

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 13 April 2016

ALJ NO.: 2014-SOX-00003

SANDEEP JOSHI,
Complainant,

v.

AMERICAN TOWER CORPORATION,
Respondent.

DECISION AND ORDER DENYING CLAIM

I. STATEMENT OF THE CASE

This proceeding arises from a complaint filed by Sandeep Joshi (“Complainant”) against American Tower Corporation (“ATC” or “Respondent”), alleging violations of the employee protection provisions in Section 806 of the Sarbanes-Oxley Act of 2002, codified in 18 U.S.C. § 1514A (the “Act” or “SOX”). Enacted on July 30, 2002, the Act provides the right to bring a “civil action to protect against retaliation in fraud cases” under Section 806. The Act affords protection from employment discrimination to employees of companies with a class of securities registered under section 12 of the Security Exchange Act of 1934 (15 U.S.C. 78l) and companies required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)). Specifically, the law protects so-called “whistleblower” employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders. All actions brought under Section 806 of the Sarbanes-Oxley Act are governed by 49 U.S.C. § 42121(b). 18 U.S.C. § 1514A(b)(2)(B).

On January 27, 2011, Complainant filed a complaint with the Secretary of Labor (“Secretary”) alleging Respondent retaliated against him in violation of SOX. On September 5, 2013, the Occupational Safety & Health Administration (“OSHA”) issued the Secretary’s Findings dismissing Complainant’s complaint. In a letter dated October 3, 2013, Complainant objected to the Secretary’s findings and requested a de novo hearing before the Office of Administrative Law Judges (“OALJ”).

As provided in the original Notice of Assignment and Pre-Hearing Order, dated October 31, 2013, a formal hearing was scheduled to take place before me on January 16, 2014. ALJX-1.

After the parties filed a Joint Motion to Continue Hearing Date until June 2014, I issued Order Continuing Hearing, dated November 20, 2013, rescheduling the hearing to June 10, 2014. ALJX-2. On March 31, 2014, I received the parties' Joint Motion to Continue Hearing Date. On April 24, 2014, I issued Revised Notice of Assignment and Hearing and Pre-Hearing Order, scheduling the formal hearing for October 28, 2014. ALJX-3.

A formal hearing was conducted before me in Boston, Massachusetts on October 28-31 and November 25, 2014. The parties were represented by counsel and afforded the opportunity to present evidence and oral arguments. The Hearing Transcript is referred to herein as "TR." Testimony was heard from Complainant;¹ Susan Baize, Senior Vice President of Tax;² Nevel Lee, Complainant's damages expert; Kimberly Foster, Complainant's wife; Michael Bartlett, Chief Financial Officer; Michael McDermott, Vice President, Tax Strategy;³ Pamela Ann LaGambina, Director of Tax Compliance; Brenna Jones,⁴ Senior Vice President, Chief Human Resources Officer; Kevin Smithson, Federal Tax Partner at PricewaterhouseCoopers;⁵ and, Roger Lane, Partner at Foley & Lardner LLP who served as an expert on Respondent's behalf.

At hearing, the parties offered documentary evidence which was admitted as Complainant's Exhibits ("CX") and Respondent's Exhibits ("RX").⁶ Administrative Law Judge Exhibits ("ALJX") 1-3, Trial Exhibits ("TX") A-J, and Joint Exhibits ("JX") 1-25, were also admitted into evidence. Complainant and Respondent both filed post-hearing briefs ("Cl. Br." and "Re. Br.," respectively). The record is now closed.

II. STIPULATIONS AND ISSUES PRESENTED

The parties stipulated to the following: 1) Complainant was hired by ATC in February 2007 to work in its Tax Department as Director of Tax Reporting and Compliance. He reported to Michael McDermott, who was then head of the Tax Department; 2) In early 2008, Deloitte, ATC's auditors, determined that ATC has a Material Weakness in its tax accounting function. Notice of that Material Weakness appeared on ATC's Form 10-K for 2007, filed with the SEC; and 3) In July 2008, Susan Baize joined ATC as Senior Vice President of Tax, succeeding Mr. McDermott as head of the Tax Department and Complainant's supervisor. Mr. McDermott stayed on in a managerial capacity, subordinate to Ms. Baize.

The issues remaining to be adjudicated are whether Complainant established by a preponderance of the evidence that: 1) Complainant engaged in protected activity under the Act;

¹ Complainant was permitted to testify as both the complainant and an expert witness. TR 35-36.

² Baize worked for Respondent in this capacity from 2008 to 2012. TR 494. She left Respondent in 2012. TR 521.

