and the sad thing is either do they.”

Ms. Morton Response to Ms. Klitch’s Complaint
E-mails, August 27-28, 2009
(CX 99 and RX 47)

Ms. Morton responded to Ms. Hoey to the points in Ms. Klitch’s August 25, 2009 e-mail¹⁵ which Ms. Hoey had forwarded to her on August 27, 2009, "FYI".¹⁶ In Ms. Morton’s opinion, “the concerns Jenny has raised could have been answered and/or resolved if she had made any attempt to seek our internal guidance.” She noted that it was “not Jenny’s style to ask for help, and she wanted full control of the area and processes.”

Ms. Morton addressed the specific concerns raised by Ms. Klitch. First, Ms. Morton noted that on "rare occasions" a client will refuse to sign a written contract. As a result, if Finance could not verify the existence of a written contract, Octagon would place the fee in a "deferred revenue for three months." If during that time the client did not object, the fee would then be record as revenue. However, at the direction of CMG, such fees are now immediately recognized as revenue. Second, Ms. Morton was unaware of any actual client problem with paying receivables off. Third, "all" consulting fess were paid through Octagon and not escrow. Fourth, invoices were not back dated. Fifth, Ms. Morton disagreed with limiting access to account information, especially to client managers and senior Octagon management. Sixth, Ms. Morton was not aware of any problems with payment procedures and was concerned that additional procedures might interfere with prompt payments to clients, which might cause clients to seek payment directly from third parties, thereby complicating the collection of fees by Octagon.

Ms. Morton felt that Ms. Klitch should have arranged a meeting with staff from different perspectives to seek advice and direction from staff with a financial background, and that Ms. Klitch, who did not have a financial background, had never tried to resolve her concerns.

Ms. Morton was not aware of Mr. de Picciotto’s request for access to the client invoicing reports for him and Ms. Plewes, but did not understand why there would be any objection, as there was nothing that they should not have access to. The situation with Ms. Plewes calling Ms.

¹⁵CX 99 also contains earlier drafts of the final response email. Ms. Morton sent the final version to herself on August, 28, 2009 at 7:35 p.m. RX 47 is Ms. Morton’s email sending the final version to Ms. Hoey at 7:36 p.m. on August 28. The exhibit also contains an email chain initiated by Ms. Hoey on September 29, forwarding Ms. Morton’s response to others at CMG and “WSW,” inquiring whether they had seen Ms. Morton’s response.

¹⁶Ms. Hoey also forwarded an email from Mr. Dowling dated August 25, 2009, informing Ms. Klitch that he was sending her complaint to legal, and that he and Ms. Hoey wanted to discuss with her that day.

Gifaldi directly exemplified Ms. Klitch's need for total control "which handcuffs all of her staff and makes every process and request take much longer than necessary." Ms. Morton described Ms. Klitch's need for total control as "excessive."

Ms. Morton expressed her confidence that Ms. Plewes had the proper controls in place to ensure client confidential matters, noting that she had been doing this for over 20 years, and observing that Ms. Plewes was adamant about following SEC regulations. Ms. Morton had always found Ms. Plewes and "her entire OFS staff very conscientious and fully protective of client confidential matters."

In her opinion, the signers on the bank account should be left unchanged. This would add a layer of control, because it would be better if Ms. Klitch was not a signer, as she had a "hands-on" role in processing the escrow checks. Ms. Morton had advised Ms. Klitch that she should not change the signers directly through the bank, because changes to the account would require approval from IPG Treasury.

Ms. Morton expressed her shock at Ms. Klitch's e-mail complaint. She believed that had Ms. Klitch reached out internally, she would have received answers that would have calmed her concerns. Ms. Morton acknowledged that some of the new procedures put in place by Ms. Klitch "have received push back," but felt that Ms. Klitch had overreacted to what amounted to a normal reaction caused by people's natural adversity to change.

Ms. Morton reported that the staff had complained the most about Ms. Klitch's refusal to invoice, delayed payments, and a general inability to get along with anyone. Ms. Klitch had turned a part-time job for one person into full-time jobs for three people.

E-Mails, April 21-22, 2009
(CX 101)

Ms. Klitch requested direction from Mr. de Picciotto in establishing a standard procedure for handling money that is received by the client escrow account for a client with an outstanding marketing guarantee, loan, or advance.

Mr. de Picciotto responded that he wanted to "keep this as simple as possible, with the understanding that we are a company of exceptions because we will be led by business needs rather than processes (though the processes are critically important to track, dis-incentivize any client services spending except what is really needed, keep people accountable, recoup any monies out of the first funds coming in, etc.)." Mr. de Picciotto explained that the loan/advance/marketing guarantee documents should always, unless there was an exception, provide that Octagon is entitled to recoup money out of first funds after deducting any fees, and provide for entitlement to recoup by a certain date.

Mr. de Picciotto addressed Ms. Klitch's specific questions, informing her that any net monies coming in would automatically be used to repay any outstanding loans, unless there was a written exception.

E-mail, September 23, 2009, attaching Deloitte Scope of Work
(CX 102)

Mr. Lombardo sent Mr. Dowling Deloitte's scope of work document, also called "Work Order Number 12", with an authorized start date of September 21, 2009, describing the investigative procedures Mr. Dowling had asked Deloitte to perform on behalf of IPG. In connection with IPG's concerns regarding the operation of Octagon, Mr. Dowling had authorized Deloitte to: conduct "walk-throughs" to gain understanding of Octagon's two escrow accounts used to manage clients' earnings, investments, and payments to third parties; conduct interviews of relevant individuals subject to Mr. Dowling's prior approval; and perform other investigative procedures as needed, such as interview Ms. Klitch. Deloitte had not been asked to test specific cash or cash equivalent outflows to and from the escrow accounts. Deloitte would get prior approval from Mr. Dowling before performing that testing procedure.

E-mail, October 22, 2009
(CX 102)

In his e-mail to Mr. Dowling, Ms. Hoey, and Mr. Camera, Mr. Lombardo presented a summary of the work performed by Deloitte relating to the Klitch matter at Octagon, Inc.

The matter was referred to Deloitte by Mr. Dowling on September 16, 2009. Deloitte was asked to gain an understanding "of the controls/processes surrounding the management of the escrow accounts at Octagon, Inc." which they accomplished by interviewing 10 Octagon personnel between September 22 and September 24, 2009 at Octagon's McLean, Virginia office. Personnel interviewed included Ms. Morton and Ms. Plewes on September 22, and Ms. Gifaldi, Mr. Schneller, Ms. King, Ms. Cerullo, and Ms. Wilson on September 23. Mr. Vikas Gaddale, Ms. Niki Sollinger, and Mr. Ho Shin were also interviewed on September 24, 2009.

Deloitte did not test the key controls and processes they learned about during the interviews with an internal audit or further investigative procedures. Deloitte also did not "make sample selections, analyze specific transactions or reconcile any accounts."

On September 29, 2009, after the September round of interviews, Deloitte verbally briefed Mr. Dowling on their observations over the phone. On October 5, 2009, Deloitte sent Mr. Dowling a list of the observations that were discussed during the September 29 phone call. In response, Mr. Dowling instructed Deloitte to interview Ms. Klitch.

Deloitte interviewed Ms. Klitch on October 14, 2009 in Boca Raton, Florida. Deloitte briefed Mr. Dowling, Ms. Hoey and Mr. Camera on Ms. Klitch's interview at IPG's offices in New York on October 16, 2009, at which time Mr. Dowling instructed Deloitte to interview Mr. de Picciotto.

On October 20, 2009, Deloitte interviewed Mr. de Picciotto in McLean, Virginia, and on October 21, 2009, Deloitte briefed Mr. Dowling, Ms. Hoey and Mr. Camera by phone on the interview with Mr. de Picciotto. IPG came to the consensus during the phone briefing that "no specific evidence of wrongdoing had been alleged or observed based on the steps taken to date."

Based on the interviews, Deloitte recommended that management review the nature and source of the funds in the second escrow account. It was Deloitte's understanding that Marty Franken's group at CMG would be conducting this review, and that Mr. Franken's group would review the "compensation of key personnel involved in the management of the escrow accounts/client invoicing and the general adequacy of controls surrounding that area."

Draft High-level Observations prepared by Deloitte, September 25, 2009
(CX 103)

One page lists eight observations following the September interviews at Octagon. Observation (3) notes Ms. Cerullo initiates wire transfers of client funds from the escrow account, which are approved by Mr. Shin, Octagon General Counsel. Mr. Shin does not confirm the validity of the payment, but trusts Ms. Cerullo's calculations. And, observation (7) indicates the invoicing and funds receipt processes are tracked with large Excel spreadsheets, which are less accurate than an IT platform in handling those matters. Risks exist, as the spreadsheets could contain inaccurate or outdated information.

E-Mails, October 8-9, 2009
(CX 113)

On October 8, 2009, Mr. Dowling asked Mr. Rossen to reach out to Ms. Hoey directly with any update, because she had a call with the CEO that day.

On October 9, Mr. Rossen responded that he did not have an update, because the next meeting would not take place until the following Wednesday in Florida.

Ms. Hoey forwarded the messages to Mr. de Picciotto, and indicated that she "was mistaken about the date of the meeting with Jenny"

Mr. de Picciotto responded to Ms. Hoey; "I appreciate the update." He asked whether Deloitte or Ms. Klitch was responsible for the spread-out schedule, and indicated that Ms. Klitch would typically be available at any time. Mr. de Picciotto asked for clarification on whether the "next" meeting meant the "last" meeting "before the audit report is finalized and the audit completed?"

In response, Ms. Hoey forwarded the e-mail to Mr. Rossen and Mr. Lombardo, asking them to respond to Mr. de Picciotto's questions.

E-Mail, October 11, 2009
(CX 125)

Mr. Rossen responded to forwarded Mr. de Picciotto's questions. Mr. Rossen did not connect with Ms. Klitch until October 5 due to her schedule, and then conflicts had prevented him from interviewing Ms. Klitch until the morning of October 14. His meeting with Ms. Klitch would be the last meeting "per our scope."

Mr. de Picciotto thanked Mr. Rossen for the clarification. He indicated they “would have taken steps to expedite the process had there been a delay on our end.”

E-Mails, October 16, 2009
(CX 126)

Ms. Hoey reported to Mr. Picciotto that they had just meet with the Deloitte team, and had a received a report. They agreed it was important that Mr. de Picciotto meet with Deloitte to finalize the matter. “I know this will make you crazy, but in the long run, promise, this is the right thing to do.”

Mr. de Picciotto responded that “it won’t make me any crazier than I have already become, so no problem in that regard . . .” He requested that his discussion with Deloitte be expedited, because he could have met with them when they had visited the McLean offices the previous month, and the process had “become quite extended in terms of the time it has taken to complete the report.”

Although Mr. de Picciotto wanted the meeting to take place as soon as possible over the phone, Mr. Rossen was unavailable that evening or over the weekend, and scheduled an in-person meeting for the following Tuesday.

Mr. de Picciotto expressed his irritation with the Deloitte interview process in an e-mail sent solely to Ms. Hoey. “Now they are making me crazy. They were in our offices for three days, and I was here, and they never once came/asked to meet me. If I were IPG, I wouldn’t pay for another trip and all the extra hours involved when this could presumably be handled by phone (if they feel a need to visit again, they should eat the costs involved). IPG is already paying the price in terms of a delayed final report.”

Mr. Marra Deposition Exhibits
(CX 127 and CX 128)

Marra deposition exhibit 3 is Mr. Marra’s barely legible handwritten notes detailing a timeline of events between Ms. Klitch’s August 25, 2009 e-mail and early December 2009.

Mr. Lombardo Deposition Exhibits
(CX 129)

Lombardo deposition exhibit 1 is the September 23, 2009 e-mail attaching Deloitte’s Scope of Work (same as CX 102).

Lombardo deposition exhibit 2 is the October 22, 2009 e-mail summary of Deloitte’s work performed on the Klitch matter (same as CX 102).

Octagon Business and Database Manager Position Description
(RX 2)

McLean, Virginia was the “highly preferred” office location. Responsibilities and duties included invoicing, budgeting, reporting and collections support, and process and system improvements.

A BS or BA in business, finance or accounting, and a minimum of two years related experience or combination of training and experience was a required qualification. Other required qualifications included: “Extreme attention to detail and highly organized”; “Experience leading implementation of process and systems improvements”; “Excellent communication, interpersonal, and customer service skills, and sense of humor”; and “Deadline and results-driven with ability to juggle multiple projects and urgent timelines.”

E-mail, January 22, 2009
(RX 5)

Ms. Gifaldi instructed Michaella Levatino that effective January 26, 2009, she should submit Client Invoice forms to the client invoice mailbox to generate Football Division invoices, as the Football Division would no longer generate invoices directly.

E-mail, January 28, 2009
(RX 6)

Ms. Gifaldi explained the new contract review and client invoicing procedures to Chris Emens and Jeff Austin in the basketball division. She acknowledged that there were problems with the billing and contract processes that were not created overnight and could not be fixed overnight, but believed that in six months there would be “huge” improvements in turnaround, communication, and efficiency.

E-mails, January 29, 2009
(RX 7)

Mr. Schneller asked Ms. Gifaldi why a particular invoice is not in the Client Invoice Log.

Ms. Gifaldi responded that she wasn’t aware Mr. Schneller ever looked at the log. She was “a little behind” and would update by the end of the week.

Mr. Schneller informed Ms. Gifaldi that he and other employees “are always looking at the log as payments are received.”

E-mails, March 4, 2009
(RX 9)

Mr. Schneller asked Ms. Gifaldi why she was denying him access to the M drive.

Ms. Gifaldi explained that she revoked access to the M drive for all employees except her, Ms. King, and Mr. Vikas as a precautionary measure for control purposes, because people were deleting files contained in subfolders in M:/Invoices. Mr. Schneller's access to M:/Invoices was revoked erroneously by IT, and she would grant him access to that folder on the M drive.

Mr. Schneller suggested that if Ms. Gifaldi was having file deletion problems, she should make the files "READ ONLY" instead of cutting off everyone's access without providing notice.

Ms. Gifaldi responded that not everyone should have read only access to M:/Invoices, because it contained division specific financial data. For example, the Tennis Division should not have access to financial data for Action Olympics. "This should have been done sooner – the only way to ensure this was to cut off access, and those that need specific access can request it" from Ms. Gifaldi. Ms. Gifaldi indicated she had sent an e-mail to IT to get Mr. Schneller access to M:/Invoices and advise them that his access to the entire M drive had been revoked in error.

E-mails, March 10, 2009
(RX 13)

Mr. Schneller observed that the February client recurring invoices had not been updated in the division folders and asked Ms. Gifaldi, Ms. Klitch and Ms. King whether it was on someone's to do list.

Ms. Gifaldi replied yes, that it would be completed by the end of the week.

Mr. Schneller asked what the schedule would be going forward, and expressed his surprise that March would have been updated before February.

E-mail, March 20, 2009
(RX 15)

Ms. Gifaldi indicated to the GIS Enterprise Service Desk that the only employees that should have read/write access to a newly created subfolder entitled "Client Invoicing Master Logs" on M:/Invoices were herself and Mr. Vikas. She asked the service desk to ensure that no other employee have access to the Client Invoicing Master Logs subfolder. "All other current access levels should remain the same."

E-mails, March 23, 2009
(RX 16 and CX 69)

After noting Alan indicated Ms. Klitch and Ms. Gifaldi had decided not to issue invoices without a valid, underlying contract, Mr. de Picciotto tells Ms. Klitch to add this issue to their discussion list because "there will be lots of situations when we will not have a contract," while the "most important thing" is to get their money. If Alan's observation was correct, Mr. de Picciotto wanted to make sure they had all situations covered.

Ms. Klitch replied, "This is not accurate – should call me to get real facts."

Mr. de Picciotto again indicates they will discuss the issue the following week and emphasized his caveat "if Alan's version is right."

Ms. Klitch in turn apologizes for being short and indicates that she and Ms. Gifaldi had just gotten off from a phone call with Alan, which had gone well, and Mr. Nero did not have any issues. Ms. Klitch explained the "process" to Mr. de Picciotto and indicated that Ms. Gifaldi had been trained to push for obtaining fully executed contracts. If someone wanted to invoice without a fully executed contact, this was considered an "exception" that needed to be sent up the chain for individualized review, which for the present meant Ms. Klitch. They would then weigh the legal risk of continuing without a contract, which was often very low versus the risk of slow collection, which was often very high, and most of the time would decide to proceed with the invoice. Based on Ms. Klitch's "epiphany" as to the reason the process was getting bogged down, she would not require a new hire. Ms. Klitch wanted to discuss the invoicing issue with Mr. Picciotto.

E-mail, April 2, 2009
(RX 17)

Ms. Gifaldi asks Mr. Vikas Gaddale to take over the processing of invoices in ClientInvoice, because she is falling behind and can't catch up.

E-mail, Spring 2009¹⁷
(RX 23)

Ms. Plewes made several complaints to Mr. de Picciotto relating to office issues, including confusion amongst the staff about the multiple changes in roles, including changes in the roles of Ms. Gifaldi and Ms. Klitch. Ms. Plewes indicated that "no one is sure what's going on."

Ms. Plewes also complained about the changes in invoicing, asking Mr. de Picciotto "what in the world is going on with client invoicing?" She indicated that no one seemed "to have a grasp on things." Even though it did not make sense to her, Ms. Plewes had changed the

¹⁷The "From" and "Sent" lines of this email are blank. Mr. de Picciotto recalled receiving this email from Ms. Plewes at the end of April or beginning of May 2009, TR, pp. 287-288. Ms. Plewes testified she sent the email in March or April of 2009 based on the email's content, TR, pp. 510-511.

name of Client Accounting to something else to allow “Client Accounting” to be used as the name of the new Invoicing system. “Now things seem to have come to a screeching halt. It’s business as usual with no new system, no improvement, no news, no schedule.”

E-mail, May 5, 2009
(RX 24)

Mr. de Picciotto announced internal operations changes to all employees in the Athletes and Personalities Division worldwide. They were putting “significant emphasis on contract and invoicing procedures that will help us track and collect revenues, identify payment risks as early as possible, and make data more accessible for client management and recruiting.”

Ms. Klitch, with help from Ms. Gifaldi and Ms. Cerullo, would be updating their contracting, invoicing, and tracking systems. And, “In light of Jenny’s focus on these important operational initiatives, I am pleased to announce that Ho Shin will assume the role of General Counsel, with responsibility for day-to-day management of the Law Department.”

E-mails, May 6, 2009
(RX 25)

Ms. Morton asked Ms. Gifaldi to explain why there had not been any NBA billing in the April financials. The absence of the April NBA billing made a “huge” difference in Ms. Morton’s financials that would affect her financial analysis through May 2010. The huge variance in her financial statements would have to be reported to IPG.

Ms. Gifaldi responded that the missing NBA billing was her fault and she would take full responsibility for it. No internal decision had been made to change the time for the NBA billing, it had been overlooked and was never billed in April. Ms. Gifaldi would submit the requests to Resource A&P as soon as possible.

E-mails, June 23-24, 2009
(RX 27)

Having received \$50,000 in two payments, but missing a third payment, Ms. Conforti on behalf of Mr. de Picciotto asks Ms. Gifaldi if invoices were ever issued for a contract with due dates on February 27, March 27, and April 27.

The next day, Ms. Gifaldi initially replies that if the contract hasn’t been billed, it will be, but she will look into the matter. Ms. Conforti responds that Mr. de Picciotto is departing for London that night and wants to know before he leaves what happened to the contract money.

About an hour and a half later, Ms. Gifaldi indicates that a draft invoice will be created for the missing \$25,000 and an internal invoice will also be created to which the payments already received may be applied.

E-mails, July 8-15, 2009
(RX 28)

On July 9 (Thursday), Ben Morrill asked Ms. Gifaldi to advise him on whether an invoice had been sent for a particular agreement. On July 10 (Friday), Ms. Gifaldi responded that the agreement was in the queue to be processed and he could expect it early next week. On July 15 (Wednesday), Mr. Morrill again e-mailed Ms. Gifaldi asking for an update. Ms. Gifaldi replied that she had just spoken with Niki (Sollinger), and the invoice should be processed shortly.

E-mails, July 13, 2009
(RX 29)

Ms. Mikella Pedretti¹⁸ of the baseball division asked Ms. Gifaldi if the new, recently announced, policy allowing payment of fees owed to Octagon by credit card was causing the hold-up in their invoicing process. Ms. Pedretti had hoped the invoices would be ready to go out that day, because it was the beginning of the All-Star break and season halfway point, but had not received anything. She requested an update as soon as possible.

About two hours later, Ms. Gifaldi responded that she was working the invoices that week and would send the request to Accounting. She should receive the invoices back within five days, and would then forward them to Ms. Pedretti.

E-mails, July 16, 2009
(RX 30)

Mr. Morrill forwarded an e-mail marked “high importance” with subject line “urgent” to Ms. Gifaldi, and requested the status of an invoice request submitted on July 7 for \$80,000. The client was ready to remit payment upon receipt of the invoice.

Ms. Gifaldi instructed that a project code be created for the invoice requested by Mr. Morrill. She apologized to Mr. Morrill: “My fault on this one – sorry about this – once approval received, will send out ASAP.”

E-mails, August 6, 2009
(RX 32)

Ms. Alice Burns asked Ms. Gifaldi to take a second look at the escrow reconciliation for July 2009. Ms. Burns did not think the reconciliation balanced, and believed the adjusted bank balance should equal the adjusted escrow balance.

E-mail, August 10, 2009
(RX 33)

Ms. Gifaldi informed Mr. Gaddale that she does not have time to process the track and field (“T & F”) invoices and asked him to send them to her for review before he sent them to T

¹⁸Ms. Pedretti worked in the baseball division, TR, p. 156.

& F for approval. Ms. Gifaldi indicated Mr. Gaddale should also try to clear out as much as possible for the Client Invoice Box, because “it’s getting very full again.”

E-mails, August 12, 2009
(RX 34)

On August 12, after learning about an inquiry from a baseball agent about the “1st half” baseball invoices for his review, because the baseball was already two-thirds over, Ms. Morton asked the baseball division when the invoices were submitted, because she wanted to track how long they are taking to be prepared. The reply e-mail indicated that Ms. Pedretti had sent the list of the baseball clients to be invoiced to Ms. Gifaldi on June 25. On July 22, they received the original invoices for review. Ms. Pedretti responded on July 23 with a list of changes, and had not received anything since then.

E-mails, August 18-19, 2009
(RX 37)

Mr. de Picciotto informed Ms. Gifaldi and Ms. Klitch that he had asked Ms. Plewes to participate in their call scheduled for Friday. Also, he was asking Mr. Abdullah to provide complete and ongoing access to all files and reports for him and Ms. Plewes, because it was “good common sense for some McLean-based senior management” to have such comprehensive access.

Mr. de Picciotto indicated to Mr. Abdullah that “the primary purpose for my having access is a conference call on this subject on Friday, and in case of a future emergency for back-up purposes.”

Mr. de Picciotto’s Travel Records, August – October 2009
(RX 41)

Mr. de Picciotto traveled from Washington, D.C. to New York City on a one-way Amtrak train ticket on August 30, 2009.

On September 13, 2009, Mr. de Picciotto flew from New York City to Washington, D.C.

On September 27, 2009, Mr. de Picciotto flew to Tokyo. On September 30, 2009, he flew from Tokyo to Johannesburg, with a lay-over in Singapore. Mr. de Picciotto departed Johannesburg on October 13, 2009, stopping for one day in Zurich before returning to Washington, D.C. on October 15, 2009.

Mr. de Picciotto was scheduled to fly to Moscow on October 22, 2009, and return to Washington, D.C. on Sunday, October 25, 2009.

E-Mail, October 26, 2009, 2:53 p.m.
(RX 48)

Mr. de Picciotto advised Ms. Kennedy that he had returned from Europe a day later than originally planned and wanted to “proceed today with two position eliminations (Jenny and Vanessa).” Mr. de Picciotto explained that the eliminations were due to performance-related issues with staff management and working relationship issues between many of their staff and “Jenny/Vanessa.” Those issues had caused them to hire Ho Shin and change Ms. Klitch’s role about a year ago from General Counsel to SVP of Internal Operations and the remaining legal title of CLO (Chief Legal Officer), with few “day-to-day” legal responsibilities. Both of Ms. Klitch’s “positions/titles/roles” had not existed previously and were created to “find an ongoing presence” with Ms. Klitch and relocation of her working base from McLean to West Palm.

Mr. de Picciotto asserted that while Ms. Klitch had asked IPG some questions about their internal operations two months ago, the elimination of these positions was not related to her raising those questions, “as everything for us is transparent and we have always worked to be the best company we can be.” Octagon was “working closely with IPG and will continue to do so on any recommendations they may have as a result of the audit process, etc.” Mr. de Picciotto noted that these eliminations were not the “only position eliminations of the year.” He would come see Ms. Kennedy when he arrived at the office within the hour.

E-Mail, October 28, 2009
(RX 51)

Ms. Plewes informed Mr. de Picciotto and Ms. Kennedy that the escrow account had not been fully reconciled since she had turned it over to Ms. Klitch and Ms. Gifaldi mid-year. Ms. Plewes had highlighted the un-reconciled amounts for each month in the attached document.

E-Mails, October 28, 2009
(RX 52)

Ms. Plewes forwarded an e-mail to Mr. de Picciotto and Ms. Kennedy from Mr. Schneller indicating that “Client Invoice” had issued an invoice for the Tennis Division in the wrong currency again, and \$4,000 would have to be returned.

E-Mails, November 2, 2009
(RX 53)

Ms. Plewes forwarded an e-mail chain with the subject “10/16 Incoming” to Mr. de Picciotto and Ms. Kennedy and indicated that the invoicing schedule for a particular contract “had the wrong fee for all current and future payments.” The invoicing schedule set Octagon’s fee rate at 15%. However, in an e-mail to Ms. Plewes on October 30, Mr. Morrill pointed out that under the contract, Octagon was actually entitled to a higher fee because this particular deal fell into the “non-industry category”, entitling Octagon to a 20% fee. Ms. Plewes changed the invoicing schedule to the 20% billing rate for all future payments.

E-Mails, November 9-10, 2009
(RX 54)

On November 9, Ms. Cerullo sent Ms. Plewes an e-mail addressing the contracts backlog. Ms. Gifaldi had told Ms. Cerullo she had a backlog of 300 contracts to review and add to the recurring invoices chart. Ms. Cerullo reported that Ms. Gifaldi had appeared stressed about it, and “kept saying she hoped Jenny wouldn’t find out.” Ms. Cerullo was unaware whether Ms. Gifaldi had caught up or if a large backlog still existed.

Ms. Plewes forwarded the e-mail to Mr. de Picciotto and Ms. Kennedy on November 10, with the message, “FYI, we have a lot of work to do here.” Ms. Plewes had learned from Mr. Gaddale that he was updating the recurring payments schedule, but would only update it after Ms. Gifaldi summarized the terms. It had not been done since Ms. Gifaldi left or for some time before she left. “This is our next priority.”

E-Mail, December 3, 2009
(RX 55)

Ms. Plewes reported two significant errors involving millions of dollars to Mr. de Picciotto and Ms. Kennedy. She had stopped sending Mr. de Picciotto “e-mails about the errors and problems we’ve encountered but today there were some significant discoveries.” By accident, they found that a particular client’s Speedo and Subway invoices for future payments had been entered incorrectly through 2012. Also, a Nike contract for another client had never been entered into the invoicing system even though the first payment was due that month. “It’s a daily occurrence but these were notable since they involved millions of dollars. Just thought you should know.”

Ms. Kennedy’s Notes from December 2008
(RX 58)

Mr. Jim De Lorenzo discussed with Ms. Kennedy several instances of interpersonal conflict involving Ms. Klitch. Mr. De Lorenzo reported holding several meetings each week with Ms. Cerullo and Kelly Wilson to calm them down due to Ms. Klitch. He described Ms. Klitch’s employment as a “reign of terror.” He had already complained to Mr. de Picciotto about Ms. Klitch. The staff was “walking on eggshells”. Ms. Klitch made every mistake into a critical error, but should not make it personal to each employee, because everyone makes mistakes. Ms. Klitch’s practice of discussing an employee’s issues with other employees was demoralizing. Mr. De Lorenzo also complained that Ms. Klitch expected people to work “all weekends and nights, there’s no end in sight.”

Ms. Niki Sollinger discussed with Ms. Kennedy what it was like to work with Ms. Klitch. Ms. Sollinger felt demoralized because however many hours they worked it was never enough. She was working extremely hard, but there was no end in sight. Ms. Klitch was very hard on Ms. Cerullo and Ms. Wilson, who did not feel appreciated. Ms. Sollinger explained that the problem was not so much the workload as it was Ms. Klitch’s approach, constantly changing priorities that created a lot of confusion and her punishing reaction to small mistakes. “We have

no personal lives/balance.” Even though Ms. Cerullo worked really hard, Ms. Klitch was very critical of her.

On Friday, December 5, Ms. Cerullo came to Ms. Kennedy’s office very upset because Ms. Klitch had told her on Wednesday that she wasn’t being efficient and that her performance had declined over the last six months. Ms. Cerullo was confused because she had recently received a raise and a promotion. Ms. Klitch told her that she had hoped the promotion would motivate Ms. Cerullo to improve but it had not. Ms. Cerullo was frustrated and did not think she could stay if things did not change. She complained of having no work life balance. Ms. Klitch was standing outside when Ms. Cerullo left Ms. Kennedy’s office. When Ms. Klitch pressured Ms. Kennedy into telling her what was wrong, she said that Ms. Cerullo was just stressed and tired. Ms. Klitch asked Ms. Kennedy if she should follow up with Ms. Cerullo, and Ms. Kennedy said no. Immediately thereafter, Ms. Klitch confronted Ms. Cerullo in her office. Loud voices and Ms. Cerullo crying “could be heard in the hallway and in the other offices.”

On Friday, December 5, 2008, Ms. Kennedy met with Ms. Klitch to discuss the issues raised by Ms. Klitch’s staff. Ms. Kennedy addressed the issues, telling Ms. Klitch:

Your staff has come to me with some concerns. They are really at their breaking point. They understand that the importance of the [redacted] case, but they are completely overwhelmed. They are extremely dedicated to their jobs, but the hours and workload are overwhelming them. They have put in so many hours already and there doesn’t seem to be any end in sight. I really feel that we are going to lose them if we don’t address the situation. Part of it is that they don’t feel appreciated – a lot of that is from the approach. How can we best work together to make this work with everyone’s schedules/lives? I would like to have them share their concerns with us directly but I wanted to talk with you first about it.

Ms. Klitch indicated she was happy to speak with her staff about their concerns. At that point, each staff member expressed their concerns directly to Ms. Klitch. Ms. Sollinger complained of not having a work-life balance, that Ms. Klitch over-reacted to small mistakes and being confused due to constantly shifting priorities. Ms. Wilson was overwhelmed by the workload and felt she had no balance or outside life. She felt there was an expectation to stay as long as Ms. Klitch at night and on the weekends because Ms. Klitch was always telling them how long she stayed. Ms. Wilson complained of shifting priorities, feeling like she was walking on eggshells, and having every issue turn into a major mistake. Ms. Cerullo also reported not having a work-life balance and unreasonable expectations for the amount of hours worked. When Ms. Klitch told them that she worked long hours over the weekends or on holidays so that they could have time off, it made them feel guilty. She did not feel that she could leave if Ms. Klitch was still at the office.

Ms. Klitch responded that she would start weekly meetings to address priorities, and discuss the priorities with Mr. de Picciotto to figure out what could be eliminated, but that the document production still needed to be done. She thought she was helping her staff by telling

them she was working so they didn't have to, but she would stop informing them of her long hours and would make sure that they left at a reasonable time.

Ms. Kennedy's Notes from April-May 2009
(RX 59)

On April 30, 2009, Mr. Schneller complained to Ms. Kennedy about Ms. Klitch. He noted that many people had stayed at Octagon for a long time because they liked the atmosphere, but that was changing. He expressed concern that Ms. Cerullo had been thrown into a complicated new job that she did not have enough time for, and questioned whether she even wanted to take it on. When Ms. King had handled that job, it had required 50% of her time even though she was very familiar with the process and very efficient. Mr. Schneller questioned why this financial function was being taken over by the legal department. No one had ever bothered to ask Ms. King what her job entailed.

At another meeting on May 1, 2009, Mr. Schneller again expressed his concern that Ms. Cerullo was being thrown into the new job without considering whether Ms. Cerullo would be able to take on the additional workload or what the job entailed. He also was concerned because on a recent conference call, Ms. Gifaldi had indicated that much of the work they were doing "will be done in India soon anyways."

On May 11, 2009, Ms. Cerullo complained to Ms. Kennedy about Ms. Klitch and the new operations processes. Ms. Klitch had created the whole process without asking Ms. King how the process worked, and then only asked Ms. King for confirmation or correction. "It takes hours to keep Jenny and Vanessa in the loop since they aren't here." Ms. Cerullo was frustrated because Ms. Klitch wrote the process and checklist, but had not given them to her, and would get mad if she skipped a step, but also would not tell her how something should be done. Ms. Klitch would never help to find solutions to their questions. Ms. Klitch's expectation that Ms. Cerullo would review every agreement was unrealistic and she did not have time for it. "Everyone hates Jenny. I feel like people will jump all over me if anything is wrong. Because they hate Jenny and want her to fail so they want me to fail too. Ms. Cerullo felt that Ms. Klitch was throwing barriers in her way instead of helping.

Ms. Cerullo noted that Ms. Gifaldi saw how Ms. Klitch acted, but did not let it get to her, she would just let it go. Ms. Klitch would lecture Ms. Gifaldi on her people skills. Ms. Klitch would tell her to go home early, but would tell Mr. Shin that something would need to be done right away, and Ms. Cerullo would be at work until 8 or 10 every night.

Ms. Kelly Wolf complained to Ms. Kennedy on May 13, 2009 that Ms. Klitch always needed to do things her way, which prevented people from getting work done. She felt as if Ms. Klitch "is always trying to find things that I've done wrong." Ms. Klitch had gone from making the lives of the five people on her staff "hell" to making the lives of the 50 people in the whole office "hell". She also expressed concern that Ms. Cerullo was being asked to work in a financial role with no background in finance or banking.

Ms. Wolf complained that Ms. Klitch's procedures wasted everyone's time. Ms. Gifaldi was "oppressed" by Ms. Klitch because she was not allowed to make decisions. Ms. Klitch's presence had caused a "total lack of trust" because of all her questioning. People were so afraid to make mistakes that they had become paralyzed. "I almost walked out last night." The new invoicing process was "cumbersome." Ms. Gifaldi lived away and the contractor in India was trusted with a lot of confidential client information.

Ms. Kennedy's Notes from August 2009
(RX 60)

Ms. Cerullo and Ms. Wilson came to Ms. Kennedy's office on August 5, 2009 to discuss issues involving Ms. Klitch. Ms. Cerullo very upset, in tears, and stated "I can't work with Jenny anymore, she is an awful person. The workload is getting better but she's awful to deal with, just a mean person."

Ms. Cerullo related that Ms. Klitch was refusing to answer a legitimate question from Mr. Schneller because he was "not on her level." Ms. Klitch was hierarchical. Ms. Cerullo complained that Ms. Klitch often said inappropriate things to her, such as criticizing the basketball division, even though it was Ms. Gifaldi who had missed the NBA billing. Ms. Klitch told Ms. Cerullo that she wasn't mad when her car radiator blew up and Ms. Cerullo couldn't get to work that day. However, Ms. Klitch told Ms. Wilson that Ms. Cerullo would have eight hours of work when she arrived at the office at 5 p.m. even though she had been working at home all day. Ms. Wilson reported that Ms. Klitch had told everyone on the legal team she was going to fire someone before she told the person being fired. Ms. Klitch had continued to speak badly of others to her staff even after Mr. De Lorenzo told her to stop last year.

When Ms. Cerullo went to HR last year, Ms. Klitch retaliated, telling her "let's not write you out of a job." Ms. Cerullo was interested in applying for another position in a different division. If she knew there was an end date she could hold on.

Ms. Cerullo was open to Ms. Kennedy's suggestion that she report to Ms. Gifaldi instead of Ms. Klitch.

On August 5, 2009, Ms. Kennedy met with Mr. Schneller to discuss an e-mail he had sent to Ms. Klitch. Mr. Schneller "was not trying to be difficult", but was concerned that there would be no tracking of checks if they wanted to find a particular check in the future. Ms. Klitch had told Mr. Schneller that she was keeping a log and he did not need to worry about it. He asked her where the log was kept, and she did not respond. He found out from Ms. Cerullo that Ms. Klitch would not respond to him, because he "wasn't at her level." Mr. Schneller felt that Ms. Klitch was trying to create a culture that was "contrary to how Octagon has always been" and different from the attitude of Mr. de Picciotto, who responded to everyone in the company. Mr. Schneller felt he deserved an answer to his e-mail, and it was fine if she wanted to discuss it with Ms. Plewes, but ignoring him was wrong.

Mr. Shin came to Ms. Kennedy's office on August 5, 2009 to discuss issues involving Ms. Klitch. He was concerned about his staff because the periodic flare-ups resulting from a lot

of contact with Ms. Klitch had a significant impact on them. Also, the staff was performing the equivalent of two jobs with the additional operations work, and Mr. Shin did not want them to have to stay until 9 pm at night. The change in everyone's attitude was apparent when Ms. Klitch was not in the office. Even though it was easier when she was working from Florida, Mr. Shin predicted the flare-ups and issues would persist, and the only solution was to fire Ms. Klitch. Mr. Shin had thought about leaving when he first came to Octagon, because of Ms. Klitch. Things got better because Ms. Klitch leaves him alone, but her presence still made his job less enjoyable, and he was thinking about leaving because of her. Mr. Shin was waiting for the right time to talk to Mr. de Picciotto.

On August 6, 2009, after Mr. Schneller forwarded an e-mail from Ms. Plewes regarding her conversation with Ms. Klitch, Ms. Kennedy met with Ms. Plewes. Ms. Plewes reported that she, Mr. Schneller and Ms. Morton did not feel they could ask Ms. Klitch questions about the invoicing process, because she was so defensive. After she refused to speak to Mr. Schneller about the escrow log, Ms. Klitch called Ms. Plewes told her that they "should not be questioning her because they (her team) have it under control." According to Ms. Plewes, Ms. Klitch would not deal with Mr. Schneller, and neither Ms. Klitch nor Ms. Gifaldi would make the log of incoming checks available to Mr. Schneller and others. In her opinion, Ms. Klitch did not seem to really understand the process, and could not answer questions about it. Ms. Plewes was concerned about retaliation, because Ms. Klitch "has been very nasty to me in the past when she has perceived that I am against her."

Notes from August 7, 2009 Meeting
(RX 61)

Mr. de Picciotto asked Ms. Kennedy to schedule a meeting for both of them to meet with Ms. Plewes and discuss "Department coverage (for invoicing), access to information, and a transition plan for Jenny Klitch's eventual departure." Mr. de Picciotto wanted to know where the invoicing information was stored and who could access it to ensure continuing access to the information once Ms. Klitch was gone.

Ms. Plewes expressed concern that Ms. Klitch would retaliate, as she had been "very vindictive" in the past, and would retaliate any time she felt that Ms. Plewes "was against her". Ms. Plewes was reluctant to become involved in the process because she was afraid of what Ms. Klitch "will do."

Mr. de Picciotto felt Ms. Plewes was the most logical person to assume responsibility for the invoicing function if Ms. Klitch was no longer with Octagon, but Ms. Plewes was reluctant to do so.

Mr. de Picciotto asked Ms. Plewes for her opinion on Ms. Gifaldi's loyalty to Ms. Klitch. Ms. Plewes did not think Ms. Gifaldi was loyal to Ms. Klitch.

Mr. de Picciotto asked Ms. Plewes to assist in determining the location of the invoicing records and who had access. Ms. Plewes informed him that she had requested access to some of the information, but had been denied access by Ms. Klitch. Mr. de Picciotto asked Ms. Plewes to

find out from Ms. Gifaldi where everything was being stored. He asked Ms. Kennedy to have IT back-up all of Ms. Klitch's and Ms. Gifaldi's files.

After discussing Mr. Schneller's complaint that Ms. Klitch had denied him access to the check log and her refusal to even discuss it with him, and that Mr. Schneller and other staff members needed access to the check log to do their jobs, Mr. de Picciotto indicated he would discuss the matter with Ms. Klitch.