³ Prior to Baize joining Respondent, McDermott's title was Director of Tax. TR 830. He worked in this capacity from 2000 through approximately mid-2008. TR 831. As Director of Tax, he was Complainant's supervisor, prior to Baize's reorganization. TR 831.

⁴ The hearing transcripts refer to Jones as Brenda. A review of the exhibits clarified her first name is actually Brenna.

⁵ Smithson also serves as a "relationship partner" at PwC; a position that calls for "coordinating other specialists within other partners within [PwC] [and] services to our clients." TR 990.

⁶ More specifically, Complainant's exhibits 1-3; 10-11; 13; 17-18; 22; 28; 31-32; 34-36; 45; 47-50; 54-56; 62; 65-67; 69; 73-74; 76-77; 80-84; 86; 90; 95-97; 99; 105; 109-12; and 114-16 were admitted into evidence. Respondent's exhibits 1; 5; 8; 15-17; 19-22; 27-28; 31; 33; 46; 50; 53; 55-63; 65-68; 71-73; 76; 80; 86; 88; 92; 94; 99; and 100 were also admitted.

2) Respondent had knowledge of Complainant's protected activity; 3) Respondent took unfavorable personnel action against Complainant; and 4) The protected activity was a contributing factor in the adverse personnel action against Complainant. If Complainant satisfied his prima facie burden—issues 1-4—there is one more remaining issue: 5) Whether Respondent demonstrated, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity.

III. FINDINGS OF FACT

A. Complainant's Initial Work History at American Tower Corporation

Complainant “hold[s] a marketing degree from Rhode Island College, and . . . a Master's in Taxation from Bentley College.” TR 34. He is a certified public accountant with a “particular field of expertise in tax accounting, which is also known as FAS 109.”⁷ TR 35. Prior to working for Respondent, Complainant worked for a number of companies, including: Vance, Cronin & Stephenson; Martin D. Braver Co.; KPMG; Ernst & Young; and Fisher Scientific. TR 37. Complainant noted that Ernst & Young—at which he “did more tax advisory and tax planning work” and “a lot more both in the auditing side and the consulting side of the FAS 109”—was “where [he] kind of did all [his] initial expertise in FAS 109.”⁸ TR 37-38.

In February 2007, Complainant began working for Respondent as director of tax reporting.⁹ TR 38. At the start of his employment, Michael McDermott was Complainant's supervisor and Pamela LaGambina reported to Complainant. TR 49, 840. Complainant's duties consisted of “tax compliance, tax accounting, and reporting, as well as tax planning and any other special projects that [his] boss would ask [him] to participate in.” TR 49. He recalled he quickly learned Respondent had a “number of examples of poor historical controls and poor documentation.” TR 57-66. These deficiencies included a lack of “support in place for . . . deferred tax liability and fixed assets,” discrepancies between “the company's net operating losses” and tax returns, poor accounting practices regarding its “state net operating loss carry forwards,” and “incorrect tax lives for the purposes of computing a tax depreciation deduction” for underlying assets. TR 57-64. Complainant reported these deficiencies to McDermott, who instructed Complainant and a number of other employees to resolve the issues. TR 59-60.

McDermott testified he had reservations about hiring Complainant because, in his opinion, Complainant appeared technically sound but had poor personal skills.¹⁰ TR 832.

⁷ According to Complainant, FAS 109 is “the accounting pronouncement for accounting and income taxes.” TR 35.

⁸ FAS 109, tax reporting, and tax provisions are all synonyms. TR 346.

⁹ Complainant testified Mike McDermott told him Complainant's “position was a newly created position and . . . it was created . . . [because] the tax department had historically been understaffed.” TR 74; *see* CX-22. In fact, “[i]n 2005, the company acquired—made a \$3 billion acquisition, which more or less doubled the company's size, without really adding any corresponding tax personnel.” TR 74. Therefore, a “main objective of . . . [Complainant's] position was to improve the tax accounting and tax reporting processes that were in place at the time.” TR 74.

¹⁰ LaGambina participated in the interview process and also expressed concerns about hiring Complainant. TR 898. Respondent's tax department “historically ran lean,” and LaGambina did not believe Complainant was going to significantly help alleviate the amount of stress and work demanded of the department because he was a delegator. TR 898.

McDermott's concerns quickly came to fruition following the start of Complainant's employment. TR 833. McDermott recalled Complainant was outstanding with technical issues; however, "[h]e was viewed as abrasive; he would talk over people" and, "if he could get out of work, he would try."¹¹ TR 833. McDermott's dissatisfaction with Complainant's performance was documented in the 2007 performance review he authored. TR 834; RX-1.