E-Mail, August 12, 2009
(RX 65)

Mr. de Picciotto responded to Ms. Plewes' e-mail updating him on her investigation into the invoicing and escrow process.¹⁹ He suggested that Ms. Plewes talk to Ms. Gifaldi by phone "to try to get a complete picture." Involving others was okay as needed.

¹⁹Ms. Plewes' August 12, 2009 email updating Mr. de Picciotto on the invoicing and escrow process is summarized supra, at CX 65.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Credibility Determinations

Mr. Phil de Picciotto

During the course of his testimony, based on his demeanor and generally earnest answers, I found Mr. de Picciotto to be a credible witness. On one occasion regarding his contact with Ms. Hoey during the course of the IPG/Deloitte investigation, Mr. de Picciotto presented a hyper-precise response when asked on cross examination about when he spoke to Ms. Hoey, which subsequently led to my comment about parsing answers.²⁰ However, upon review of the transcript, while perhaps reflecting a less than cooperative attitude during cross-examination, Mr. de Picciotto's distinction between an e-mail exchange with Ms. Hoey about scheduling and a spoken conversation with her during the investigation was not incorrect or evasive to the extent it adversely affects my confidence in the veracity of his testimony.²¹

I have also considered the following two assertions by complainant's counsel that documentary evidence in the record impeached Mr. de Picciotto's credibility. First, while Mr. de Picciotto testified that he was not involved in the Deloitte investigation,²² a September 16, 2009 e-mail from Mr. Dowling of IPG to Ms. Kennedy states that Ms. Kennedy will receive an update for the plan for next week from Mr. de Picciotto, CX 40. However, while Ms. Kennedy believed the update may have related to the interview scheduling process, no witness identified what the referenced update may have been, or how Mr. Dowling may have learned about an update. Further, that e-mail exchange occurred prior to the actual start of Deloitte's investigation on September 21, 2009.

Second, Mr. de Picciotto testified that his contact with the Deloitte investigators was limited to his interview and a follow-up call;²³ whereas, in an October 11, 2009 e-mail Mr. de Picciotto thanks a Deloitte representative for a clarification, CX 125, and Mr. de Picciotto exchanged e-mails with the same Deloitte representative on October 19 and 20, 2009, CX 125. Once again however, the first e-mail was generated by Mr. de Picciotto's e-mail correspondence with Ms. Hoey about the spread-out duration for the investigation interviews, which led Ms. Hoey to ask the Deloitte representative for an explanation; and in turn, the representative responded to both Ms. Hoey and Mr. de Picciotto. The second e-mail exchange was related solely to the scheduling of Mr. de Picciotto's interview with the Deloitte representative and did not involve any discussion of the investigation itself. Consequently, I find the noted e-mail correspondence an insufficient basis to doubt Mr. de Picciotto's hearing testimony that other than participating in an interview he was not involved in the Deloitte investigation.

²⁰TR, p. 381.

²¹After noting my frustration with parsing on whether Mr. de Picciotto had any communication with Ms. Hoey about the investigation, I also acknowledged that the cause of my observation might be "in-artful questioning," TR, p. 381.

²²TR, p. 373.

²³TR, p. 396.

Other Witnesses

I also find that the other witnesses, Ms. Gifaldi, Ms. Morton, Ms. Kennedy, and Ms. Plewes provided credible testimony. Although Ms. Morton and Ms. Kennedy have been long-term employees of Octagon, which was founded by Mr. de Picciotto, based on their demeanor, generally direct answers, and lack of equivocation, I considered their sworn testimony probative on multiple issues in this case. Likewise, while she has an obvious interest in the outcome of her SOX complaint, Ms. Gifaldi provided straightforward, sincere, candid at times, and credible testimony.

Testimonial and Evidence Conflicts

On a few occasions, the record contains varied versions of conversations. Based on my credibility determinations, I attribute such inconsistencies to incomplete recollection of the participants, including Mr. de Picciotto. To the extent that a conflict in testimony, or other inconsistency, requires a detailed assessment and resolution, I will render a discussion of the issue in *[[italics]]*.

Specific Findings

2007

Octagon, Inc. is a global sports entertainment and music management and marketing company with three core lines of business: representation of individual personalities, athletes, and other artists; consultation services with companies on how to use sports, entertainment and music to posture their own businesses; and event management. Octagon and its Athletes and Personalities Division (“A & P”) is headquartered in McLean, Virginia. Octagon is a wholly owned subsidiary of Interpublic Group of Companies (“IPG”) through a holding company, Advantage International Holdings, Inc. (“AIHI”). IPG owns AIHI, which in turn owns Octagon. Constituency Management Group (“CMG”) is a part of Interpublic. IPG is a New York Stock Exchange publicly traded company. Because Octagon is held by a company that is held by IPG, Octagon is responsible for complying with SOX requirements.

Octagon represents athletes in negotiating deals between the athlete and a team. The athletes are represented by individual agents working for Octagon. While most athletes sign a representation contract, some players prefer a "handshake" deal, with the contract details commemorated by an agent in an e-mail. The company is organized into various divisions which are categorized by activity or sport, such as baseball, football or hockey. Octagon interacts with its clients' income in two principle ways. First, on the corporate side, for the services Octagon provides, the athlete or client is billed directly based on the portion of the athlete's salary with the team that is set out in their contract. Second, on the client side, Octagon manages endorsement compensation for its athletes, which involves funds that are separate from corporate accounts and maintained in an escrow account. Client-side invoicing is provided as a service for Octagon clients to collect money for the client from third parties or sponsors for endorsements, appearances, and sponsorship. Such invoices are not considered a receivable by Octagon and

instead represent an invoice from the client to the endorsement company, the resulting payment being deposited into the client's escrow account maintained by Octagon.

In some instances, in order to advance funds to client athletes, the parties will sign a promissory note by which the athlete promises to repay money borrowed from Octagon from his or her future salary.

[[An issue exists over the characterization of the relationship between Octagon and Octagon Financial Services, OFS. Mr. Marra of IPG and Mr. de Picciotto described OFS as a separate entity wholly owned by AIHI, or a “sister” company to Octagon. Ms. Plewes also indicated that Octagon and OFS are separate companies but noted some overlap in functions, such as Ms. Morton from Octagon acting as a CFO for OFS, and OFS employees processing invoice receipts that were placed in an Octagon account. On the other hand, Ms. Klitch indicated that OFS was a subsidiary of Octagon, and Ms. Gifaldi testified that OFS reported to Octagon. Based on her status as head of OFS and her detailed explanation, and as essentially corroborated by both Mr. Marra and Mr. de Picciotto, I give Ms. Plewes' testimony greater probative weight on this issue and conclude that OFS is a separate, sister company to Octagon.]]

A sister company to Octagon, OFS offers optional financial services to Octagon clients, such as asset management or wealth preservation. Additionally, a few functions overlap between the companies. In particular, OFS employees process invoice receipts and place them into Octagon accounts.

Fall 2007 After serving as an assistant general counsel at Ocwen Federal Bank, a loan servicing company, and with eight years of law firm experience, Ms. Klitch is hired by Mr. de Picciotto for the position of General Counsel in Octagon's A & P Division. Mr. de Picciotto is impressed by Ms. Klitch's resume, in particular her experiences as both a professional athlete and an attorney. He feels that her background, which includes major law firm experience, sports experience, and understanding of SOX compliance, could not be more perfect. She also has good references. Ms. Klitch moves to McLean, Virginia, where the position is located, but also maintains a home in West Palm Beach, Florida.

2008

Ms. Gifaldi has a Bachelor's Degree in English. Her work experience includes over four years in the mortgage business, first with Liberty Mortgage as a loan processor, followed by three years with Ocwen Loan Servicing as a billing coordinator/loan analyst, then as a litigation process manager, and finally as manager of default management outsourcing. At various times during her tenure at Ocwen, Ms. Gifaldi's responsibilities included creating and implementing processes and procedures of the electronic billing system, reviewing and processing legal invoices, working with accounting and investor reporting while being responsible for the disbursement of millions of dollars, managing employees with regard to billing, and managing department cash flow in regards to the General Ledger.

February/March 2008 Ms. Klitch receives a positive written performance review from Mr. de Picciotto. It is the only written performance review she receives.

Sometime during 2008 Mr. de Picciotto receives complaints from division heads and employees in the Legal Department that Ms. Klitch as General Counsel is heavy-handed, combative, and not a team player. In particular, division chiefs complain that she does not understand that her role is to help them conduct their business.

Fall of 2008 Mr. de Picciotto decides to transition Ms. Klitch out of the general counsel role and considers terminating her employment. However, after a conversation with Ms. Klitch during which she persuades Mr. de Picciotto that she has the operations and organizational skills to help him centralize Octagon's services, Mr. de Picciotto decides to: a) move Ms. Klitch into operations in part to centralize the invoicing system and connect it to the company's legal system, and b) hire a deputy general counsel to eventually take over Ms. Klitch's role as General Counsel.

In transitioning into her role in operations, Ms. Klitch assumes responsibility for the invoicing processes. Mr. de Picciotto asks Ms. Klitch to take responsibility for invoicing sponsors, because he has general concerns about controls in that area. At this time, Octagon's 12 divisions are initiating their respective invoices, while the returned invoice payments are processed, and the escrow accounting is handled, by Mr. Schneller and Ms. King in OFS, under the supervision of Ms. Plewes. Problems occur with this system, because one person sends out an invoice and another person records the receipt of payment. On occasion, due to the split responsibilities and associated communication issues, a mismatch occurs and no record exists of an invoice having been sent out.

October 2008 The Octagon position description for business and database manager requires a B.A. or B.S. in business, finance or accounting, and a person being deadline oriented with the ability to juggle multiple projects under urgent timeliness. The highly preferred location is McLean, Virginia.

Ms. Klitch knows Ms. Gifaldi from supervising her at Ocwen and informs her of the job opportunity at Octagon. Ms. Gifaldi applies. During a day-long process, Ms. Gifaldi is chiefly interviewed by Ms. Plewes, Managing Director and President of OFS, Ms. Kennedy, Octagon HR Director, and Ms. Morton, Octagon Chief Financial Officer. At the conclusion of the process, Ms. Plewes, Ms. Kennedy, and Ms. Morton have reservations about hiring Ms. Gifaldi based on her lack of a financial background, interpersonal skills and the fact that she will be working remotely. However, based on Ms. Klitch's strong recommendation and her role as Ms. Gifaldi's future supervisor, Mr. de Picciotto hires Ms. Gifaldi for the position of database manager at Octagon to clean up the invoicing process. Ms. Klitch intends Ms. Gifaldi to help improve and "clean-up" the invoicing and escrow procedures. Ms. Gifaldi is a key hire to centralize the invoicing process. She moves temporarily from Denver, Colorado to McLean, Virginia for three months.²⁴ When Ms. Gifaldi arrives, she is supervised by Ms. Klitch.

Ms. Klitch discusses the invoicing processes with Ms. Gifaldi. Ms. Klitch explains that Octagon's goal is to centralize the client invoicing process, implement controls, and make the company's invoicing more efficient than the present process in which each division

²⁴She then returns to Denver to work remotely. Eventually, she moves to Fort Lauderdale, and continues to work remotely.

independently bills third parties for endorsements, and maintains its own associated record keeping. Another reason for changing to a centralized system is that at present some divisions are better than others at keeping invoicing records. Octagon intends to change to one source that both submits the invoices and maintains the invoice payment record.

In an effort to centralize the invoicing process for millions of dollars, Ms. Gifaldi uses a spreadsheet to manually track the invoices and adds 15 to 20 data points which hadn't been used before to better track and maintain the invoice information and establish reasonable controls. Specifically, she records the amount of money that has been invoiced to a vendor owing money based on the Octagon client's contract. She also tracks payment of the invoices on a separate spreadsheet.

[[There is a testimonial dispute as to whether Ms. Morton believed Octagon's invoicing process was horrific. Ms. Gifaldi testified that during one conversation Ms. Morton said she was horrified by Octagon's procedure for tracking invoicing data, which required Ms. Gifaldi to manually track numerous data points related to millions of dollars in invoices using an excel spreadsheet. Ms. Morton denied she ever told Ms. Gifaldi that she was horrified by Octagon's invoicing practices.

Based on their respective demeanors at the hearing, fairly direct responses to questioning, and the absence of any noticeable evasion, I first find that both Ms. Gifaldi and Ms. Morton were credible witnesses. Absent another witness to their conversations, I am unable to determine which recollection is more accurate. However, I note that Ms. Morton testified to having concerns about lax invoicing controls, having been part of a discussion with Mr. de Picciotto regarding general concerns about invoicing controls, and being aware that Ms. Klitch was tasked to address these concerns. Accordingly, I find that whether or not Ms. Morton specifically told Ms. Gifaldi that the invoicing process was horrible, she was concerned about lax invoicing controls.]]

Ms. Gifaldi also discusses the invoice processes with Ms. Morton, who expresses a concern about lax invoicing controls.

November 2008 Mr. Ho Shin is hired as Deputy General Counsel.

December 2008 At a meeting held to explain the new invoicing process, Ms. Klitch incorrectly explains the operation of the old invoicing process and ignores corrections from Ms. Plewes and Mr. Schneller. She continues to try making the same incorrect point by speaking more loudly.

December 1 to 4, 2008 Three members of Ms. Klitch's legal staff complain to Ms. Kennedy that Ms. Klitch is over-critical, over-punishing for small mistakes, and requires the staff to work extremely long hours. Ms. Klitch constantly changed priorities, which caused a lot of confusion. Her managerial style is described as a "reign of terror."

One of the staff members also indicated that he had already complained to Mr. de Picciotto about his situation.

Around this time, Ms. Plewes receives complaints from employees that Ms. Klitch is rude, demanding and has a very aggressive managerial style.

December 5, 2008 Ms. Kennedy meets with Ms. Klitch and advises her of the complaints she has received. Ms. Klitch agrees to discuss the issues with each employee. Consequently, each individual is invited into the meeting and presents his or her concerns to Ms. Kennedy and Ms. Klitch. After listening to her staff, Ms. Klitch agrees to conduct weekly staff meetings to set priorities. She expresses her belief that she was helping her staff by letting them know she was working long hours to reduce their workload. Ms. Klitch agrees to make sure they leave the office at a reasonable time.

Sometime in December 2008 Ms. Morton advises Mr. de Picciotto that Ms. Klitch is uncooperative and her subordinates have come to her about the way they have been treated. Mr. de Picciotto has already received complaints about Ms. Klitch, which in part lead to her move into an operations role without day-to-day staff management and legal responsibilities. Mr. de Picciotto encourages Ms. Klitch to work more frequently off site out of West Palm.

December 16, 2008 After reviewing information regarding the new client invoicing process, Ms. Plewes compliments Ms. Gifaldi on her effort and good work in producing organized and clear documentation.

2009

Early 2009 Ms. Klitch and Ms. Gifaldi take over the invoicing process as Ms. Klitch continues to transition from General Counsel to her new role in the newly created Operations Department. Ms. Gifaldi and Ms. Klitch communicate daily about the invoicing and client escrow processes. Ms. Klitch continues to report to Mr. de Picciotto. As part of her new role, Ms. Klitch is tasked with evaluating the current legal and regulatory framework for the invoices, assessing it, and improving it. At Ms. Klitch's request, Mr. de Picciotto does not announce the staffing change.

There is some resistance from other Octagon employees to the changes in the invoicing procedure being implemented by Ms. Klitch and Ms. Gifaldi. Ms. Gifaldi does not find the response to be unreasonable.

January 2009 Ms. Gifaldi's salary is \$95,000 with a \$10,000 discretionary bonus.

January/February 2009 Ms. Gifaldi begins to implement the new centralized invoicing process that is aimed at improving the current process by introducing more controls, increasing efficiency, and generally "cleaning it up." To advance this effort, a centralized contract repository and contract review procedure are introduced. Ms. Gifaldi begins the contract review portion of the new invoicing procedure. She is responsible for reviewing thousands of contracts to ensure the executed invoices are consistent with the underlying contract, and then verifying on the escrow log that Octagon has received the corresponding payment on behalf of the athlete. Ms. Gifaldi receives the executed contracts to review through an electronic mailbox, after the contract has passed through the Legal Department.

Ms. Gifaldi is concerned when she uncovers instances of invoices never having been issued or non-payment by the sponsor, in some cases going back a few years. These types of payments are generally received in the client escrow account. Ms. Gifaldi discovers the discrepancies by comparing the contracts with the invoice records maintained by the different divisions and then matching the invoice with incoming funds to the escrow account. In some cases, a division was able to produce a copy of an invoice missing from the invoice records. Ms. Gifaldi also received explanations that invoices had been issued, but a copy was not available.

Ms. Gifaldi believes that Octagon has a fiduciary duty to its clients, meaning that they are obligated to act in the clients' best interests, and that Octagon breached that duty with its flawed invoicing system. Out of thousands of contracts, she finds about 50 instances where an Octagon client is owed money from a sponsor, and fixes the discrepancy by invoicing the sponsors for the money owed. Ms. Gifaldi is concerned that clients had not received money they were due because of the flawed invoicing system, and that clients will leave Octagon or file a lawsuit if they find out about the invoicing issues.

Ms. Gifaldi raises her concerns about the invoicing process with Ms. Klitch and they discuss solutions to the problem.

During the course of her work with the new invoicing system, errors occurred, including invoices being issued in the wrong currency, invoices being issued in the wrong amounts, and invoices being issued outside the time period required by the contract.

January 22 to 29, 2009 Ms. Gifaldi becomes responsible for issuing all the Octagon incentive-based invoices, other than recurring invoices, which were mailed in bulk. She informs the various divisions of the new invoicing process, and instructs the divisions to complete and send the client invoice forms to her through the client invoice mailbox. As a result, part of her duties involves checking the client invoice mailbox in order to issue the divisions' invoices. Ms. Gifaldi also advises the divisions that she will need executed contracts to be sent to the Legal Department for review. Finally, noting that the problems in billing and invoicing did not arise overnight, Ms. Gifaldi anticipates that within six months the divisions will see a "huge" improvement in communication and efficiency.

When Mr. Schneller asks Ms. Gifaldi why a particular invoice is not in the client invoice log, Ms. Gifaldi responds that she is a little behind but would update the invoice log by the end of the week. She also indicates that she was unaware that Mr. Schneller ever looked at the log. Mr. Schneller replies that he looks at the log as payments are received.

Between February and May 2009 During a visit by Ms. Gifaldi, Mr. de Picciotto tells her very briefly that they have to do better.

Around March 2009 Ms. Gifaldi also becomes responsible for recurring invoices, which are contained in 50% of the contracts and deal with contract-stipulated periodic payments for endorsement deals.

Ms. Klitch seeks advice from Ms. Morton on how the client invoicing process should work. Ms. Klitch expresses her concerns to Ms. Morton that invoices are being issued without a written contract in place. Ms. Morton shares some of her concerns. Ms. Morton does not bring Ms. Klitch's concerns to Mr. de Picciotto, because she feels Ms. Klitch's job is to identify and correct issues, and her role is just to give advice. Ms. Klitch tells Ms. Morton that Mr. de Picciotto is not responsive to her inquiries, and that she is not getting the support she needs in terms of documentation prior to issuing the invoices.

Ms. Klitch asks Ms. Morton questions about general SOX requirements for Octagon's corporate books. However, Ms. Morton believes invoicing as a service to clients does not fall under the same umbrella of requirements, because SOX relates to a publicly traded company and its financial statements, and the escrow account and client invoicing are not reflected in their financial statements.

Ms. Klitch receives a spot bonus.

March 4, 2009 Ms. Gifaldi cuts off access to the M drive for everyone except herself, Ms. King and Mr. Gaddale after she discovers that some invoices in the tennis division folder have been deleted. When Mr. Schneller complains, Ms. Gifaldi explains she revoked access to the M drive as a precautionary measure for control purposes. Mr. Schneller suggests making the files "read only" instead of denying everyone access without providing any advance notice. Ms. Gifaldi responds that it is not appropriate for everyone to have access to the M drive, because it contains division specific financial data. She asks IT to grant Mr. Schneller access to the M drive and advises IT that his access was revoked in error.

March 10, 2009 By e-mail, with a copy to Ms. Klitch, Mr. Schneller asks Ms. Gifaldi why the February 2009 recurring invoices have not been updated in the divisions' folders. Due to training and transition issues, Ms. Gifaldi had not yet broken down the bulk recurring invoices into the specific division folders. Ms. Gifaldi promises to complete the task by the end of the week. Mr. Schneller asks what the schedule will be going forward and expresses surprise that March had been completed before February.

March 11, 2009 Mr. de Picciotto's administrative assistant sends a contract to Ms. Gifaldi which requires invoices at the end of February, March, and April 2009.

March 20, 2009 Ms. Gifaldi instructs IT to limit read/write access to the subfolder "Client Invoicing Master Logs" on M:/Invoices to herself and Mr. Gaddale. Mr. Schneller and Ms. King still have "read only" access to the client log information.

March 23, 2009 In response to a complaint from the baseball division chief because Ms. Klitch and Ms. Gifaldi were not issuing invoices without a valid underlying contract, Mr. de Picciotto informs Ms. Klitch that there will be many situations when they will not have a written contract, but "the most important thing for us will always be to get the money in." Mr. de Picciotto believes Octagon had documented the agreements in other ways.

Ms. Klitch explains how she resolved the contract issue, and advises Mr. de Picciotto that the new invoicing process will not require a new hire, but they may need to juggle some tasks and assignments.

March/April 2009 Ms. Gifaldi receives a performance review from her supervisor, Ms. Klitch, for the time period between October 2008 and March 2009.

April 2, 2009 Due to the back log of the thousands of contracts that she has to review, and because she was falling behind and couldn't catch up, Ms. Gifaldi asks Mr. Gaddale to take over processing the client invoices.

Around April 2009²⁵ Ms. Plewes complains to Mr. de Picciotto that the staff is confused about the changes in staffing and the new invoicing procedure, particularly the client invoicing process. None of the changes Ms. Gifaldi and Ms. Klitch are supposed to put in place have been done. Things have come to a screeching halt, with no system, no improvement, no news, and no schedule.

April 13, 2009 *[[On the significance of Ms. Klitch's change in roles and associated title changes to Vice President of Operations and Chief Legal Officer, Ms. Klitch liked to think the changes represented an advancement. Mr. de Picciotto advised Ms. Klitch to use her new title of Chief Legal Officer as she saw fit and she was clearly enthusiastic about moving in the operations area of the business. Similarly, Ms. Kennedy in HR treated the change as a promotion. In contrast, Mr. de Picciotto testified that the change really represented a demotion. In considering these disparate characterizations, I first note that there was no change in Ms. Klitch's pay. Additionally, Mr. de Picciotto had hired Ms. Klitch to be Octagon's General Counsel, but due to personnel issues in the Legal Department, he decided to move her out of the legal function. Further, Ms. Klitch's transition clearly represented a decrease in the legal portion of her job and in his May 5, 2009 e-mail to the company about the change, he specifically did not indicate that Ms. Klitch had been promoted. Consequently, I conclude that from their individual perspectives, both Ms. Klitch and Mr. de Picciotto are correct. That is, the change represented a new opportunity for Ms. Klitch; whereas, Mr. de Picciotto removed Ms. Klitch from the position to which she had been specifically hired and replaced her with Mr. Shin as General Counsel to run the legal department.]]*

Ms. Klitch informs Mr. de Picciotto that Mr. Shin is pleased with the idea of assuming the General Counsel title. She proposes changing Ms. Gifaldi's title from Business and Database Manager to Director, Client Invoicing. For herself, Ms. Klitch proposes the title of Chief Legal Officer ("CLO") for the decreasing legal portion of her job, which will only be used rarely, when she is acting in a legal capacity. For the Operations portion of her position, she proposes the title "COO"²⁶ to emphasize her Operations role. Although she is not "big" on titles unless they serve a functional purpose, she admits she is facing a lot of resistance on her Operations initiatives. If

²⁵Based on the testimony of Mr. de Picciotto that he received this email from Ms. Plewes at the end of April or beginning of May 2009, and Ms. Plewes' testimony that she sent the email in March or April 2009, I find that Ms. Plewes sent the email to Mr. de Picciotto around April 2009.

²⁶Chief Operating Officer

people ask, Ms. Klitch prefers they think she is advancing and not being demoted or moving laterally, and hopes that Mr. de Picciotto thinks she is advancing. She plans to only emphasize or use any title in communications when it serves a functional purpose.

April 14, 2009 Mr. de Picciotto responds that Ms. Klitch's title should be Senior Vice-President of Operations and Chief Legal Officer. Ms. Klitch can use the titles individually or together as she prefers and the situation requires. Mr. de Picciotto tells her to use the Chief Legal Officer title as she deems appropriate, and not be shy about including it in communications.

April 20, 2009 Mr. de Picciotto asks for comments from Ms. Klitch, Ms. Morton and Ms. Plewes regarding a draft e-mail he planned to send "worldwide" to give a business update and address changes related to "rolling out" various operations improvements. In his proposed message, Mr. de Picciotto expresses his appreciation for the constructive comments Ms. Klitch, Ms. Gifaldi and Ms. Cerullo had received and indicated that this feedback was being incorporated into adjustments, such combining the two intake processes. Mr. de Picciotto explains that due to Ms. Klitch's focus on these important operational initiatives, Mr. Shin will assume the role of General Counsel, with responsibility for the day-to-day management of the Law Department. In response, Ms. Plewes expresses a concern that the message will create more confusion than they already had regarding roles and responsibilities. She advises Mr. de Picciotto to clearly define Ms. Klitch's role, as the message did not make it clear.

April 21, 2009 Ms. Gifaldi reviews a timeline for the transition of responsibilities from OFS employees to her. According to the transition plan, for payment processing, Ms. King and Ms. Cerullo would meet every afternoon for two hours between April 27 and May 22 while Ms. Cerullo transitioned into the job. Beginning May 25, Ms. Cerullo would officially take over the process. For the Month End reconciliation, Ms. Gifaldi would watch Ms. King prepare the April Month-End using Live Meeting. Ms. King would supervise Ms. Gifaldi for the May and June Month-End reconciliations, and then Ms. Gifaldi would complete the Month-End reconciliation on her own beginning in July.

Ms. Klitch discovers that promissory notes are being repaid from the client escrow account when the terms of the promissory note dictate that the note should be repaid from another source, and requests instruction from Mr. de Picciotto in establishing a procedure for handling money received for clients with outstanding loans. She informs Ms. Gifaldi of the promissory note issue.

Upon learning of the promissory note issue from Ms. Klitch, Ms. Gifaldi is concerned that the promissory notes are being paid from the escrow account instead of salary payments, and fears that clients will seek representation elsewhere or there will be legal ramifications if they discover how their escrow account is being handled, and expresses her concerns to Ms. Klitch. Clients do not receive an accounting of their escrow accounts. They only receive a tax statement at the end of the year. Octagon clients receive payment from the escrow account by a check in the mail or wire transfer.

April 22, 2009 Mr. de Picciotto responds to Ms. Klitch that Octagon is a company of exceptions led by business needs rather processes, though processes are critically important. He instructs Ms. Klitch to use money coming in to automatically repay any outstanding loans, unless there is a written exception. In an associated conference call with Mr. de Picciotto and Ms. Gifaldi, Ms. Klitch again expresses her concern to Mr. de Picciotto that payments are being taken from client escrow accounts when the promissory note indicates the note is supposed to be paid from the client's salary. Mr. de Picciotto tells Ms. Klitch to take the repayment from the endorsement coming into the escrow account to pay down the note. He does not want the money leaving the escrow account when the promissory note remains outstanding.

April 30 and May 1, 2009 Mr. Schneller informs Ms. Kennedy that Ms. Klitch has changed the enjoyable atmosphere at Octagon. He also expresses a concern for Ms. Cerullo, because she has been given a complicated task.

May 2009 Ms. Klitch receives a second spot bonus.

May 5, 2009 At the request of staff members who were confused about changing roles, Mr. de Picciotto announces in an e-mail to the A & P Division that Mr. Shin will assume the General Counsel position, "in light of" Ms. Klitch's focus on important operational initiatives related to contracting, invoicing, tracking and collecting payments. As General Counsel, Mr. Shin continues to report to Ms. Klitch, who now holds the title of Senior Vice-President for Operations and Chief Legal Officer.

May 6, 2009 By e-mail, Ms. Morton asks Ms. Gifaldi why none of the NBA team billing had gone out in April as scheduled. Ms. Morton explains that the failure to issue the NBA invoices made a huge difference in the reported financials for April and that change would linger into her financial analysis for May. As a result, Ms. Morton will have to report the missing invoices to IPG. In response, Ms. Gifaldi indicates that she overlooked the billings and never submitted the requisite request to have the invoices sent out. She acknowledges the missing NBA billing is her fault and takes full responsibility. The April NBA invoices amount to between \$600,000 and \$800,000.

Around this time, Ms. Morton also discusses with Ms. Gifaldi and Ms. Klitch the need to complete the corporate invoicing on time, without exception, and its critical importance to Octagon in regards to financial reports and year to year comparisons. She also advises Mr. de Picciotto of this invoicing problem caused by Ms. Gifaldi. Mr. de Picciotto informs Ms. Klitch that he is giving Ms. Gifaldi a second chance.

May 11, 2009 Ms. Cerullo expresses her concerns to Ms. Kennedy regarding the new client invoicing process. She reports it is difficult working with Ms. Gifaldi and Ms. Klitch remotely, because they have to be constantly updated and kept in the loop, and that task takes hours.

Around May 13, 2009 Ms. Wolf, Director of Client Services for tennis, complains to Ms. Kennedy that Ms. Klitch always needs to do things her way, which prevents people from getting work done. Ms. Klitch had gone from making the lives of the five people on her staff "hell" to making the lives of the 50 people in the whole office "hell". She also expresses

concern that Ms. Cerullo was being asked to work in a financial role with no background in finance or banking. Ms. Klitch's presence had caused a "total lack of trust" because of all her questioning. People were so afraid to make mistakes that they had become paralyzed. The situation was so bad, Ms. Wolf almost quit the night before. In Ms. Wolf's opinion, the new invoicing process was "cumbersome." In addition, Ms. Gifaldi is not reachable because she does not work in McLean and does not understand how they do business. Ms. Wolf is also concerned that the contractor in India is trusted with a lot of confidential client information.

June 2009 Ms. Gifaldi and Ms. Klitch start managing the escrow account. Ms. Gifaldi's involvement is limited to performing the month-end reconciliation. Ms. Klitch identifies discrepancies between the percentage of client funds Octagon is authorized to take as its fee, and the percentage that Octagon is taking, and shares this information with Ms. Gifaldi. Because the discrepancies involve an interpretive legal dispute, they are identified by Ms. Klitch. In particular, Ms. Gifaldi becomes aware of at least 5 to 10 instances, out of 25 to 35 payments received on a weekly basis, where Octagon is taking a greater commission from funds received into the escrow account than it is authorized to take, and feels this should be fixed.

Most of the discrepancies arise from an interpretive dispute in the contracts over whether a particular deal is categorized as industry or non-industry, with the amount of Octagon's fee varying depending on the categorization. Sometimes the discrepancy is due to a mistake made in the initial invoice that is repeatedly carried over.²⁷ Ms. Gifaldi catches a few of the discrepancies on her own when comparing the percentage that Octagon should have received with the amount that was actually billed. She reports the discrepancies to Ms. Klitch. Ms. Gifaldi does not encounter a situation where Octagon retains a fee based on a percentage that is higher than the percentage specifically authorized by the contract.

About June 2009 Ms. Klitch concludes that additional signers should be added to the BB&T bank escrow account to implement her planned account controls and remove OFS personnel, including Ms. Plewes and Mr. Schneller, from the escrow process. As required by the IPG finance department, Ms. Klitch intends to run the additional signers through senior CMG/IPG individuals. However, she is advised not to take that action. Ms. Klitch believes Mr. de Picciotto does not want IPG to become involved because he does not want them to manage the account since IPG does not understand the issues involved with the account and would attempt to run it in a way that would be harmful to Octagon's business. Ms. Morton also advises Ms. Klitch not to change the signers on the account because they serve as another layer of control. Ms. Klitch delays taking any action to change the signers on the account.

June 23-24, 2009 Having received \$50,000 in two payments, but missing a third payment, Ms. Conforti on behalf of Mr. de Picciotto asks Ms. Gifaldi if invoices were ever issued for a contract with due dates on February 27, March 27, and April 27.

The next day, Ms. Gifaldi initially replies that if the contract hasn't been billed, it will be, but she will look into the matter. Ms. Conforti responds that Mr. de Picciotto is departing for London that night and wants to know before he leaves what happened to the contract money.

²⁷TR, p. 83.

About an hour and a half later, Ms. Gifaldi indicates that a draft invoice will be created for the missing \$25,000 and an internal invoice will also be created to which the payments already received may be applied.

June 25, 2009 The baseball division submits to Ms. Gifaldi a list of clients to be invoiced for the first half of the baseball season, which is about mid-July.

July 7, 2009 Ms. Gifaldi fails to act on an invoice request for \$80,000 from Coca-Cola.

July 8 to 15, 2009 Mr. Morrill e-mails Ms. Gifaldi on July 9 (Thursday) to ask whether an invoice had been issued on a particular agreement. Ms. Gifaldi responds on July 10 (Friday) that the agreement was in the queue and Mr. Morrill could expect to receive it early the following week. When Mr. Morrill does not receive anything by July 15 (Wednesday), he e-mails Ms. Gifaldi again for an update. Ms. Gifaldi responds that she had just spoken with Ms. Sollinger, an attorney in the Legal Department, and the invoice would be processed shortly. Although the delay is due to work being done on the contract by the Legal Department, Ms. Gifaldi does not explain the reason for the hold-up to Mr. Morrill or provide an update prior to his July 15 follow-up e-mail.

July 13, 2009 Ms. Pedretti of the baseball division asks Ms. Gifaldi if the new credit card payment system was holding up the baseball billing. Ms. Pedretti was hoping the invoices would be ready to go out that day, because it was the beginning of the All-Star break. Ms. Gifaldi responds that she is working on the invoices this week and should have them in five days.

July 16, 2009 Mr. Morrill asks Ms. Gifaldi for the status of the \$80,000 invoice request submitted on July 7, 2009 that has not been issued, because Coca Cola is ready to remit payment upon receipt of the invoice. Ms. Gifaldi indicates it is her fault, apologizes to Mr. Morrill, and tells him she will send the invoice out as soon as possible.

July 22, 2009 Ms. Pedretti receives the baseball team invoices from Ms. Gifaldi.

July 22, 2009 Ms. Morton forwards an e-mail exchange to Ms. Klitch indicating that Ms. Gifaldi's help is needed with the French basketball invoices. The basketball guys were "helpless" and needed someone proactive to work with them.

July 23, 2009 Ms. Pedretti responds to Ms. Gifaldi with a list of changes to the baseball invoices.

August 5, 2009 Ms. Cerullo comes to Ms. Kennedy and reports an issue between Mr. Schneller and Ms. Klitch regarding access to client invoicing information. Ms. Cerullo also complains that Ms. Klitch has continued to say many inappropriate things to her.

Later that day, Ms. Kennedy meets with Mr. Schneller to discuss the issue involving Ms. Klitch. Mr. Schneller is concerned because he needs access to information and wants to ensure it is being tracked. However, he's been informed that Ms. Klitch refuses to respond to him because he is not at her level.

Mr. Shin informs Ms. Kennedy that he is very concerned about the staff, because the office atmosphere completely changes when Ms. Klitch is in McLean, and the staff is stressed, nervous, and on edge. Mr. Shin suggests firing Ms. Klitch.

August 6, 2009 Ms. Alice Burns, with Octagon shared accounting services, asks Ms. Gifaldi to take a second look at the July 2009 escrow reconciliation because she does not think the reconciliation balanced.

Ms. Plewes and Ms. Kennedy meet to discuss the issues involving Mr. Schneller and Ms. Klitch. Ms. Klitch will not deal directly with Mr. Schneller and does not want Ms. Plewes' staff to question her. Ms. Plewes feels that Ms. Klitch does not understand the process and her defensiveness prevents anyone from asking her questions and that she is skirting a major internal control. As a result, Ms. Kennedy arranges a meeting between herself, Ms. Plewes and Mr. de Picciotto.

Prior to August 7, 2009 On several occasions Ms. Morton reports Ms. Klitch's performance problems to Mr. de Picciotto. She tells him about Ms. Klitch's lack of cooperation, invoicing problems, corporate invoicing problems, and that people had to come to her about the way they had been treated by Ms. Klitch. Ms. Morton also tells Mr. de Picciotto about Ms. Gifaldi's poor performance related to the specific invoicing instances and the corporate invoicing.

Mr. de Picciotto also learns of Ms. Gifaldi's performance problems, specifically her unresponsiveness to e-mails and difficulties caused by working remotely, from Ms. Kennedy. Ms. Kennedy reports the performance issues to Mr. de Picciotto instead of Ms. Klitch, because Ms. Klitch can be retaliatory.

August 7, 2009 *[[The lack of a formal document associated the decision to terminate Ms. Klitch and the two and a half week delay before IPG was informed of the termination after Ms. Klitch submitted her August 25, 2009 e-mail raises an issue about the actual timing of the termination decision. However, the credible testimony of Mr. de Picciotto, Ms. Kennedy, and Ms. Plewes, who attended the August 7, 2009 meeting, as corroborated by Mr. Schneller's complaint that led to the meeting, Ms. Kennedy's actual meeting notes, and the definitive actions Mr. de Picciotto took right after the meeting to ensure the company had complete back-up of Ms. Klitch's e-mails and files controlled by her, and the time associated with obtaining that information and related access, establish that on August 7, 2009 Mr. de Picciotto had reached his breaking point with Ms. Klitch and decided to terminate her employment with Octagon, but delayed advising Ms. Klitch and IPG of the decision pending completion of the data/information access and back-up process.]]*

Mr. de Picciotto meets with Ms. Plewes and Ms. Kennedy and announces that he has reached his breaking point with Ms. Klitch and has decided to terminate her employment. He also advises them that he is considering also terminating Ms. Gifaldi's employment. He then initiates a discussion about a transition plan for how client invoicing will be handled after Ms. Klitch's departure. Mr. de Picciotto asks Ms. Plewes and Ms. Kennedy whether Ms. Gifaldi is

loyal to Ms. Klitch. Ms. Kennedy believes she is loyal to Ms. Klitch and recommends she be terminated as well, because of both loyalty and performance issues.

Ms. Plewes does not think Ms. Gifaldi is loyal to Ms. Klitch and she wants to be sure that they understand what system is in place so they could operate without Ms. Klitch and Ms. Gifaldi. Mr. de Picciotto directs Ms. Plewes to determine whether they can function without Ms. Gifaldi as well as Ms. Klitch. He specifically asks her to investigate the current invoicing system, and find where the invoicing records are kept and who has access to them, in part by reaching out to Ms. Gifaldi. Previously, Ms. Klitch had denied Ms. Plewes access to some of the information. Ms. Plewes expresses her concern that Ms. Klitch is vindictive and will retaliate. However, although Ms. Plewes is reluctant to take over the invoicing function again, Mr. de Picciotto feels that Ms. Plewes is the logical choice to assume responsibility for the invoicing function after Ms. Klitch leaves.

Mr. de Picciotto also asks Ms. Kennedy to back up all of Ms. Klitch and Ms. Gifaldi's files and e-mails. Mr. de Picciotto defers actually ending Ms. Klitch's employment, or advising her of his termination decision, at that time, because the data in Ms. Klitch's possession needs to be backed up externally and preserved, and access has to be granted to other individuals. After Ms. Klitch's termination, Mr. de Picciotto intends to return to a decision about Ms. Gifaldi's employment based in part on who else had access to the invoicing system to ensure retention of documentation upon the departure of Ms. Klitch and possibly Ms. Gifaldi.

August 10, 2009 Ms. Gifaldi tells Mr. Gaddale to process the track and field invoices because she does not have time.

August 12, 2009 Ms. Gifaldi still has not completed the baseball team corporate invoices that were due at the middle of the baseball season. At this time, the baseball season is already two-thirds complete. The missing baseball invoices have the same impact on financial reporting to IPG as the missing basketball invoices in April. The baseball invoices amount to more than \$500,000.