Complainant received a rating of "meets expectations" within his 2007 performance review. RX-1 at 2; *see* TR 307-14, 869-74. At hearing Respondent's attorney highlighted some of McDermott's comments about Complainant's shortcomings:

One area of improvement that [Complainant] needs to work on is his communication skills. Although he clearly gets his points across people have viewed him as "talking over them" or dismissing their ideas without listening to them. In order to progress to the next level [Complainant] needs to spend some time softening his approach when dealing with others.

RX-1 at 6. On a related note, McDermott expressed "concern . . . that people may 'turn him off' or put a lower priority on his work. As bright as he is, his effectiveness will be limited if people are unwilling to work with him." *Id.* at 8. Ultimately Complainant received an "improvement needed" under the communication category—the lowest rating possible at Respondent.¹² *Id.* at 2, 8. Although Complainant received an "outstanding"—the highest rating—for his technical skills, McDermott also expressed concerns over Complainant's decision making and leadership skills, as well as being a team player. *Id.* Complainant testified he disagreed with a number of comments McDermott included within this performance review.¹³ TR 314.

At this time frame McDermott and Jean Bua, Respondent's corporate controller, contemplated placing Complainant on a performance improvement plan ("PIP") and if his behavior did not improve, he would be terminated. TR 838. McDermott testified Bua was "on board at that point." TR 839. In 2008, however, Susan Baize was hired and, although

¹¹ Brenna Jones, who at the time was the director of human resources, testified she also did not think "[Complainant] would be a good fit for the company." TR 961-62. "He came across as very arrogant, somewhat rude, condescending, [and] patronizing." TR 962. Jones recalled relaying these concerns to the Chief Financial Officer ("CFO") to which he responded, "Short of him being Charles Manson, we need to go ahead and hire him" because they needed his technical expertise. TR 962-63.

¹² Respondent's attorney asked Complainant to review the transcript from his July 25, 2014 deposition. TR 304-06. Within the deposition, Complainant testified McDermott had "reasonably good" tax skills and was an honest, ethical person that "would generally try to do the right thing." JX-23 at 73-74. Overall, he did not think that McDermott played a role in Baize's plan to get rid of Complainant. TR 326. Subsequent to this testimony, Complainant clarified that his opinion of McDermott being ethical and honest was "from a numbers standpoint." TR 330. In contrast, Complainant noted he and McDermott had different views on Complainant's responsibilities and behavior while working for Respondent. TR 330. More specifically, Complainant disagreed with McDermott's characterization of Complainant's behavior at the company. TR 330; *see* RX-71.

¹³ Complainant challenged whether this version of the 2007 performance review was the final draft because his signature is not present. TR 309-10; RX-1. Days after Complainant's testimony, however, McDermott testified this was the final version of the 2007 performance review despite the lack of signature. TR 836-38. McDermott indicated page seven of the review contains accomplishments Complainant wished reflected in the review. TR 836-37; RX-1 at 7. This was the one change McDermott made after discussing the review with Complainant. TR 837.

McDermott informed her that “they were going to put [Complainant] on a PIP,” Baize wanted to give Complainant the same clean slate the rest of the department was granted.¹⁴ TR 839.

The addition of Susan Baize as senior vice president in July 2008, brought change to Complainant, LaGambina, and McDermott’s duties.¹⁵ TR 68, 839-41. McDermott explained that prior to Baize’s employment, “there was me, basically Sandy, and pretty much everyone else, meaning he was responsible for everything, you know, the running of different groups. He had compliance and he had reporting under him.” TR 840. Baize introduced a “four-pillar” system to the tax department and installed McDermott as head of strategy, Complainant as head of reporting, LaGambina as head of compliance, and Robbin Webber as head of international. TR 840.

Complainant received “an additional responsibility, in a function known as tax risk management . . . [and was] relieved . . . from [his] tax compliance duties.” TR 68. Complainant testified:

[Baize] had said to me at the time that I was a multi-talented tax athlete, and I was capable of excelling in a number of different areas of tax. She felt that the focus on the tax reporting or tax accounting side of it, as well as the tax risk management side of it, would be more strategic. It would make best use of my abilities.¹⁶

TR 69; *see* CX-18. Baize confirmed she “made an adjustment to the entire tax team” and “split [Complainant’s] responsibilities in half” because “he couldn’t handle the work that was on his plate.”¹⁷ TR 496.