Based on an inquiry from an agent about the invoices for his baseball clients for the first half of the baseball season, which he hasn't yet received for review, Ms. Morton investigates the situation and learns that the baseball division initially sent the list of baseball clients to be invoiced for the first half of the baseball season to Ms. Gifaldi on June 25, 2009. Ms. Gifaldi sent the completed invoices back to the baseball division for review on July 22, 2009. On July 23, 2009, after making required changes, the baseball division returned the invoices to Ms. Gifaldi. Since then, the baseball division has received nothing further from Ms. Gifaldi regarding the invoices. After learning about this sequence, Ms. Morton then speaks to Ms. Klitch and Ms. Gifaldi about the missing invoices.

Ms. Plewes reports her progress to Mr. de Picciotto and Ms. Kennedy on her investigation into the current invoicing and escrow process. She indicates that some files on the M drive were accessible to Ms. Plewes, Mr. Schneller and Ms. King, including the Client Invoicing Master, which was current through the day before. However, she does not feel comfortable with the availability of information relating to the location of invoices,

responsibility for generating the invoices, and scheduling of future payments. Ms. Plewes recommends that she meet with Ms. Gifaldi to find out if she was familiar with the entire process and could access everything. She asked Mr. de Picciotto to let her know if he wanted her to dig deeper, which would require involving others. Mr. de Picciotto agrees that she should involve more people and call Ms. Gifaldi to get a more complete picture.

By August 18, 2009 *[[Mr. de Picciotto's testimony about the timing of his decision to actually terminate Ms. Gifaldi's employment is supported and corroborated by the following evidence. Ms. Morton's credible testimony that after she learned of Ms. Gifaldi's second significant failure to send out invoicing for clients in a major sport on August 12, 2009, she subsequently told Mr. de Picciotto about the omission. Ms. Plewes' credible testimony that: a) she initially objected to Ms. Gifaldi's termination at the August 7, 2009 meeting because she would have to assume the responsibilities of Ms. Gifaldi and needed time to be sure she understood the current invoicing system in order to operate without Ms. Klitch and Ms. Gifaldi; b) after reporting to Mr. de Picciotto on August 12, 2009 that she found the files incomplete (CX 65), he instructed her to continue with her efforts and involve more people; and c) a couple of days later, after additional review of the client invoice mailbox and associated documents, she told Mr. Picciotto "that she felt comfortable going forward without Ms. Gifaldi"; and Mr. de Picciotto replied "Okay, then, we're ready." Ms. Klitch's objection on August 18, 2009 to Mr. de Picciotto's instruction to IT to provide full access to the M drive to Ms. Plewes. And, Ms. Klitch's August 25, 2009 e-mail complaint about Ms. Plewes' re-entry into the invoicing process by contacting Ms. Gifaldi directly.]]*

Mr. de Picciotto learns from Ms. Morton about Mr. Gifaldi's second major invoicing deficiency – her failure to send out the mid-July baseball client invoices, which will cause Octagon to miss its financial numbers by a substantial amount.

Ms. Plewes advises Mr. de Picciotto that after looking at the client invoice mailbox and reviewing other documents, she believes they have sufficient access and feels comfortable going forward without Ms. Gifaldi. In light of the recently disclosed invoicing failure, which represents the second time Ms. Gifaldi has failed to issue a significant amount of invoices, and since renewed access for Ms. Plewes to the invoicing system will help ensure Octagon does not suffer from a loss of documentation, Mr. de Picciotto decides it's time for a complete change with the termination of Ms. Gifaldi's employment, along with Ms. Klitch's departure. Mr. de Picciotto responds, "Okay, then we're ready." He tells her to be prepared to take over the invoicing process again.

August 18, 2009 Mr. de Picciotto asks Mr. Atiq Abdullah, head of Octagon's IT Department, to provide access to the M drive for him and Ms. Plewes. He also asks Ms. Klitch whether anyone other than her and Ms. Gifaldi had overall access to all the files in the client invoicing/escrow/collections, which was where he had asked Mr. Abdullah to add access for himself and Ms. Plewes.

Due to corporate separateness concerns, Ms. Klitch reacts to the change in access and suggests that Ms. Morton would be a more appropriate senior management person than Ms. Plewes to have full access to the invoice reports and files in order to preserve the legal distinction between OFS and Octagon, and not spread confidential client financial information.

While understanding her concern about the separation between Octagon and OFS, and agreeing to consider her suggestion going forward, Mr. de Picciotto responds that Octagon needs multiple layers of access and back-up, and that he will keep Ms. Plewes as McLean senior back-up, as she will only use her access in an Octagon role.

August 19, 2009 Mr. Abdullah provides Mr. de Picciotto and Ms. Plewes with access to the M drive.

August 24, 2009 Ms. Plewes again contacts Ms. Gifaldi about the invoicing process.

Ms. Klitch expresses to Ms. Gifaldi in a phone conversation that she is struggling with how to resolve some issues with the client escrow account because she is not getting the support she needs from Octagon. Ms. Klitch tells Ms. Gifaldi she is scared for her bar license.

August 25, 2009 At 11:00 a.m., Ms. Klitch sends a formal e-mail complaint to Ms. Kennedy and Mr. Tom Dowling, IPG's Chief Risk Officer, setting out numerous concerns related to her efforts in implementing proper controls in the client invoicing procedure and escrow account.

In particular, Ms. Klitch believed Octagon needed to bring someone in from CMG/IPG, and wanted to run the practices by them, so they could “approve of them, suggest helpful modifications, or require more controls. These practices included taking client fees from marketing payments without documentation of rep/fee agreements; paying corporate (non-marketing) receivables off/down with marketing funds without client authorization where the representation agreement does not permit or address this practice; paying certain consultant fees through the client escrow account; processing tax refunds/OFS payments through the account with/without client authorization; permitting client managers to back date invoices; and, implementation of more strict payment/check authorization procedures.

After noting that Octagon was a fiduciary of its clients' money, Ms. Klitch welcomed assistance from the experts at CMG/IPG to guide them in doing “the right thing in each situation from a legal, SOX, and accounting perspective.” So far, they had been trying to implement certain controls since June 1 when they took over the payment application process, and she was aware that many controls still needed to be implemented, but ongoing internal resistance had slowed their progress.

Ms. Klitch expressed her shock at recently learning that Mr. de Picciotto had granted Ms. Plewes from OFS access to the client invoicing/escrow database; contrary to one of Ms. Klitch's major goals of ensuring a separation of Octagon and OFS, which was a distinct, highly regulated investment and financial services entity. Ms. Klitch was further concerned about Ms. Plewes' renewed involvement with the invoicing process, which included contacting Ms. Gifaldi directly

the day before, because Ms. Plewes had been the prior supervisor of the invoicing/escrow processes that had some lax controls which in part afforded OFS employees access to significant amounts of confidential non-OFS client financial information, lacked control over outgoing invoices and deposits of invoiced money, permitted funds to remain undistributed for over two years, and allowed Octagon to take fees without checking the fee agreement and/or proper documentations in place.

Ms. Klitch made her suggestion to involve CMG/IPG in the escrow process with great trepidation as she had “been advised not to do so,” since CMG/IPG might want to take over the escrow process, which would result in harm to Octagon's business because CMG/IPG could not handle the complexity of the process.

Ms. Klitch also asserted it was necessary to add certain signers to the BB&T accounts to “fully implement our controls and disengage OFS from this process” because the signers at present were Mr. de Picciotto, and two OFS employees, Ms. Plewes and Mr. Schneller. However, Ms. Klitch was advised not to run the additional signers by senior CMG/IPG people or see if BB & T would provide signature cards to change them, which she understands does not comply with IPG policy. She was told that her supervisor did not want the account drawn to the attention of CMG/IPG. Ms. Klitch stated “I need advice in this regard and fear retaliation simply for asking.” In her opinion, the best course of action was to escalate her concerns to CMG/IPG so they could become involved quickly, which was why she copied Mr. Dowling on the e-mail, even though she was not sure he was the proper person to address her concerns.

At 11:40 a.m., Mr. Dowling responds to Ms. Klitch’s e-mail, copying Ms. Hoey, an IPG attorney, and Mr. Nick Camera, IPG’s General Counsel, and informs Ms. Klitch that he is forwarding the e-mail to legal and Ms. Hoey. Mr. Dowling states that he wants to discuss the e-mail with her, and indicates he is available for a phone call later in the afternoon.

Mr. Dowling tells Ms. Kennedy over the phone that IPG will handle the complaint, and she should not reply. He indicates that Ms. Klitch’s termination has to be postponed.

[[According to Mr. de Picciotto, when Ms. Kennedy briefly notified him about Ms. Klitch's e-mail, she only indicated that the correspondence had been sent to IPG and she wanted him to know. He didn't recall whether he asked her what the e-mail was about. Ms. Kennedy recalled that during their "couple of minutes" phone conversation, although Mr. de Picciotto did not ask her what was in Ms. Klitch's e-mail, and she did not send it to him, she advised him that Ms. Klitch had sent a complaint to IPG regarding invoicing and the escrow account. She also advised that they would have to hold off on the termination of Ms. Klitch. While some disagreement exists between Mr. de Picciotto and Ms. Kennedy about the extent of the conversation, I will rely on Ms. Kennedy's apparently better recollection. Further, based on their consensus, I also find that Ms. Kennedy did not inform Mr. de Picciotto about the actual details in Ms. Klitch's lengthy e-mail.]]

Believing that Mr. de Picciotto should be informed that Ms. Klitch sent an e-mail to IPG, Ms. Kennedy informs Mr. de Picciotto in a short phone call that they have received an e-mail complaint from Ms. Klitch concerning the client invoicing and escrow account and that IPG will handle an investigation. She tells him they will have to hold off on terminating Ms. Klitch, but

does not discuss the substance of the complaint. Mr. de Picciotto is annoyed, because Ms. Klitch didn't approach him or Ms. Morton about her problems and instead brought in IPG. Ms. Klitch's e-mail also did not make Octagon look good in front of IPG.

Mr. de Picciotto calls Ms. Hoey who tells him that IPG is handling an investigation into the complaint. She refuses to tell him the contents of Ms. Klitch's e-mail. In response to his inquiry, Ms. Hoey also tells him to put any planned terminations on hold until the investigation has been completed.

Ms. Kennedy tells Ms. Plewes that Ms. Klitch sent a complaint to IPG, but does not discuss the substance of the complaint. Ms. Plewes does not speak to anyone else about the complaint.

At some point, Ms. Klitch calls Ms. Gifaldi and informs her that she has complained to IPG about her concern that Octagon had a fiduciary duty to protect its clients' interests.

August 27, 2009 Mr. Dowling calls Ms. Morton about the Klitch e-mail and Ms. Hoey forwards the Klitch e-mail to Ms. Morton.

August 28, 2009 Ms. Klitch has a 10-15 minute phone conversation with Mr. Dowling and Ms. Hoey regarding the substance of her complaint.

Without any discussion with Mr. de Picciotto, in the evening, Ms. Morton e-mails Ms. Hoey her response to the Klitch e-mail. Ms. Morton explains the overall function of client accounting and the client escrow fund to make sure Ms. Hoey and Mr. Dowling understand that the invoicing and escrow issues raised by Ms. Klitch are not reflected on Octagon's financial statements. She individually addresses the issues raised by Ms. Klitch concerning the current practices. First, Ms. Morton notes that on "rare occasions" a client will refuse to sign a written contract. As a result, if Finance could not verify the existence of a written contract, Octagon would place the fee in a "deferred revenue for three months." If during that time the client did not object, the fee would then be recorded as revenue. However, at the direction of CMG, such fees are now immediately recognized as revenue. Second, Ms. Morton was unaware of any actual client problem with paying off receivables. Third, "all" consulting fees were paid through Octagon and not escrow. Fourth, invoices were not back dated. Fifth, Ms. Morton disagreed with limiting access to account information, especially to client managers and senior Octagon management. Sixth, Ms. Morton was not aware of any problems with payment procedures and was concerned that additional procedures might interfere with prompt payments to clients, which might cause clients to seek payment directly from third parties, thereby complicating the collection of fees by Octagon.

Ms. Morton believes Ms. Klitch, who does not have a financial background, should have sought advice from those who do, but she never attempted to resolve her concerns internally. Had she done so, her concerns could have been resolved. There is no reason why Mr. de Picciotto or Ms. Plewes should not have access to everything in the system. Ms. Morton describes Ms. Klitch's need for total control as excessive and inefficient. Ms. Morton trusts that Ms. Plewes has proper controls in place to ensure the proper amount of client confidentiality is protected; she has been doing so for 20 years. Ms. Morton is also shocked by the Klitch e-mail,

because had Ms. Klitch reached out internally, she would have received answers that would have calmed her concerns. Ms. Klitch's implementation of new procedures had received some resistance, but Ms. Klitch overreacted to the response.

Late August 2009 Ms. Hoey asks Ms. Kennedy about Ms. Klitch's background and position. Ms. Kennedy also forwards a copy of Ms. Klitch's employment agreement to Ms. Hoey. Ms. Gifaldi does not come up in Ms. Kennedy's communications with Ms. Hoey, and Ms. Kennedy does not forward Ms. Gifaldi's employment agreement to her.

Late August or Early September 2009 Ms. Gifaldi tells Ms. Cerullo that she is 200 to 300 contracts behind in the contract review process and she hopes that Ms. Klitch does not find out, because she did not want her to know how overwhelmed they are. Ms. Gifaldi is overwhelmed by her work.

September 12, 2009 Mr. de Picciotto thanks Ms. Gifaldi for incorporating his requested changes and making very helpful improvements on a report. He also notes that while it took longer than he expected for her to make the changes he considers the changes worthwhile.

September 16, 2009 Mr. Dowling refers the Klitch matter to the Deloitte investigators. Deloitte is chosen for its independence from IPG and because it has provided investigatory services to IPG in the past. Deloitte is tasked with gaining an understanding of the controls and processes involving the management of Octagon's escrow accounts.

Mr. Dowling indicates to Ms. Kennedy that Mr. de Picciotto is planning to update her today on the plan for next week. Mr. Dowling updates Ms. Kennedy that the Deloitte auditors will be coming in. Mr. de Picciotto does not contact Ms. Kennedy.

Between September 16 and September 23, 2009 Ms. Kennedy informs Ms. Gifaldi that someone will be interviewing her about the invoicing and escrow processes. Ms. Morton has a conversation with Mr. de Picciotto about Deloitte coming down to Virginia to look at the escrow account and surrounding processes.

September 21, 2009 Deloitte is authorized to begin working in connection with the Klitch matter, including conducting walk-throughs to understand the use of Octagon's escrow accounts and interviewing relevant personnel with prior approval from Mr. Dowling.

September 22, 2009 Deloitte investigators interview Ms. Morton and Ms. Plewes.

Ms. Kennedy learns Ms. Gifaldi will be terminated when Mr. de Picciotto calls her from the office and informs her that he has decided to eliminate the positions of Ms. Klitch and Ms. Gifaldi due to economic, performance, and work location reasons. Mr. de Picciotto asks Ms. Kennedy to prepare for the terminations so they will be ready when the investigation is complete.

September 22 to October 22, 2009 Ms. Kennedy does not communicate with Mr. de Picciotto regarding either the investigation or the Klitch complaint during the investigation.

September 23, 2009 Ms. Gifaldi, who is working remotely from Florida, is interviewed by Deloitte investigators over the phone. She explains to the interviewers her concerns about the

discrepancies between what the escrow log shows Octagon has been taking as fees from clients, and what the contract spreadsheet indicates is the correct fee based on the underlying contract. She tells them about the promissory note issue and how the escrow account was handled before Ms. Klitch and she assumed the escrow duties.

The interviewers ask questions and Ms. Gifaldi responds to them. She believes that the discrepancies she identifies to the investigators speak for themselves. Ms. Gifaldi is familiar with Sarbanes-Oxley and aware that it applies to Octagon, although she does not know all of its nuances. She believes that the discrepancies relate to SOX, because certain controls are required under SOX. Ms. Gifaldi observes that whether SOX applies or not, taking a greater fee than contractually authorized is an issue that must be corrected.

Mr. Schneller, Ms. King, Ms. Cerullo and Ms. Wilson are also interviewed on September 23, 2009.

September 24, 2009 Deloitte investigators interview Mr. Gaddale, Ms. Sollinger, and Mr. Shin.

September 25, 2009 The Deloitte investigators prepare a list of eight “High-level Observations”. The observations include wire transfers being approved by Mr. Shin without a review to confirm the validity of the payment, and the invoicing and funds receipt processes being tracked on large Excel spreadsheets instead of an IT platform, which creates risk of inaccuracy or outdated information.

September 29, 2009 Ms. Hoey forwards Ms. Morton’s response to the Klitch e-mail to Mr. Harris Diamond, the head of CMG, which is Octagon’s reporting entity within IPG. Mr. Harris forwards it to Mr. Martin Franken, the CFO of CMG. Mr. Franken forwards the response to Mr. Frank Okunak, the CFO of Octagon Worldwide, and Mr. Okunak forwards it to Ms. Morton with question marks in the body of the e-mail.

Deloitte investigators brief Mr. Dowling on their observations following the initial round of interviews. Mr. Dowling instructs the Deloitte investigators to schedule an interview with Ms. Klitch.

October 6, 2009 Ms. Klitch does not want to process a tax refund check for a former OFS client through client escrow, because it does not relate to taking a fee or Octagon. This is the same reason she does not want OFS to have access to their intake log, because they need to preserve the distinction between OFS and Octagon.

October 9, 2009 Ms. Hoey forwards an e-mail to Mr. de Picciotto from the Deloitte investigators indicating there is no update because Ms. Klitch’s interview is not until the following week. She indicates that she is mistaken about the date of the meeting with Ms. Klitch. Mr. de Picciotto responds that he appreciates the update and asks whether Deloitte or Ms. Klitch is responsible for the spread-out schedule. Ms. Hoey forwards Mr. de Picciotto’s inquiry to the Deloitte investigator.

October 11, 2009 Mr. Rossen, the Deloitte investigator, e-mails Mr. de Picciotto to clarify the delay in scheduling Ms. Klitch's interview, which is currently scheduled for October 14, 2009. He indicates the meeting with Ms. Klitch is the last interview per the scope of work. Mr. de Picciotto responds that he would have expedited the process had there been a delay on his end.

October 14, 2009 Ms. Klitch is interviewed by Deloitte investigators in Boca.

October 16, 2009 Deloitte investigators brief Mr. Dowling, Ms. Hoey and Mr. Camera at IPG's offices in New York on their meeting with Ms. Klitch. The Deloitte investigators are instructed to schedule an interview with Mr. de Picciotto.

Ms. Hoey informs Mr. de Picciotto that even though it will make him "crazy", scheduling an interview with the Deloitte investigators is the right thing to do.

Referring to the timing of his interview, Mr. de Picciotto responds that scheduling the interview will not make him crazier than he already is. Later, Mr. de Picciotto expresses his frustration to Ms. Hoey that he wasn't interviewed when Deloitte came to Octagon the first time.

October 20, 2009 Mr. de Picciotto is interviewed by Deloitte investigators. The interviewers ask about invoicing, the escrow account, control environment, contracts, storage, retention and filing, data registration, and access to processes. Based on these questions, Mr. de Picciotto develops some idea of the topics in Ms. Klitch's August 25, 2009 e-mail but still does not know the specific allegations.

October 21 and 22, 2009 Because Mr. Dowling prefers to receive a summary of Deloitte's investigation, instead of a final report, Mr. Lombardo submits a summary of work Deloitte performed via e-mail. Deloitte investigators brief Mr. Dowling, Ms. Hoey, and Mr. Camera over the phone on the interview with Mr. de Picciotto. During the conversation, IPG management concludes there is no specific evidence of wrongdoing and that Deloitte's investigation clears IPG of the wrongdoing alleged in Ms. Klitch's complaint. Deloitte recommends that IPG management review the nature and source of funds sitting in a second escrow account. This review will be conducted by Mr. Franken's group at CMG. Mr. Franken's group will also review the adequacy of controls in the management of the escrow accounts and client invoicing.

Mr. Shin informs Mr. de Picciotto that the Deloitte investigation has been completed and there was no finding of wrongdoing. Ms. Hoey also informs Mr. de Picciotto that he may now do whatever he believes is necessary from a performance reorganization perspective without any IPG input.

October 22 to 26, 2009 Mr. de Picciotto travels to Europe and Russia.

About October 25, 2009 Ms. Kennedy contacts Ms. Hoey, and advises that Ms. Gifaldi is going to be terminated. This is the first time Ms. Hoey is aware of plans to terminate Ms. Gifaldi; she had not been a "blip on the radar at IPG" prior to her termination.

October 26, 2009 Having returned from his trip, at 2:53 p.m., Mr. de Picciotto sends Ms. Kennedy an e-mail informing her that he is ready to proceed with the terminations of Ms. Klitch and Ms. Gifaldi, which he terms "position eliminations." He recounts the performance-related issues between the staff and "Jenny/Vanessa" that caused the hiring of Mr. Shin and changing Ms. Klitch's role from General Counsel to SVP Internal Ops and CLO, a legal title with few legal responsibilities. Mr. de Picciotto notes both of Ms. Klitch's "positions/titles/roles" had not existed previously and were created to "find an ongoing presence" with Ms. Klitch and relocation of her working base from McLean to West Palm. The present elimination of the positions had nothing to do with Ms. Klitch raising questions to IPG, "as everything for us is transparent and we have always worked to be the best company we can be." Octagon was "working closely with IPG and will continue to do so on any recommendations they may have as a result of the audit process, etc."

Ms. Klitch is informed over the phone by Ms. Kennedy and Mr. de Picciotto that her position is being eliminated, because "it wasn't working out." When a surprised Ms. Klitch asks why, Mr. de Picciotto and Ms. Kennedy decline to provide any further detail. At the time, Ms. Klitch is working out of her home in West Palm Beach, Florida.

Ms. Gifaldi is terminated over the phone by Mr. de Picciotto and Ms. Kennedy in a brief call lasting a couple of minutes. Mr. de Picciotto informs a surprised and angry Ms. Gifaldi that her position is being eliminated and thanks her for her service. It is the first time Ms. Gifaldi learns that she is being fired. Mr. de Picciotto does not explain why her position is being eliminated. At the time, Ms. Gifaldi is working in Fort Lauderdale, Florida.

Instead of providing Ms. Klitch and Ms. Gifaldi with the four week advance notice of termination explicitly required by their employment contracts, Mr. de Picciotto decides to give them each four weeks' pay, because he is eager for them to leave. He believes that he is honoring their employment contracts by paying for the four weeks of the notice period.

After October 26, 2009 Ms. Morton learns of Ms. Gifaldi and Ms. Klitch's terminations.

[[Ms. Gifaldi contends that Mr. de Picciotto's assertion that he did not have knowledge of the actual substance of Ms. Klitch's e-mail complaint until after the terminations must be incorrect considering his involvement in the termination decisions and his role as Octagon's president. However, no documentary evidence indicates that Mr. de Picciotto received a copy of the complaint prior to the terminations. Further, as previously discussed, IPG and Deloitte specifically did not advise Mr. de Picciotto of the contents of the August 25, 2009 e-mail. Mr. de Picciotto's assertion is also supported by the credible testimony of both Ms. Kennedy and Ms. Morton that they did not forward the complaint to him or discuss the complaint with him.

Consequently, I find that Mr. de Picciotto was not aware of the substance of Ms. Klitch's complaint until after the terminations took place.]]

Mr. de Picciotto becomes aware of the contents and specifics of Ms. Klitch's August 25, 2009 e-mail.

October 26, 2009 to May 17, 2010 Ms. Gifaldi is unemployed. She makes monthly Cobra payments between \$160 and \$180. She borrows \$10,000 to live on and takes between \$5,000 and \$7,000 out of her 401K.

October 28, 2009 to December 3, 2009 Ms. Plewes discovers Ms. Gifaldi is responsible for numerous additional errors uncovered after her termination including: failing to reconcile the escrow account since she took responsibility for it in June, issuing an invoice in the wrong currency, issuing an invoice for an incorrect fee amount, having a large contract backlog, and failing to enter, or entering incorrectly into the invoicing system, contracts involving millions of dollars.

Early November 2009 Mr. Dowling meets with Mr. Okunak and Mr. Franken to discuss the recommendations from the Deloitte investigation. Mr. Franken is responsible for handling the next steps.

November 26, 2009 Ms. Gifaldi begins to receive \$400 a week in unemployment benefits, which continues for the duration of her unemployment.

Early December 2009 Mr. Dowling informs Ms. Hoey that CMG/Octagon is diligently handling the next steps, and no further action is needed from IPG.

2010

January 2010 Under her contract, had Ms. Gifaldi remained an Octagon employee her salary would have become \$99,000.

May 17, 2010 Ms. Gifaldi leaves her family and friends in Fort Lauderdale to take a new job as Assistant Vice-President, Risk Management for American Home Mortgage Servicing in Coppell, Texas, located outside of Dallas. Her salary is \$81,000 with a 15 percent bonus.

Sometime between May 2010 and July 2011 Ms. Gifaldi is promoted to Vice-President, Origination Compliance. Her salary is \$98,000 with a 20 or 25 percent bonus.

Jurisdiction

As previously noted, 8 U.S.C. § 1514A(a) prohibits a publicly traded company, or a company required to file with the SEC, “including any subsidiary or affiliate whose financial information is included in the consolidated financial statement of such company . . . or any officer, employee, contractor, subcontractor, or agent of such company”²⁸ from discriminating against an employee for engaging in a SOX protected activity. As a result, a complainant may establish jurisdiction to invoke the SOX employee protection provisions if she is an employee of a subsidiary of a publicly traded company, and the subsidiary’s financial information is included in the company’s financial statements to the SEC.

Ms. Gifaldi was employed as a business and database manager/director of client invoicing for Octagon’s newly created Operations Department. Ms. Gifaldi’s work was assigned by her Octagon supervisors, and the authority for her hiring and termination resided with Mr. de Picciotto, Octagon’s president. Octagon is wholly owned by Advantage International Holdings, Inc., which in turn is wholly owned by Interpublic Group of Companies, Inc., a publicly traded company on the New York Stock Exchange. In other words, Octagon is an indirect subsidiary of IPG, a publicly traded company, through AIHI. Financial information reported by Octagon to IPG is included in IPG’s financial statements. As a wholly-owned subsidiary of a company that is a wholly-owned subsidiary of IPG, Octagon falls under the “subsidiary” category in 18 U.S.C. § 1514A(a), and is subject to SOX requirements. Accordingly, I find that as an employee of Octagon, Ms. Gifaldi has established jurisdiction under SOX.

Case in Chief

According to 18 U.S.C. § 1514A(b)(2)(B), the applicable rules and procedures to be applied during the adjudication of a SOX whistleblower complaint are governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”).

Under 49 U.S.C. § 42121(b), as applied by 18 U.S.C. § 1514A and 29 C.F.R. § 1980.109, to establish that a respondent has committed a violation of the employee protection provisions of SOX, a complainant must prove by a preponderance of the evidence that an activity protected under SOX was a contributing factor to the unfavorable personnel action alleged in the complaint. Based on these principles, to establish a violation of SOX, a complainant must prove three elements: 1) she engaged in a protected activity; 2) she was subjected to an unfavorable personnel action; and 3) her protected activity was a contributing factor in the unfavorable personnel action. If a complainant establishes that her protected activity was a contributing factor in the adverse personnel action, the respondent can avoid liability by proving by clear and

²⁸This quoted provision regarding a subsidiary was added to SOX by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, which was enacted July 21, 2010, several months after Ms. Gifaldi filed her SOX whistleblower complaint in January 2010. However, in *Johnson v. Siemens Technologies, Inc.*, ARB No. 08-032 (Mar. 31, 2011), the Administrative Review Board (“ARB”) determined the subsidiary amendment applied to all cases currently pending before the Secretary since the new law “merely clarified” that subsidiaries and affiliates are subject to the SOX employee protection provisions.

convincing evidence that it would have taken the adverse action in the absence of protected activity.

In Ms. Gifaldi's case, the termination of her employment on October 26, 2009 is clearly an adverse action that satisfies the second requisite element. Accordingly, I now turn to consideration of whether: 1) she engaged in an activity protected under SOX, and 2) such activity was a contributing factor in her employment termination.

Issue # 1 – Protected Activity

Adjudication Principles

The first requisite element to establish unlawful retaliation against a whistleblower is the existence of a protected activity. Under 18 U.S.C. § 1514A(a)(1), the specific activity protected involves an employee providing information, or causing information to be provided, or otherwise assisting in an investigation, regarding any conduct the employee reasonably believes constitutes violations of section 1341, 1343, 1344, or 1348 of the Act, any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders, when the information or assistance is provided to, or the investigation is conducted by, a federal regulatory or law enforcement agency, any member or committee of Congress, or a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

The Secretary, U.S. Department of Labor, ("Secretary") has broadly defined protected activity as a report of an act that the complainant reasonably believes is a violation of the subject statute. Although the allegation need not be ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations." *Minard v. Nerco Delamar Co.*, 92 SWD 1 (Sec'y Jan. 25, 1995), slip op. at 8. Under SOX, 18 U.S.C. § 1514A(a)(1), an employee engages in protected activity when she provides information regarding corporate conduct which the employee believes "constitutes a violation of" at least one of six specific categories of criminal fraud or security violations set out in the Act. The employee's belief must be subjectively and objectively reasonable. Although an employee is not required to identify the specific criminal provision, SEC rule or regulation, or applicable provision of federal law, her protected communication must nevertheless relate to one. The six categories specified by 18 U.S.C. § 1514A(a)(1) of which violation may be reported by an employee are:

1. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1341, Frauds²⁹ and Swindles [mail fraud]. This provision establishes that use of the Post Service or a private or commercial interstate carrier as a means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime.

²⁹Fraud is defined as "false representation of a matter of fact . . . which is intended to deceive another so that he will act upon it to his legal injury." BLACK'S LAW DICTIONARY 788 (4th ed. 1968).

2. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1343, Fraud by Wire, Radio, or Television [wire fraud]. This provision establishes that use of wire, radio, or television communication as means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime.

3. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1344, Bank Fraud [bank fraud]. This provision establishes that executing a scheme or artifice to defraud a financial institution is a felony crime.

4. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1348, Securities and Commodities Fraud [securities fraud].³⁰ This provision establishes that executing a scheme or artifice a) to defraud any person in connection with defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act or that is required to file reports under Section 15(d) of the Securities Exchange Act; or b) to obtain by means of false or fraudulent pretenses any money or property in connection with the purchase of such security identified in a) above is a felony crime.

5. Any rule or regulation of the Securities Exchange Commission.

6. Any provision of federal law relating to fraud against shareholders.

For a complainant to establish she engaged in SOX-protected activity that involves providing information to her employer, the complainant need only show that she “reasonably believes” the conduct complained of constitutes a violation of the laws listed at Section 1514. 18 U.S.C. § 1514A(a)(1). While the Act does not define “reasonable belief,” the legislative history reveals that the reasonableness standard adopted by Congress was “intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts.” (see generally *Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993). *Sylvester v. Parexel Int’l*, at 14, ARB No. 07-123, ALJ Nos. 2007-SOX-39, 2007-SOX-42 (ARB May 25, 2011), (citing S. Rep. 107-146 at 19 (May 6, 2002)).

The ARB has interpreted the concept of “reasonable belief” to require both that a complainant have a subjective belief that the complained-of conduct represents a violation of relevant law, and also that the belief be objectively reasonable. To establish the subjective belief component of the “reasonable belief” standard, a complainant must show he or she actually believed the conduct complained of constituted a violation of relevant law. The objective component “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experiences as the aggrieved employee,” a standard similar to the objective reasonableness standard applied in Title VII retaliation claims. *Sylvester*, slip op. at 14-15, citing *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009).

³⁰This criminal provision was added by Section 807 of the Sarbanes-Oxley Act (2002).

In *Sylvester*, the ARB provided further elaboration concerning the bounds of a SOX protected activity. First, to satisfy the reasonable belief requirement, a complainant need not actually convey the reasonableness of his or her beliefs to management. *Sylvester*, slip op. at 15. Second, SOX does not require a complaint to describe an actual violation of a relevant law to constitute protected activity. “An employee’s whistleblower communication is protected where based on a reasonable, but mistaken, belief that the employer’s conduct constitutes a violation of one of the six enumerated categories under Section 806.” *Id.* slip op. at 16. Further, a whistleblower complaint describing a violation about to be committed, but that has not been committed yet, is protected. An “employee need not wait until a law has actually been broken to safely register his or her concern.” *Id.* Third, to prevail on a SOX whistleblower claim, a complainant is not required to allege shareholder fraud, nor must a complainant establish the elements of criminal fraud. *Id.* slip op. at 19-21. Fourth, there is no materiality requirement for the information being provided to the employer that a complainant alleges is a protected activity. *Sylvester*, slip op. at 22. However, the triviality of a complainant’s concerns is relevant to whether the complainant actually engaged in protected activity under Section 806. Fifth, “a reasonable belief about a violation of ‘any rule or regulation of the Securities and Exchange Commission’ could even encompass a situation in which the violation, if committed, is completely devoid of any type of fraud.” *Id.*, slip op. at 21. Sixth, reversing its prior holding in *Platone v. FLYi, Inc.*, ARB No. 04-154, ALJ No. 2003-SOX-27 (Sept. 29, 2006), the current ARB rejected the “definitive and specific” standard which required that a complainant’s alleged protected activity definitively and specifically relate to one of the laws listed under § 1514A(a)(1). Instead, moving away from the heightened “definitive and specific” evidentiary standard, the ARB held that the proper, present standard is whether a complainant has reported conduct that she reasonably believes *relates* to one of the violations listed in Section 806. *Id.*, slip op. 17-19.³¹

Finally, based on the particular facts in this case, and as raised as an issue by complainant's counsel, another type of protected activity may be available to Ms. Gifaldi. Specifically, the Supreme Court in *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011) applied a derivative protected activity theory to provide discrimination protection to the plaintiff who fell within the "zones of interests" intended to be protected by the anti-discrimination statutory provision based on the protected activity of another employee. In *Thompson*, on the basis that a reasonable worker might be dissuaded from engaging in a protected activity if she knew that her fiancé would be fired, the court held the fiancé's termination represented impermissible discrimination in response to his fiancée's protected activity. 131 S. Ct. at 868-870.³² That is, a plaintiff who “falls within the ‘zones of interests’

³¹I also note that in *Robinson v. Morgan–Stanley*, ARB Case No. 07–070, ALJ No. 2005 SOX 44, slip op. at 13-14 (Jan. 10, 2010), the ARB observed that SOX “does not indicate that an employee's report or complaint about a protected violation must involve actions outside the complainant's assigned duties.”

³²The court applied the adverse action standard in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) (employer’s actions are “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination”). The ARB recently expanded the definition of adverse action established in *Burlington Northern* to “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-5, at 17.

sought to be protected by the statutory provision” can prevail on a retaliation claim without engaging in protected activity if the employer retaliates against another employee for engaging in protected activity by taking an adverse action against the plaintiff. Recognizing the difficulties in establishing the parameters of the requisite relationship between the person engaged in the protected activity and the plaintiff that would lead to the conclusion that the adverse action against the plaintiff represented deterrent retaliation to the employee engaged in the protected activity, the court only provided examples of the two possible extremes: a) the termination of a close family member would almost always meet the standard; whereas b) a mild reprisal of a mere acquaintance would almost never satisfy the standard. *Id.* at 868.

With these principles in mind, I will first address whether Ms. Gifaldi herself engaged in a SOX protected activity which has three components. First, the report or action must relate to a purported violation of a specific category under the Act, or SEC rule or regulation, or federal law relating to fraud against shareholders. Second, the complainant’s belief about the purported violation must be subjectively and objectively reasonable. Third, the complainant must communicate her concern to her supervisor (or other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a federal regulatory or law enforcement agency, or a member or committee of Congress.

Similarly, regarding a derivative protected activity, I apply the same three components to determine whether Ms. Klitch engaged in a protected activity, and then decide whether Ms. Gifaldi’s relationship with Ms. Klitch places her within the zones of interests intended to be protected under SOX.

Protected Activities – Ms. Gifaldi

An analysis of Ms. Gifaldi’s protected activities in terms of relationship to SOX, subjective/objective reasonableness, and communication is facilitated by considering specific time periods during her employment with Octagon.

Fall 2008

In the fall of 2008, after joining Octagon as a database manager, in addition to contacts with Ms. Klitch, Ms. Gifaldi had generalized discussions with Ms. Morton and the head of the tennis division and explained how in an effort to prepare for centralized invoicing she was developing a spreadsheet with 15 to 20 additional data points to better manually track invoice information and establish reasonable controls. She also had some “one-off” conversations with Ms. Plewes about fixing the invoicing system. While these conversations relate to invoicing, which later becomes a subject of greater concern to Ms. Gifaldi, the evidentiary record is insufficient to establish that at the time of these conversations Ms. Gifaldi had a subjective and objective belief that the Octagon invoicing process she walked into represented a SOX violation. Consequently, Ms. Gifaldi did not engage in protected activity at this time.

January 2009

Beginning in January 2009, after assuming responsibility for centralized invoicing and developing comprehensive spreadsheets to track client invoicing and invoice payments, Ms. Gifaldi began the arduous task of reviewing thousands of the company's contracts from multiple divisions to ensure corporate invoicing was accurate and complete. During this process, by comparing the contracts with the invoice records maintained by the different divisions and then matching the invoices with incoming funds, Ms. Gifaldi discovered numerous instances, about 50, of incorrect, or missing, invoice billing that she believes were due to inadequate invoicing controls. In addition, some Octagon clients were still owed money from a sponsor because either the requisite invoice had not gone out or a payment had not been received. Although the sponsor was responsible for the non-payment, Ms. Gifaldi concluded most of the affected clients were unaware of the issue. Due to the flawed invoicing system and lack of controls to ensure that all invoices were consistent the associated contracts, Ms. Gifaldi believed that Octagon had failed to act in the best interests of its clients, thereby breaching its financial fiduciary duty.

Based on Ms. Gifaldi's credible testimony, I find that she subjectively believed these multiple shortfalls between amounts due under the contracts and Octagon's failure to correctly invoice those payments raised a concern under SOX. In terms of the objective standard, although only about 50 discrepancies were discovered, the testimony of Ms. Morton, Octagon's CFO, establishes that corporate invoices were nevertheless considered receivables, or assets, that were reported in Octagon's financials, which eventually became part of IPG's financial statements. As a result, Ms. Gifaldi's concern about the invoicing errors was also objectively reasonable.

Finally, since Ms. Gifaldi reported her subjectively and objectively reasonable invoicing concern to her supervisor, Ms. Klitch, I find Ms. Gifaldi engaged in a SOX protected activity in January 2009 in regards to the discovered invoicing errors.

March 2009

Ms. Gifaldi and Ms. Klitch refused to issue invoices absent a valid, written contract. As demonstrated by the resulting e-mails, Ms. Klitch: a) was the person attempting to institute this change in regards to a few Octagon contracts that had been arranged through an oral agreement consummated with a handshake based on an invoicing control concern, and b) had trained Ms. Gifaldi to obtain fully executed contracts before she issued an invoice. While Ms. Gifaldi may have agreed with the requirement and enforced it, the evidentiary record does not sufficiently establish whether she presented the unwritten contract issue to Ms. Klitch as a SOX concern on her own accord, and whether she refused to issue an invoice without a written contract because she was directed to do so by Ms. Klitch, or due to her own SOX concerns. Consequently, Ms. Gifaldi has failed to establish that she engaged in a protected activity in March 2009 by refusing to issue invoices based on "handshake" contracts.

April 2009 to August 24, 2009

After Ms. Gifaldi and Ms. Klitch started managing the escrow accounts maintained by Octagon for its clients, Ms. Klitch identified two issues concerning client escrow accounts. First, in her legal opinion, an interpretative dispute existed on whether particular contracts provided for an industry, or higher, non-industry fee for Octagon to be obtained from the escrow account payments. Second, Ms. Klitch did not approve of Octagon's practice of using escrow account funds to pay down a client's outstanding promissory note balance. While Ms. Klitch told Ms. Gifaldi about these issues, Ms. Gifaldi's direct involvement with the escrow accounts was generally limited to performing "front end" processing, and the month-end reconciliation. And, in regards to the first escrow account issue, Ms. Gifaldi noted that in at least five to 10 instances out of 25 to 35 payments received on a weekly basis, Octagon was taking a different commission payment from funds received into the escrow account than the fee set out in the associated contract, which she reported to Ms. Klitch. Ms. Gifaldi was concerned about this practice and believed it should be fixed. She also shared Ms. Klitch's concern about the repayment of promissory notes directly from the escrow accounts. Based on these practices, Ms. Gifaldi had a concern that clients would leave Octagon if they become aware of its use of the escrow accounts and/or take legal action.