Baize also testified, during cross examination, that another reason she restructured the tax department was because LaGambina “was in the process of resigning because she could no longer work under [Complainant]”; in fact, “she did not want to work with [Complainant] in any capacity.”¹⁸ TR 641-42. When Complainant was hired, LaGambina reported to him. TR 898-

¹⁴ Baize testified Bua and McDermott briefed her about her staff when she was hired. TR 639. This briefing included an admonishment about Complainant. TR 640. Despite the commonly held belief that Complainant was smart but aggressive, “wasn’t a team player,” and “had difficulty with management of a large volume of work,” Baize “wanted to have a FAS 109 person on the ground as [she] was coming in the door” and gave him a “clean slate.” TR 640. Jones testified she attempted to warn Baize about Complainant, and Baize told her “I’m going to stop you there. I’ve heard it from everybody, but I want to take a position and give everybody a clean slate, and I want to give him a chance.” TR 964.

¹⁵ Complainant affirmed that any issues that existed prior to July 1, 2008 would have predated Baize’s involvement. TR 301.

¹⁶ During cross examination, Complainant affirmed he was both head of tax management and director of tax reporting at Respondent; however, director of tax reporting was “really [his] primary function at [Respondent].” TR 346. He affirmed that “essentially . . . as head of tax reporting for [Respondent],” it was his job “to ensure that the tax information that went into the company’s financial statements was materially accurate and complete.” TR 346. Complainant had performed similar tasks for past employers. TR 347.

¹⁷ This shift in responsibilities included appointing tax compliance back to LaGambina. Baize testified at hearing that Complainant was “not very helpful” in facilitating this transition. TR 496. She, however, stated the opposite—Complainant was helpful in this transition—within the 2008 performance review she drafted. CX-32; TR 498.

¹⁸ LaGambina once reported to McDermott; however, she began reporting to Complainant once he was hired. TR 840. McDermott recalled LaGambina complaining about Complainant “not following her schedule; that it was

902. LaGambina did not enjoy working under Complainant because from “very early on” he made inappropriate comments, he was not a team player, and, of greatest importance to LaGambina, he did not respect the work schedule that Respondent and LaGambina had previously agreed upon.¹⁹ TR 899. LaGambina needed a reliable work schedule that enabled her to leave at 4:00 PM each day so that she could attend to her son. TR 899. Amidst a debacle that Complainant himself created with the 2006 tax return, LaGambina said it became clear she could no longer work for Respondent if she was working under someone who would not accommodate her schedule. TR 899-901. She voiced these concerns to McDermott and he moved her out from Complainant’s supervision to working under himself on special projects. TR 901-02. LaGambina did not work in this capacity very long because of Baize’s restructuring. TR 901-02.

In light of LaGambina’s sentiments towards Complainant, and Complainant’s inability to manage all the compliance and reporting work, Baize testified she “cut [Complainant’s] work in half” by giving LaGambina the lead role in compliance matters, added risk management to Complainant’s tasks, and then “anointed [McDermott] as the director of strategy.” TR 642. In response to this change in his responsibilities, Baize testified Complainant stated, “It’s fine by me because what that means is I’m going to be doing half the work and getting paid the same.” TR 642-43. Baize was surprised Complainant would “make a flippant statement like that.” TR 643.

As demonstrated by subsequent performance reviews, Complainant’s standing improved from McDermott’s 2007 performance review. Complainant received a rating of “meets expectations” within the 2008 performance review from Baize. TR 51; *see* CX-32 at 2. Within the comments, however, Ms. Baize wrote: “Although Sandy is at an overall ‘meets,’ he has been operating closer to an ‘exceeds’ level in the past 4 months. Keeping in mind that the bar is very high at American Tower, a ‘meets expectation’ at a Director level is considered a very strong performance.” CX-32 at 2. In accordance with this comment, the remainder of the review is full of positive remarks about Complainant’s “top notch” performance particularly within the last four months. *Id.*

As much as his technical expertise was praised, Complainant received a “Meets Expectations” regarding his communication skills. *Id.* at 4. Baize expressed concern about Complainant being so “highly driven” that he could sometimes result in being overly aggressive and “ask[ed Complainant] to be less aggressive in his tone and delivery, and to focus on the

making her life difficult; that he was hard to work with.” TR 840. During cross examination, McDermott was asked to review a document in which LaGambina referred to Complainant as an asshole. TR 886-90; CX-17. McDermott could not recall the email, but testified he probably went down the hall and told LaGambina not to put that in an email. TR 890. McDermott also admitted he may not have reported LaGambina’s email to Baize because “[he] probably agreed [Complainant] was being an asshole, so [he] may not have.” TR 890. Upon being asked if Complainant ever used the term asshole, McDermott admitted he never heard or read Complainant call someone an asshole: “He was talking over people, not listening to their ideas. He was throwing his ideas down their throats. There was a lot of things to it. I don’t think he ever swore though.” TR 890.