Again, Ms. Gifaldi's credible testimony demonstrates that she was actually concerned about the issues identified by Ms. Klitch relating to the client escrow accounts. However, in regards to the fee percentage issue, as reflected by her own uncertainty, this contractual interpretative dispute does not objectively appear to relate to a violation of SOX. On the other hand, the concern about Octagon's use of escrow accounts to recoup promissory note payments was objectively reasonable. Although Ms. Morton stated that the escrow accounts were not assets reported on its financial statement, as a subsidiary of IPG, Octagon nevertheless maintained the escrow accounts on behalf of its clients and any inappropriate use of such funds would objectively relate to SOX.

However, in terms of communication, Ms. Gifaldi testified that Ms. Klitch informed her about the fee percentage issue and Ms. Klitch identified the improper use of the escrow accounts. Consequently, the dynamics of their professional relationship did not involve Ms. Gifaldi presenting the escrow account issues to Ms. Klitch; instead, it was the other way around – Ms. Klitch raised the concerns, which Ms. Gifaldi then essentially shared. Under these circumstances, I find Ms. Gifaldi's interactions with Ms. Klitch regarding the escrow account issues did not satisfy the requisite communication element for a SOX protected activity.

August 25, 2009

Although Ms. Gifaldi did not claim that the August 25, 2009 e-mail was a protected activity, I again note that as previously discussed, Ms. Klitch only mentioned Ms. Gifaldi in the context of her complaint that Ms. Plewes was going behind her back and contacting Ms. Gifaldi directly. The remaining portion of the e-mail contained no SOX complaint specifically attributed to Ms. Gifaldi.

September 23, 2009

During a telephone interview with the Deloitte investigator, who was conducting an inquiry directed by IPG, Ms. Gifaldi engaged in two protected activities. First, as specifically protected under 18 U.S.C. § 1514A(a)(1), by willingly answering the Deloitte investigator's questions, Ms. Gifaldi "otherwise assisted" in a investigation conducted on behalf of the parent company of Octagon into allegations reasonably related to SOX violations. That is, her participation standing alone, was a protected activity.

Second, based on her credible testimony, I find that Ms. Gifaldi also presented her SOX concerns about: a) the invoicing irregularities issue to the Deloitte investigator when she explained her invoicing process and the discrepancies she discovered between her spreadsheet entries and actual receipts, and b) the use of escrow proceeds to repay promissory notes. Accordingly, these disclosures during her interview with the Deloitte investigator also represented protected activities.

Derivative Protected Activity

The determination of whether Ms. Gifaldi may also be able to invoke employment discrimination protection under SOX through the judicial theory of derivative protected activity requires an initial examination of Ms. Klitch's protected activities, followed by an evaluation of the nature and extent of the relationship between Ms. Klitch and Ms. Gifaldi.

Protected Activities – Ms. Klitch

In March 2009, due to invoices being issued without a written contract in place, Ms. Klitch expressed her concerns to Ms. Morton, Octagon's CFO, about insufficient invoicing internal controls and also engaged Mr. de Picciotto in a conversation about the practice. In April 2009, after discovering that client promissory notes were being repaid from client escrow accounts without apparent authority, Ms. Klitch presented this issue to Mr. de Picciotto. About the same time, she identified a problem associated with the appropriate commission fee to be collected based on whether the service was characterized as industry or non-industry. On August 25, 2009, after becoming concerned with Ms. Plewes' re-engagement in the invoice process, Ms. Klitch sent a detailed e-mail to Ms. Kennedy and Mr. Dowling, IPG's Chief Risk Officer, setting out multiple issues that subjectively and objectively involve SOX issues. And, on October 14, 2009, Ms. Klitch both assisted in an investigation conducted by Deloitte on behalf of Octagon's parent company, and again discussed the issues contained in her August 25, 2009 e-mail. I find all of these acts represent activities protected under SOX.

Relationship – Ms. Klitch and Ms. Gifaldi

Preliminarily, I note Ms. Gifaldi injury was certainly greater than a "mere reprisal" threshold mentioned in *Thompson*. As previously discussed, Ms. Gifaldi suffered the most severe type of adverse personnel action, discharge from employment.

Next, concerning the requisite relationship, the *Thompson* decision involved the anti-retaliation provisions of Title VII and was decided in part on specific statutory definitions not present in SOX. Further, as emphasized, and then relied upon, by the current ARB, SOX adjudication is procedurally and substantively distinct from the general Title VII statutory framework. See *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-5, at 19 (ARB Sept. 13, 2011) (“Section 806 contains very different language than the comparable Title VII provisions and a correspondingly different construction is required.”). Considering that dicta, absent any indication that the *Thompson* decision applies more broadly to other statutory employee protection provisions, I am reluctant to impose Title VII precedent from *Thompson* in this present SOX case due to the differences in the two laws.

Nevertheless, even if *Thompson* were determined to apply to SOX cases, I find the nature and extent of the relationship between Ms. Gifaldi and Ms. Klitch³³ to be significantly and sufficiently distinct in multiple features from the connection between the employee who engaged in protected activity and her discharged fiancé in *Thompson*. Other than their professional relationship both at Ocwen and Octagon, and apparent mutual respect, the evidentiary record contains no evidence that Ms. Klitch and Ms. Gifaldi were friends, interacted socially away from work, or had any emotional connection to each other. In other words, the nature of their relationship was strictly supervisor-subordinate. Likewise, other than their shared interest in the fiscal success of Octagon, Ms. Klitch and Ms. Gifaldi did not have any real or potential financial or monetary ties to each other outside of work. Finally, Ms. Klitch and Ms. Gifaldi did not share any real or potential familial connection. As a result, in stark contrast to the two individuals in *Thompson* who were engaged to be married, Ms. Klitch and Ms. Gifaldi clearly lacked the extensive personal, emotional, and monetary connections that would be sufficient to dissuade an employee in Ms. Klitch’s similar situation from engaging in SOX protected activity due to the possible adverse impact on Ms. Gifaldi. Accordingly, due to the lack of the requisite, highly connected interpersonal relationship with Ms. Klitch, I find Ms. Gifaldi did not fall within the *Thompson* zone of interest to be able to invoke the protection associated with the derivative protected activities of Ms. Klitch.

Summary

Several of Ms. Gifaldi’s concerns and actions between March and August 2009 were not SOX protected activities. Likewise, Ms. Gifaldi is not able to rely upon a derivative protected activity. However, in January 2009, Ms. Gifaldi engaged in protected activity by reporting her reasonable SOX concerns about inaccurate invoicing and the absence of sufficient invoicing controls to Ms. Klitch. And, on September 23, 2009, Ms. Gifaldi also engaged in two additional protected activities by assisting in an investigation ordered by the publically traded parent company of her employer into allegations with potential SOX violation implications, and reporting her reasonable SOX concerns about inaccurate invoicing and the absence of sufficient controls, as well as an escrow account issue to the Deloitte investigator.

³³While Mr. de Picciotto may have considered Ms. Klitch and Ms. Gifaldi to be a “packaged” deal in terms of starting over after their terminations, the required focus under *Thompson* is the characteristics of the actual relationship between Ms. Klitch and Ms. Gifaldi.

Issue # 2 – Contributing Factor

Since Ms. Gifaldi's employment was terminated by Octagon on October 26, 2009 and she has established that she in engaged in protected activities in January 2009 and on September 23, 2009, I turn to the principal issue in this case – contributing factor. To establish employment discrimination under SOX, Ms. Gifaldi must prove by a preponderance of the evidence that a protected activity was a contributing factor in Octagon's termination of her employment. Specifically, she must prove that either her January 2009 communication to Ms. Klitch regarding her invoicing concerns, her participation on September 23, 2009 in the Deloitte investigation, or her disclosures during the September 23, 2009 Deloitte interview was a contributing factor in her October 26, 2009 employment discharge.

Adjudication Principles

The ARB recently confirmed that “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way” the decision concerning the adverse personnel action, *Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-952, ALJ No. 2005-SOX-33, slip op. at 12 (ARB Sept. 30, 2011) (citing *Marano v. U. S. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)), *aff'd sub. nom. Bechtel v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 2d Cir., No. 11-4918 (2d Cir. Mar. 15, 2013). In the absence of direct evidence of causation, contributing factor may be proven through circumstantial evidence which may include temporal proximity, indications of pretext, inconsistent application of employer’s policies, and shifting explanations for an employer’s actions. *Bechtel*, ARB No. 09-952, at 13. If a complainant shows evidence of pretext, she may rely on inferences drawn from such pretext to establish by a preponderance of the evidence that protected activity was a contributing factor in the unfavorable personnel action. *Bechtel*, ARB No. 09-952, at 13. At the same time, although the ARB has stated that "proof of causation or 'contributing factor' is not a demanding standard," *Rudolph v. National Railroad Passenger Corp.*, ARB No. 11-037, ALJ No. 2009 FRS 015, slip op. at 15, (Mar. 29, 2013), under the AIR 21 adjudication framework incorporated by SOX, and specifically 29 C.F.R. § 1980.109(a),³⁴ the complainant's burden of proof for all three elements, including contributing factor, remains "preponderance of the evidence."

The determination of contributing factor essentially has two components: knowledge and causation.³⁵ In other words, the employer must have been aware of the protected activity (knowledge) and that protected activity was a contributing factor in the decision to take the adverse personnel action (causation). Further, knowledge of a protected activity may be either actual or imputed. Regarding the latter category, relying on the "cat's paw" legal concept of liability recognized in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), the ARB has concluded a complainant need not prove the decision maker responsible for the adverse action actually knew of the protected activity, if she can establish that any person advising the decision maker on the adverse action was aware of the protected activity. *Rudolph*, slip op at 17.

³⁴76 Fed. Reg. 68,084, 68,095 (Nov. 3, 2011).

³⁵See *Bechtel*, slip op. at 13 (the four elements that a claimant must prove by a preponderance of the evidence are: a) statutorily protected activity, b) employer's knowledge of the protected activity, c) adverse action, and d) contributing factor.)

With these principles in mind, I will determine whether any of Ms. Gifaldi's protected activities was a contributing factor for either respondent, IPG or Octagon, in her employment termination by considering actual/imputed knowledge and causation.

IPG

Actual Knowledge

Regarding Ms. Gifaldi's January 2009 protected activity, until Ms. Klitch's August 25, 2009 e-mail, IPG had no basis to be aware that Octagon was even having a problem with inaccurate or incomplete invoicing or insufficient invoice controls, let alone Ms. Gifaldi's concerns about those issues. IPG was first informed of the invoicing problems when Ms. Klitch sent Ms. Hoey and Mr. Dowling her August 25, 2009 e-mail, CX 1 and CX 42, which included a reference to Ms. Gifaldi. However, as previously noted, that reference involved Ms. Klitch's complaint that Ms. Plewes was attempting to reinsert herself into the invoicing process by "contacting Vanessa (Ms. Gifaldi) without involving" Ms. Klitch, Ms. Gifaldi's direct supervisor, which made "Vanessa very uncomfortable." That direct reference to Ms. Gifaldi does not involve any protected activity. Additionally, although Ms. Klitch used plural pronouns, such as "we" and "our," in various portions of her e-mail, Ms. Klitch did not specifically identify Ms. Gifaldi as part of the plural group. Finally, on its face, the e-mail did not give the reader any indication that Ms. Gifaldi herself had engaged in a SOX protected activity. As a result, Ms. Klitch's August 25, 2009 e-mail did not inform IPG that Ms. Gifaldi had engaged in SOX-protected activity prior to the September 2009 investigation.

On the other hand, based on Deloitte's scope of work, CX 102, the investigators had to obtain Mr. Dowling's prior approval before Ms. Gifaldi was interviewed on September 23, 2009, and Mr. Lombardo's telephonic and e-mail summaries of the Deloitte investigation, CX 102, identified Ms. Gifaldi as one of the Octagon employees that who was interviewed. As a result, IPG knew Ms. Gifaldi participated in the Deloitte investigation, which was a protected activity.

Although Mr. Dowling was aware that Ms. Gifaldi had been interviewed, and the summary identified her as an interviewee, neither Deloitte's September 25, 2009 draft report, CX 103, nor its final summary, CX 102, identified any specific information or recommendation attributable to what Ms. Gifaldi actually said during her interview. Further, according to Mr. Marra, no one at IPG reviewed the notes from the interviews conducted by Deloitte. Consequently, although IPG was aware that Ms. Gifaldi was interviewed during the Deloitte investigation, IPG did not actually know the content of her interview, that is, Ms. Gifaldi protected activity of providing SOX-related information to the Deloitte investigator.

Imputed Knowledge

As discussed below, no one at Octagon with knowledge of Ms. Gifaldi's January 2009 protected activity advised IPG on whether it should release its hold on any adverse personnel action upon completion of the Deloitte investigation. Similarly, none of the Deloitte investigators with knowledge of Ms. Gifaldi's specific concerns presented during the September 23, 2009 interview recommended any adverse personnel actions as corrective action upon

completion of the investigation. As a result, IPG did not have imputed knowledge as envisioned by the *Rudolph* case of Ms. Gifaldi's January 2009 protected activity or the content of her September 23, 2009 Deloitte interview.

Causation

Since IPG was at least aware of Ms. Gifaldi's protected activity of assisting in the Deloitte investigation, I next address whether that protected activity was a contributing factor in any action taken by IPG in regards to Ms. Gifaldi's October 26, 2009 employment termination.

In terms of circumstantial evidence of causation, due to strong temporal proximity, Ms. Gifaldi understandably believes that her employment termination was attributable to her participation in the Deloitte investigation since little over a month after her interview with a Deloitte investigator as part of IPG's inquiry into Octagon's business practices, including invoicing and escrow accounts, she was fired. However, that circumstantial evidence in regards to IPG is outweighed by other evidence in the record that demonstrates IPG played no active role in Ms. Gifaldi's termination.

Under their corporate arrangement, Octagon generally had authority to hire and fire its personnel without approval by IPG. Thus, as Mr. Marra credibly testified, IPG played no role in the determination that Ms. Gifaldi should be fired. IPG only became indirectly involved with Ms. Gifaldi's personnel action when after receiving Ms. Klitch's August 25, 2009 e-mail it exerted its authority as a parent company to direct Octagon to defer any adverse action against Ms. Klitch and any planned terminations until completion of the investigation³⁶ which Ms. Kennedy and Mr. de Picciotto then applied to Ms. Gifaldi. Notably, IPG's decision to place a hold on any terminations for the duration of the investigation was put in place at the end of August 2009, prior to Ms. Gifaldi's protected activity of participating in the investigation on September 23, 2009. Thus, significantly, after Mr. Dowling had received the Deloitte report on October 21-22, 2009 upon completion of the investigation, the basis for IPG's personnel action hold expired. As a result, Ms. Hoey advised Mr. de Picciotto that the personnel action hold had been lifted and he may proceed without any IPG input. In that situation, IPG's release of its hold, which represented neither approval nor disapproval of any pending personnel action, was only due to the completion of the investigation.

Conclusion

Consequently, because IPG played no role in Mr. de Picciotto's decision to terminate Ms. Gifaldi's employment, and its hold and subsequent release on Octagon employee terminations were related solely to the duration of the pending Deloitte investigation, the preponderance of the probative evidence demonstrates that Ms. Gifaldi's September 23, 2009 participation in the Deloitte investigation was not a contributing factor to IPG's release of its hold on any Octagon employee separations, including Ms. Gifaldi's discharge.

³⁶Mr. Dowling told Ms. Kennedy that Ms. Klitch's termination had to be postponed, and Ms. Hoey told Mr. de Picciotto to put any planned terminations on hold until completion of the investigation.

Octagon

Actual Knowledge

An analysis of Octagon's role in terminating Ms. Gifaldi's employment obviously focuses on Mr. de Picciotto, who was the decision maker in this case, and his knowledge of Ms. Gifaldi's protected activities. Considering first Ms. Gifaldi's January 2009 protected activity concerning Octagon's invoicing, the evidentiary record is essentially void of any probative evidence that Ms. Gifaldi communicated her concern regarding invoicing irregularities to Mr. de Picciotto. During cross-examination, in response to the questions of whether two of the Deloitte recommendations concerning the invoicing addressed the concerns that Ms. Klitch and Ms. Gifaldi had, Mr. de Picciotto replied yes.³⁷ However, that question did not address when he became aware of Ms. Gifaldi's concerns and Mr. de Picciotto subsequently testified that he only became aware that Ms. Gifaldi had such concerns during the course of the litigation.³⁸ Further, and significantly, neither Ms. Gifaldi's testimony nor the documentary evidence establishes that Ms. Gifaldi informed Mr. de Picciotto about her invoicing concern during the course of her Octagon employment. Likewise, Mr. de Picciotto credibly testified that Ms. Gifaldi did not bring her concern about the integrity of the invoicing system to him. Instead, Ms. Gifaldi reported the invoicing irregularities that she discovered to Ms. Klitch, and Mr. de Picciotto also credibly testified that Ms. Klitch did not tell him that Ms. Gifaldi had an issue with invoicing.

Mr. de Picciotto was also unaware of Ms. Gifaldi's disclosures during her September 23, 2009 interview with Deloitte. Shortly after Ms. Klitch submitted her August 25, 2009 e-mail, Mr. de Picciotto became aware that two of her topics involved invoicing and escrow accounts, which both fell within Ms. Gifaldi's areas of responsibilities. And, during the course of his October 20, 2009 Deloitte interview, based on the questioning, Mr. de Picciotto would have been in a position to further deduce that the content of Ms. Klitch's August 25, 2009 e-mail dealt in part with issues in both areas. However, as previously discussed, although Ms. Gifaldi was mentioned in Ms. Klitch's August 25, 2009 e-mail, that specific reference did not involve any protected activity by Ms. Gifaldi, and the protected disclosures in the e-mail were made by Ms. Klitch without attribution to Ms. Gifaldi. Further, even though Mr. de Picciotto would have been able to determine the issues being investigated by Deloitte due to Ms. Klitch's August 25, 2009 e-mail, he would only know that Ms. Klitch had presented those problems with Octagon invoicing and escrow accounts to IPG. The existence of the August 25, 2009 e-mail, knowledge of the e-mail's topics, and his Deloitte interview, would not have placed Mr. de Picciotto on notice that in her September 23, 2009 Deloitte interview Ms. Gifaldi expressed the same SOX protected concerns that Ms. Klitch presented in her e-mail. And, most notably, neither Ms. Gifaldi nor the Deloitte investigator shared the contents of her interview with IPG or Mr. de Picciotto.

³⁷TR, pp. 388-389.

³⁸TR, p. 417.

Concerning her interview participation, Mr. de Picciotto was not notified by either IPG or Deloitte of which Octagon employees were going to be interviewed, and the record does not contain evidence that anyone told him specifically that Ms. Gifaldi was interviewed. Thus, as he credibly testified,³⁹ Mr. de Picciotto did not definitively know that Ms. Gifaldi had been interviewed. Yet, given the topics of Ms. Klitch's August 25, 2009 e-mail, and considering Ms. Gifaldi's areas of responsibility, he would have been aware that Ms. Gifaldi was more than likely one of the Octagon employees who was interviewed by Deloitte.

In summary, Mr. de Picciotto did not have actual knowledge of Ms. Gifaldi's January 2009 protected activity related to Octagon's invoicing irregularities. He also did not know what Ms. Gifaldi said during the course of her September 23, 2009 interview with Deloitte. At best, Ms. Gifaldi is only able to establish that Mr. de Picciotto most likely would have been able to conclude that she participated in the Deloitte investigation as a witness.

Imputed Knowledge

In terms of imputed knowledge, Ms. Klitch was well aware of Ms. Gifaldi's SOX protected activities in January 2009. However, Ms. Klitch did not either seek Ms. Gifaldi's termination or advise Mr. de Picciotto as he was making his decision to terminate Ms. Gifaldi's employment. As a result, Ms. Klitch's knowledge of Ms. Gifaldi's January 2009 protected activities is not imputed to Mr. de Picciotto.

During the August 7, 2009 meeting with Mr. de Picciotto and Ms. Plewes, Ms. Kennedy recommended that Ms. Gifaldi be terminated. However, the record does not establish that at that time Ms. Kennedy was aware of Ms. Gifaldi's January 2009 protected activity. Additionally, her employment discharge recommendation occurred before Ms. Gifaldi's protected activities on September 23, 2009. And, Ms. Kennedy did not provide any further input prior to Mr. de Picciotto's August 18, 2009 decision to terminate Ms. Gifaldi. Thus, imputed knowledge of Ms. Gifaldi's protected activities does not arise based on Ms. Kennedy's August 7, 2009 recommendation.

Finally, while Mr. Dowling at IPG knew that Ms. Gifaldi had participated in, and assisted, the Deloitte investigation, neither Mr. Dowling or IPG sought Ms. Gifaldi's employment termination or advised Mr. de Picciotto on that personnel action. Consequently, their knowledge of Ms. Gifaldi's protected activity of assisting in the investigation is not imputed to Mr. de Picciotto. Similarly, the Deloitte investigator who interviewed Ms. Gifaldi also had no advocacy role in her termination, such that his knowledge of the content of her September 23, 2009 interview is not imputed to Mr. de Picciotto.

Causation

Because Mr. de Picciotto may have been aware that Ms. Gifaldi participated in, and assisted with, the Deloitte investigation, I will now determine whether that protected activity was a contributing factor in Ms. Gifaldi's October 26, 2009 employment discharge. Additionally, although I determined that Mr. de Picciotto did not have actual or imputed knowledge of Ms.

³⁹TR, p. 302.

Gifaldi's January 2009 protected activity and the protected content of her September 23, 2009 interview, the following discussion also has some applicability to the other two protected activities. Absent direct evidence of causation, I turn to an assessment, both individually and cumulatively, of circumstantial evidence in terms of animosity, pretext, and temporal proximity.

Animosity

As a first consideration, Mr. de Picciotto testified that he was upset by the August 25, 2009 e-mail, but the obvious focus of his animosity was Ms. Klitch who brought issues with Octagon's business practices to the attention of its parent company, IPG, which Mr. de Picciotto did not believe understood Octagon's business. I have also considered that while Ms. Gifaldi received four weeks pay, Mr. de Picciotto did not honor the contract provision to provide four weeks notice of termination because he was eager to terminate Ms. Klitch and Ms. Gifaldi. However, as Mr. de Picciotto explained, his eagerness was attributable to two factors. First, Mr. de Picciotto wanted to correct the problems that had developed with Octagon's invoicing, which he attributed to Ms. Klitch and Ms. Gifaldi. Second, and significantly, the Deloitte investigation had already delayed for two months his ability to effectuate the necessary changes by terminating Ms. Klitch and Ms. Gifaldi. As a final consideration, the record contains no evidence of any apparent hostility by Mr. de Picciotto towards Ms. Gifaldi during the course of her employment with Octagon.

Pretext

A second significant circumstantial evidence consideration involves an analysis of the record for incidents and inconsistencies that may support a determination that Mr. de Picciotto's explanation for Ms. Gifaldi's termination is actually pretextual. In Ms. Gifaldi's case, this review involves the evaluation of her performance at Octagon, the timing between the date Mr. de Picciotto said he decided to terminate Ms. Gifaldi's employment and her October 26, 2009 dismissal, the lack of formal documentation of the termination decision, and changing reasons for her termination.

Work Performance

Complainant's counsel asserts that Ms. Gifaldi's sudden termination appears inappropriate considering that during her tenure at Octagon, as confirmed by Ms. Kennedy, she did not receive any adverse, or negative performance appraisals or performance improvement plans, which would have given Ms. Gifaldi a second chance that Mr. de Picciotto agreed his employees should be offered. Her record was also devoid of any adverse supervisor comments by Ms. Klitch and Ms. Klitch testified that she was not aware of any performance issues with Ms. Gifaldi. Likewise, Ms. Gifaldi testified that no one ever complained to her about her work performance.

The assertions about the absence of a negative performance appraisal or a performance improvement plan are correct. However, an analysis of the specifics of her work record at Octagon lessens the probative impact of that circumstantial evidence related to the absence of a derogatory record. Ms. Gifaldi only received one performance plan around March 2009, which covered her first half year with Octagon prior to any difficulties with her work. Then, as she

acknowledged, about the time she received her appraisal, Ms. Gifaldi was becoming overwhelmed by her workload, mainly due to her contract compliance reviews. That workload issue appears to have led to several significant performance shortfalls, including two late team billing submissions for basketball clients, worth \$600,000 to \$800,000, and baseball clients, worth more than \$500,000, and a failure to timely submit an \$80,000 invoice. And, contrary to the assertion about the absence of any critical feedback, upon discovery that the basketball invoices did not go out in time, Ms. Morton talked to both Ms. Gifaldi and Ms. Klitch in May 2009 about the significant adverse impact on Octagon's financials caused by Ms. Gifaldi's omission and the importance of getting team invoices out on time. As for a chance to show improvement, after her major failure with the basketball client invoices, upon being informed of Ms. Gifaldi's performance problem, Mr. de Picciotto decided to give her a second chance and took no formal action. Yet, in mid-July 2009, Ms. Gifaldi failed to take advantage of that second opportunity when she again did not ensure that the baseball client invoices went out on time, and only acted on the corrected vouchers that she had received on July 23, 2009 after Ms. Morton inquired about the missing invoices worth \$500,000 on August 12, 2009.⁴⁰ Finally, in regards to the absence of adverse supervisor comments, Ms. Gifaldi may have been partially to blame since she acknowledged at the hearing that she didn't want Ms. Klitch to know about the contracts back log and didn't want her to know she had a staffing issue. In light of this performance record after her only performance appraisal, even absent a performance improvement plan, Mr. de Picciotto's stated reason for his decision to finally terminate Ms. Gifaldi's employment – her second serious failure to submit sport team invoicing on time less than three months after her first omission – does not appear to be pretextual.

Timing

Upon initial consideration, the duration of the time between when Mr. de Picciotto stated he decided to terminate Ms. Gifaldi and the date of the actual termination, and occurrence of protected activities in between, also suggests pretext. Specifically, although Mr. de Picciotto testified that he made his termination decision by August 18, 2009, Ms. Gifaldi was not terminated until after her participation in the Deloitte investigation and the completion of the investigation at the end of October 2009. Again, however, the sequence of events through October 26, 2009 provides an explanation for the delay that lessens the pretext implication.

As corroborated by Ms. Kennedy and Ms. Plewes, Mr. de Picciotto credibly testified that he first considered ending Ms. Gifaldi's employment at the August 7, 2009 meeting when confronted with the latest issue with Ms. Klitch in her reassigned role as Operations Vice President that arose two days earlier with Mr. Schneller and Ms. Plewes. At that time, rather than due to her protected activities which occurred more than half a year earlier in January 2009, Ms. Gifaldi's job came into jeopardy, because Mr. de Picciotto decided to end Ms. Klitch's relationship with Octagon which included her revised invoicing program operated remotely by Ms. Gifaldi from Colorado. Due to Ms. Plewes' hesitation about taking over invoicing, Mr. de Picciotto did not take final action on Ms. Klitch's termination, or make a final decision regarding Ms. Gifaldi at that time. Instead, he instructed Ms. Plewes to gather information about the

⁴⁰At the hearing, Ms. Gifaldi didn't really have an excuse for not taking prompt action other than to say that based on what was going on, she must have prioritized tasks. TR, p. 190.

current invoicing system. On August 12, 2009, Ms. Plewes advised she was not completely confident about the location of invoicing documents and responsibilities. About a week later, around August 18, 2009, in response to Ms. Gifaldi's second major invoicing omission, and since Ms. Plewes reported that having reviewed the current invoicing system she was ready to proceed without Ms. Gifaldi, Mr. de Picciotto decided to terminate Ms. Gifaldi and told Ms. Plewes that they were ready to go and to be prepared to take over Ms. Gifaldi's invoicing responsibilities. However, before he took action to effectuate his termination decision, such as advise Ms. Kennedy in HR, Ms. Klitch filed her August 25, 2009 e-mail and IPG directed Mr. de Picciotto to place on hold any termination actions for the duration of the investigation. On September 22, 2009, a day before Ms. Gifaldi's protected activities related to her interview, as the Deloitte investigation was finally getting ready to start, Mr. de Picciotto advised Ms. Kennedy to prepare to terminate Ms. Gifaldi as soon as the investigation was completed. But, another month elapsed because the Deloitte investigation persisted until October 22, 2009. At the completion of the Deloitte investigation, IPG removed the personnel action restriction; and upon return from his trip to Europe and Russia, Mr. de Picciotto terminated the employment of Ms. Klitch and Ms. Gifaldi on October 26, 2009. Consequently, while tortuous and lengthy, the chronology up to Ms. Gifaldi's separation does not provide sufficient evidence of pretext.

Lack of Documentation

Ms. Gifaldi also suggests that lack of any formal documentation undermines Mr. de Picciotto's claim that he decided to fire Ms. Gifaldi about August 18, 2009, which further supports a finding of pretext. While Ms. Gifaldi correctly notes that the record contains no formal documentation of Mr. de Picciotto's final termination decision, several other considerations leads me to that conclude the absence of a formal communication does not establish pretext.

First, Mr. de Picciotto clearly did not always commemorate his final decisions to terminate an employee with a formal document. Significantly, the testimony of Ms. Plewes and Ms. Kennedy demonstrates that no formal document was produced when Mr. de Picciotto decided to terminate Ms. Klitch's employment on August 7, 2009. Second, some informal documentation does exist in the form of Ms. Kennedy's notes from the August 7, 2009 meeting that establishes that by the time of that meeting Mr. de Picciotto was considering terminating Ms. Gifaldi's employment. Third, the credible testimony of Ms. Kennedy and Ms. Plewes also establishes that Ms. Gifaldi's job was at risk on August 7, 2009. Fourth, although no formal documentation exists, Ms. Plewes' credible testimony establishes that Mr. de Picciotto made his final employment termination decision before August 25, 2009 when after being made aware by Ms. Morton that Ms. Gifaldi had again failed to submit sport team invoices totaling more than \$500,000, and being told by Ms. Plewes that she felt comfortable with the back-up of invoicing, Mr. de Picciotto told her they were ready and she should prepare to take over invoicing again.

Changing reasons for termination

In his October 26, 2009 e-mail to Ms. Kennedy, Mr. de Picciotto referenced the termination of Ms. Gifaldi in part as a position elimination and when he called Ms. Gifaldi he told her that her employment was being terminated because he was eliminating her position.

Whereas, at the hearing, Mr. de Picciotto testified that Ms. Gifaldi was terminated due to performance issues. In considering whether this explanation dichotomy demonstrates pretext, I first note that Mr. de Picciotto explained at the hearing that he used position elimination as a basis for discharge to soften the blow of losing her job and he emphasized that the neither position held by Ms. Klitch and Ms. Gifaldi was filled after their departure. Instead, the invoicing function was returned to Ms. Plewes in OFS. Secondly, as just previously discussed, Ms. Gifaldi did have significant performance issues, in particular the second invoicing failure for the baseball clients. Her performance record, coupled with Mr. de Picciotto's explanation for why he told Ms. Gifaldi the basis for her termination was the elimination of her position, undermines the use of changing reasons for her termination as a basis for finding pretext.

Temporal Proximity

From Ms. Gifaldi's perspective, the strongest circumstantial evidence of impermissible employment discrimination is temporal proximity. That is, less than nine months after voicing her concerns about invoicing in January 2009 and just six weeks after she explained her invoicing and escrow account issues to the Deloitte investigator, Ms. Gifaldi was fired. However, the probative significance of the temporal proximity between these events is diminished upon consideration of the sequence of events that led up to Ms. Gifaldi's termination as set out below.

January to March 2009 After Ms. Gifaldi advises Ms. Klitch of the invoicing problems in January 2009, she continues to review thousands of Octagon contracts to ensure the company's invoices comply with contractual provisions. This labor- intensive work eventually causes Ms. Gifaldi to become overwhelmed, which requires her to prioritize tasks and deadlines.

March 2009 An initial symptom of her workload issue appears when Mr. Schneller asks Ms. Gifaldi why the February 2009 recurring invoices had not been updated in the divisions' folders. Since she continues to fall behind, Ms. Gifaldi turns over client invoicing to Mr. Gaddale. Later that month, she fails to ensure the NBA team billing, worth between \$600,000 and \$800,000, is issued on time.

May 5, 2009 Ms. Morton confronts Ms. Gifaldi about the NBA team billing failure, emphasizes the financial significance of prompt billing, and advises Ms. Klitch and Mr. de Picciotto of the shortfall.

June 25, 2009 The baseball division provides Ms. Gifaldi with a list of clients to be invoiced in mid-July.

Around mid-July 2009 Ms. Gifaldi fails to promptly act on an \$80,000 invoice request. She also fails to send out the baseball division client invoices, worth more than \$500,000.

August 7, 2009 Due to a confrontation between Ms. Klitch and Ms. Plewes, in a meeting with Ms. Plewes and Ms. Kennedy, Mr. de Picciotto announces that he is going to terminate Ms. Klitch and is also considering letting Ms. Gifaldi go. In response, Ms. Plewes voices her hesitation about taking over invoicing before she understood the system established by Ms.

Klitch and Ms. Gifaldi. Mr. de Picciotto instructs her to begin the process of backing up their files and e-mails and gaining access to the invoicing records.

August 12, 2009 Ms. Morton becomes aware of Ms. Gifaldi's failure to ensure the baseball invoices went out in mid-July 2009 and informs Mr. de Picciotto. Ms. Plewes reports she needs additional time to understand the current invoicing system.

By August 18, 2009 Having learned of the baseball invoicing failure, and received Ms. Plewes' confirmation that she is ready to proceed without Ms. Gifaldi, Mr. de Picciotto decides to terminate Ms. Gifaldi's employment and tells Ms. Plewes to be ready to take over invoicing.

August 25, 2009 Ms. Klitch files her e-mail complaint, in part raising a concern about Ms. Plewes' apparent attempt to become re-involved with invoicing.

Shortly after August 25, 2009 IPG tells Mr. de Picciotto to hold off on any employment terminations during the course of its investigation.

September 21, 2009 IPG authorizes Deloitte to investigate Ms. Klitch's concerns and conduct interview of Octagon employees.

September 22, 2009 Mr. de Picciotto tells Ms. Kennedy to be ready to terminate Ms. Gifaldi at the conclusion of the Deloitte investigation.

September 23, 2009 A Deloitte investigator interviews Ms. Gifaldi.

October 22, 2009 Mr. Shin advises Mr. de Picciotto that the investigation is complete. Ms. Hoey advises Mr. de Picciotto that he may now proceed with any personnel actions he deems necessary.

October 22 to 25, 2009 Mr. de Picciotto travels to Europe and Russia.

October 26, 2009 Mr. de Picciotto terminates Ms. Gifaldi by telephone.

This timeline undercuts the probative force of temporal proximity in Ms. Gifaldi's case in several significant ways. First, although by August 7, 2009, Mr. de Picciotto was considering letting Ms. Gifaldi go in conjunction with Ms. Klitch's departure, he did not reach a final conclusion in part until after he learned about Ms. Gifaldi's repeat failure to send out invoicing for a major sport, worth more than half a million dollars. In other words, Ms. Gifaldi had two very significant, and recurrent, performance failures between her January 2009 protected activity and Mr. de Picciotto's decision to terminate her employment eight months later.

Additionally, based on my factual determinations, Mr. de Picciotto decided to terminate Ms. Gifaldi's employment by August 18, 2009, and in light of IPG's personnel action hold, advised Ms. Kennedy on September 22, 2009 to be ready to discharge Ms. Gifaldi upon completion of the investigation. Notably, both those actions occurred prior to her protected activities on September 23, 2009. That is, although Ms. Gifaldi did not receive notice of her

termination until after she assisted in the Deloitte investigation and presented her concerns about invoicing and escrow accounts to the Deloitte investigator on September 23, 2009, the decision to terminate her employment with Octagon had already been made but placed on hold pending completion of the Deloitte investigation.

Consequently, while in terms of temporal proximity her notice of discharge followed her protected activities, that circumstantial evidence has diminished probative force considering her intervening performance failures after January 2009, and has very little, if any, probative value concerning her September 23, 2009 protected activities.

Cumulative Consideration

As a final step, having addressed each potential aspect of circumstantial evidence upon which Ms. Gifaldi may rely, I now also step back and evaluate all the circumstantial evidence together for cumulative effect. Upon considering animosity; pretext in terms of work performance, timing, lack of documentation, and changing reasons for termination; and temporal proximity together, as well as Mr. de Picciotto's credible testimony, as corroborated by Ms. Morton's testimony about Ms. Gifaldi's significant performance failures in April and July 2009, Ms. Plewes' testimony about the sequence of events in mid-August 2009, and Ms. Kennedy's testimony about the August 7, 2009 meeting and Mr. de Picciotto's September 22, 2009 instruction to her to prepare for Ms. Gifaldi's termination upon completion of the Deloitte investigation, I find the preponderance of the probative evidence does not establish that a protected activity was a contributing factor in Ms. Gifaldi's employment discharge.

Conclusion

Ms. Gifaldi has failed to establish that two of her protected activities, raising her concerns to Ms. Klitch in January 2009 about invoicing and her September 23, 2009 disclosures during the Deloitte interview, were contributing factors in her employment termination, because Mr. de Picciotto was not aware of those two protected activities. Upon consideration of the entire record and associated circumstantial evidence, I also find that Ms. Gifaldi has failed to establish by a preponderance of the probative evidence that her protected activity of participating in, and thereby assisting, the Deloitte investigation on September 23, 2009, of which Mr. de Picciotto may have been aware, was a contributing factor in any way to her October 26, 2009 employment discharge, because by the time she assisted with the investigation Mr. de Picciotto had already decided to terminate her employment.⁴¹

⁴¹I also note that in regards to her disclosures during the September 23, 2009 interview, the final decision to terminate her employment had already been made by the time she engaged in that protected activity.

Conclusion⁴²

During the course of her Octagon employment, Ms. Gifaldi engaged in three activities protected under SOX. In January 2009, she reported reasonable SOX concerns about inaccurate invoicing and the absence of sufficient invoicing controls to Ms. Klitch. On September 23, 2009, Ms. Gifaldi assisted in the Deloitte investigation concerning Ms. Klitch's SOX related concerns. And, on the same day, Ms. Gifaldi reported her reasonable SOX concerns about inaccurate invoicing and the absence of sufficient controls, as well as an escrow account issue, to the Deloitte investigator.

On October 26, 2009, Ms. Gifaldi suffered an adverse action when Octagon terminated her employment.

In terms of contributing factor, although IPG was aware that Ms. Gifaldi participated in the Deloitte investigation, the preponderance of the probative evidence demonstrates that the parent company played no role in Mr. de Picciotto's decision to terminate Ms. Gifaldi's employment, and its hold on Octagon adverse personnel action and subsequent release of that hold were based solely on the duration of the pending Deloitte investigation. Consequently, having failed to prove that her September 23, 2009 assistance in the Deloitte investigation was a contributing factor to IPG's release of its hold on any Octagon employee separations, including her employment discharge on October 26, 2009, her SOX employment discrimination complaint against IPG must be dismissed.

Regarding Octagon, Ms. Gifaldi did not establish that Mr. de Picciotto was aware of either her January 2009 protected activity of raising invoicing concerns to Ms. Klitch, or her protected disclosure during the September 23, 2009 Deloitte interview. While Mr. de Picciotto may have been aware of her participation in the Deloitte investigation, that protected activity occurred after he made a final decision to terminate her employment. Accordingly, having failed to prove a requisite element – contributing factor – her SOX employment discrimination complaint against Octagon must be dismissed.

⁴²Since Ms. Gifaldi has not proven her case-in-chief by a preponderance of the evidence, I need not address the third and fourth issues in this case relating to the respondents' affirmative defense, and damages.

ORDER

The SOX employment discrimination complaints of MS. VANESSA GIFALDI against INTERPUBLIC GROUP OF COMPANIES, INC., and OCTAGON, INC. are **DISMISSED**.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: May 2, 2013
Washington, D.C.

NOTICE OF APPEAL RIGHTS: NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. See 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).