¹⁹ Complainant testified he found LaGambina difficult to work with. TR 121. He “found her to be defensive and abrasive.” TR 121, 331. Shay testified he did not enjoy working with LaGambina because he found her to be abrasive. JX-24 at 53. Kahn also testified he found LaGambina “somewhat” abrasive. JX-25 at 119-20. Lastly, Tice testified at deposition that LaGambina was defensive, “very opinionated,” and by the end of her time at Respondent, LaGambina was not friendly to her. JX-22 at 22-23.

needs of the audience, particularly outside of tax.” *Id.* at 3. Ms. Baize also indicated his communication skills and willingness to work with others showed signs of improvement, she “particularly enjoyed working with [him], and rel[ied] on his technical expertise and viewpoints on many important matters.”²⁰ *Id.* 2-5.

In February 2010, Complainant received his 2009 performance review. TR 52-53; *see* JX-3. He was given an “overall rating of exceptional.” TR 53. Baize included positive remarks and comments including: “outstanding performer,” “demonstrates sound ethical leadership and holds others accountable for consistent ethical behavior,” “promotes an inclusive and respectful work environment,” and “partner with SVP and CFO to create a development plan for potential VP position.” TR 55.

Baize also included comments about Complainant’s communication and prioritization skills. JX-3 at 2-5. Baize noted the following concerns about his communication skills: “From a development standpoint, it would be my recommendation for [Complainant] to continue to focus on his ‘soft skills’ which we have previously discussed”; “focus on improving his communication skills with the CFO and others”; “areas for improvement . . . : Strive to show kindness and support with colleagues outside his functional area”; and adjust his demeanor and approach—“i.e. direct and aggressive”—in an appropriate way for “those who don’t always understand his personality and/or communication skills.” *Id.* at 2, 4.

Baize also emphasized Complainant’s need for flexibility in prioritizing tasks: “I would ask that [Complainant] be a bit more flexible when I request a reprioritization of either he, Larry, or Edison’s time as needed to satisfy requests from Tom Bartlett or myself that I deem to be urgent”; “there is sometimes a rigidity to how he approaches prioritization, that I would ask for him to periodically relax to accommodate practicalities and realities of people’s time and focus” and “may also require yielding to the needs of other functional groups over his own”; and, “be open to the idea that the other pillars (Strategy, Compliance) may require support at the expense of [Complainant] meeting his internal deadlines.”²¹ *See Id.* at 3-5.

Complainant testified this performance review was not the only time in which Baize discussed a promotion with Complainant. TR 56. Complainant recalled that “[d]uring . . . and after [his] review,” Baize indicated that she would “talk to Tom Bartlett to explore the possibility of creating a potential vice president of tax position for [him],” that efforts would be made to “hone [his] executive communication skills” which included attending “more meetings with [Respondent] executives,” “becoming more involved with mergers and acquisitions work, and sending [him] to . . . the Kellogg School of Management” at Northwestern University. TR 56-57. The 2009 performance review was the last one he received because he “was terminated before the next one would have come.” TR 57.

Baize confirmed that she discussed creating a vice president position for Complainant with Bartlett. TR 501. In an email to Bartlett, dated March 15, 2010, Baize requested that they

²⁰ Complainant’s communication rating rose from “improvement needed” in 2007’s performance review, to a “meets expectations” in 2008. RX-1; CX-32.

²¹ As to Complainant’s prioritization of tasks and flexibility, Baize noted Complainant showed improvement in this area over the past year, but she hopes to continue helping Complainant improve his awareness. JX-3 at 4, 5.

develop an eighteen month to two year development plan for Complainant to become a vice president. CX-48 at 2; TR 502-03. Baize clarified, however, that she proffered the idea to Bartlett because she was willing to “try and test the waters” for Complainant; whom “made it very clear that he expected to be promoted.” TR 503. In the event there was push back on the suggestion, “that there wasn’t going to be a significant amount of overall support, [Baize] would have pulled it.” TR 504.

Baize also testified within the context of the mergers and acquisition conversation she had with Complainant, they also discussed Respondent’s probable transition to a real estate investment trust (“REIT”).²² TR 643-45. Such a transition would have implications for Respondent’s need for someone of Complainant’s caliber because there would be “significantly less work” and “not a lot of technical issues . . . from a tax reporting perspective.” TR 644.

Baize recalled discussing these ramifications with Complainant²³ and made an effort to find alternative duties so that when the transition took place, Complainant’s role would not be eliminated or reduced. TR 644. One alternative duty involved Complainant working with Robin Webber on mergers and acquisitions.²⁴ TR 644-45. Baize testified the partnership did not flourish because it was difficult to motivate Complainant to get involved in the work and take ownership for his contribution to the project. TR 645. It was around this time period that Baize suggested mergers and acquisition classes to Complainant.²⁵ TR 645.

In response to the question, “Prior to April of 2010, you had a good working relationship with [Complainant]?” Baize replied:

It’s hard to say yes or no to that. My working relationship with him was adequate. . . . I felt I needed somebody of his ability up until that point. And I was willing to overlook certain idiosyncrasies in his personality, in the way he dealt with other folks, often times not terribly respectful. . . . And, you know, I had worked real hard to develop a good relationship, and I wanted to see him successful, intelligent, and had ability in the FAS 109 area in particular that I think was unusually strong. So although the working relationship could sometimes be a little strained, I was willing to overlook that because of the natural abilities that this gentleman has.²⁶

²² Baize explained a REIT is “an election that a company makes so that it’s treated such that certain of its earnings that relate to real estate . . . would not be subject to U.S. federal tax. TR 643.

²³ During June or July 2010, Complainant vocalized his concerns about “what [his] role was going to be in a post-REIT setting” to Baize and Smithson. TR 338. Complainant affirmed he “didn’t know” about his job security regarding the transition to a REIT. TR 338.

²⁴ Robbin Webber was the director of international tax. TR 660. Following Complainant’s termination, her role was refined to include tax reporting. TR 660.

²⁵ Baize recalled having concerns about Complainant wanting to remain with Respondent long term. TR 508. She testified she remembered “early on voicing concerns and even having discussions with Kevin Smithson that [she wasn’t] too sure [Complainant was] keen on staying on because of his insecurities around the REIT transformation.” TR 508. That said, Baize was well aware of Complainant’s desire for a promotion to a vice president position. TR 508-09.

²⁶ McDermott testified that leading up to April 2010, Complainant showed signs of improvement at times, but would ultimately regress back to his original behavior. TR 841. He alleged he reported these concerns to Baize multiple times, but at hearing could only recall one specific conversation he had with Baize. TR 841. When McDermott,

TR 505.

B. Overview of Fixed Asset Tax Remediation Plan

A “material weakness” was imposed by Respondent’s auditors, Deloitte & Touché (“Deloitte”), in “March 2008 for the financial year of 2007” because of “historically poor documentation of its deferred tax assets.”²⁷ TR 72. Complainant explained that a material weakness is a “deficiency or a combination of deficiencies in the company’s internal controls, such that . . . there is a risk that a material statement of the company’s financial statements could either occur or could not be detected on a timely basis.” TR 71. Deloitte made this determination in early 2008 after it reviewed Respondent’s internal controls. TR 71, 509. McDermott testified he was Respondent’s head of the tax department and Complainant was head of reporting in charge of the tax provisions when this material weakness was imposed. TR 869.

One of the projects Respondent “undertook in response to that material weakness obligation” was the fixed asset tax remediation project (“FA Remediation”).²⁸ TR 510. In April 2008, Jean Bua, Respondent’s corporate controller and senior vice president “set forth a remediation work plan with specific steps to address tax processes and improve or correct those.” TR 73, 833; *see* CX-22. Complainant recalled Baize holding a tax meeting, in which she “emphasized that the primary directive and goal of the tax department in 2008 was to improve its processes and get the material weakness lifted by year-end.” TR 76, 78; *see* JX-2.

Baize, and Smithson attended a conference on REITs, he recalled telling Baize the situation with Complainant had not changed-- he was still treating LaGambina and others disrespectfully and something needed to be done. TR 842.²⁷ Deloitte was Respondent’s auditor from 2007-2011. TR 72. Complainant recalled a number of auditors leaving the account because they “were asking very difficult questions of the company, and [Baize] told me they were asking too many questions.” TR 79. Jim DeSisto and Mike Simmons were removed from the account in March 2009, and Steve Kiernan was removed in approximately March 2010. TR 80. Complainant considered these removals to be “huge red flag[s]” because “[u]p to that point in time . . . it really seemed like she was trying to do the right thing and she wanted to make all the numbers right. And it made no sense to me why she would remove—or had caused auditors to be removed for having legitimate objections to these numbers.” TR 80. During his deposition, Complainant testified none of the three auditors who were “questionably removed” worked on the FA Remediation. JX-23 at 137.

²⁸ According to McDermott, the FA Remediation was “part of cleaning up our deferred tax accounts for financial reporting purposes and to substantiate that we had sufficient tax fixed assets to support what was reported, the deferrals that were reported in the financial statements. So it was a process basically to go back and make sure everything was there.” TR 860. Smithson similarly explained:

So the fixed assets and the tax accounts around the fixed assets, there was a concern that what was in the financial statements as the tax accounts associated with the fixed assets were not correct. And so the remediation was to look at the fixed assets that were being reflected in the financial statements and the related tax accounts on those fixed assets to ensure that we had the correct balances in the deferred tax items. And to the extent there were adjustments that needed to be made, that we would clean those up and get to the correct balances.

TR 993.

Baize testified in September 2008, LaGambina had primary responsibility for the FA Remediation.²⁹ TR 510. LaGambina affirmed when she got compliance back following the Baize reorganization, fixed assets came back under her purview.³⁰ TR 904. LaGambina testified “almost the whole department” played a role in the FA Remediation. TR 904. Pricewaterhouse Coopers (“PwC”) served as a “thought partner” over the course of the project.³¹ TR 905. Once Respondent was “done with [the] project, as far as [it] had scrubbed it,” and “looked at it a million times,” Baize hired PwC to do a pre-audit of the FA Remediation.³² TR 905-06. Lastly, Deloitte was the Respondent’s auditors and would have to approve of the FA Remediation.³³ TR 906.

Smithson explained the FA Remediation, and PwC’s role therein, was a “very open iterative process”:

We³⁴ would, or [Respondent] would do an analysis, and there would be more than one person doing an analysis, and there would be more than one person doing an analysis on the fixed assets, the buildup of the fixed assets to ensure . . . the underlying assets were in existence, that they were correctly stated.

We would then come together [a]nd people would—individuals would, . . . say, oh, I found an adjustment here. And the other—another person might say—and this might be between [LaGambina] and [Complainant]—oh well this adjustment, actually it’s not the right adjustment it needs to be this, and it would be a completely iterative process, after which each of those meetings there would follow on to-do’s on both sides.

²⁹ McDermott similarly testified, “[LaGambina] was the key player in the role”; “I was involved as consultant when they needed me”; “[Complainant] was also involved probably more towards springtime”; PwC “provide[d] support and assistance”; and, Deloitte, as Respondent’s auditors, “would have to be comfortable that it was right” because “[t]hey’re the ones auditing our financial statements to make sure that the material is correct.” TR 860-61.

³⁰ Fixed assets had been Complainant’s responsibility since he was hired. TR 904. His failure to conduct year-end reconciliation analyses made LaGambina’s job that much more difficult. TR 904.

³¹ LaGambina explained PwC’s role as a thought partner: “We would run concepts off of them. How would you hand this? Once we had identified differences, how is it handled? Is it an adjustment to net operating losses? Is it a Section 481 adjustment? So it was a lot of that technical stuff.

³² LaGambina explained this project was “huge”—it contained “400,000 lines of assets.” TR 905. “[Respondent] wanted PwC to look at it too to see if they missed anything” because of the sheer size of the project. TR 905. The personnel involved in the thought partner component of PwC did not work on the pre-audit group. TR 905-06. Smithson confirmed, the pre-audit “was a dry run. Because there were so many you know, hands sort of trying to figure out what the adjustments were, there needed to [be] a process memo. And in fact, we completed process memos in the September timeframe prior so that it could be released to Deloitte for their audit.” TR 998. Smithson indicated, however, he “assisted Belinda Eischel, [his] partner that [he] had mentioned in the specialty practice. And so together we worked through it, along with our teams, including Ran and people from—staff from Belinda’s team who specializes in this area.” TR 998.

³³ As Respondent’s auditors, Deloitte would need to “sign off” on “[t]he financial statements, how they affected the financials, how [Respondent] treated it. They needed to agree, otherwise, [Deloitte would] not . . . give us a clean opinion. TR 907.

³⁴ Smithson explained, by “we,” he meant Baize, LaGambina, Complainant, himself, and perhaps others. TR 996. He also emphasized his role was “sort of stepping back listening to this and then offering a perspective to [Baize].” TR 996.

TR 996.

Ultimately, Respondent “consulted with Deloitte and they made an assessment that they no longer had the material weakness and Deloitte agreed with that in the opinion.”³⁵ TR 77.

C. Complainant’s FIN 48 Error

In April 2010, Complainant made an “erroneous FIN 48 disclosure . . . on the [Respondent’s] 2009 financial statements.” TR 209. He uncovered his mistake “during the process of completing the similar disclosure in connection with the company’s first quarter 2010 financial statements, [he] then discovered the error that had been made in the prior period.” TR 210. Deloitte also discovered Complainant’s error, and alerted Complainant of his error “on the same day that [he] discovered the error.” TR 210. Complainant testified he took responsibility for his mistake. TR 210.

Complainant acknowledged he did not approach Baize and admit his mistake; rather, he disclosed his error when Baize called him at approximately seven in the evening while he was at a restaurant with a friend. TR 210. Baize called and told him “the auditors were in her office and they had communicated to her that there was an error on the disclosure of the company’s 2009 financial statements.” TR 210. Complainant informed Baize he had found the error earlier that day, and he “had spent the day working through that error” with Shay “trying to compute the magnitude of the error and also to put a process in place to make sure the error did not occur again.” TR 211.

Complainant testified he would have informed Baize when he first noticed the error; however, when he “actually looked down the hall to her office . . . she wasn’t in there.” TR 211. After failing to locate her, Complainant worked alongside Shay for the rest of the day, trying to “determine the magnitude of the error and also to fix the process going forward.” TR 211. This effort consumed the rest of Complainant’s day and, by the time it was done, “it was the end of the day” and he “wanted to step back, refresh his thoughts,” and “let . . . Baize know in the morning” what had transpired. TR 211.

The following day, Complainant met with Deloitte and Baize, and “set forth [his] findings and that [he] put together from correcting the process the day before, and . . . showed them what [he] believed the new disclosure should look like.” TR 212. Complainant also met with Bartlett and Shay where he similarly explained the error and the new process he believed would resolve the insufficient control. TR 213-14. Complainant affirmed at hearing this error did not have a material impact on Respondent’s financial statements. TR 214.

On May 6, 2010, Baize sent an email to Complainant concerning the FIN 48 error he committed. TR 214; CX-47. At hearing, Complainant’s attorney highlighted the bullet points in Baize’s email that characterized Complainant’s error as a non-issue; in fact, one point stated the

³⁵ Complainant testified he saw a presentation in June 2010 he believed Respondent prepared in an effort to remove the material weakness in 2009. TR 77-78; JX-2. He testified during his deposition he does not know why or how the material weakness came to be removed, if the presentation was accurate or ever presented to Deloitte. JX-2; JX-23 at 297-308.

Respondent “went through an SAB 99 analysis and concluded that this was not quantitatively and qualitatively material.” TR 216; CX-47. Complainant testified during his time at Respondent, Baize never communicated any dissatisfaction to him about the way he handled this FIN 48 error.³⁶ TR 220.

Contrary to Complainant’s perspective on his error, its overall significance, and how it impacted Baize, Baize testified this event triggered a change in the way she viewed Complainant. TR 647-51. She remembered Deloitte’s auditors came into her office and told her there was an error in the FIN 48 disclosure totaling about \$20 million of which Complainant was aware but did not to disclose to Baize. TR 648-49. Baize was embarrassed by the fact that Complainant, her director, knew about the error he made; and yet, Deloitte reported the error to her. TR 649. When Baize attempted to contact Complainant, she could not find him in his office because Complainant was in a bar. TR 649-50. Baize briefly spoke with him on the phone, and Complainant confirmed that Deloitte was correct and that he had made a mistake. TR 649.

Baize testified, the following day, she asked Complainant about what she believed was a mechanical error—“Why is it they found this and you missed it?” TR 650. Complainant informed Baize that he did not miss it and disclosed that “he had seen the error . . . a few days before.” TR 650. Baize asked for clarification: “[Y]ou saw this error a few days before; waited for Deloitte to come to you; and you never told me about this error?” TR 650. Complainant allegedly replied, “I didn’t want to bother you with these types of things.” TR 650.

Baize recalled that she was “incredulous” but clarified: “it wasn’t the error; it wasn’t the amount; it wasn’t any of that. It was the fact that [Complainant] made that statement to me.” TR 650. She testified she responded to Complainant, “Are you kidding me? Do you know if I get up off my chair and I walk down that hall and I tell Tom Bartlett what you just told me, you’d be fired on the spot?” TR 650. Complainant said nothing in response and “just looked at [Baize].” TR 650. Baize concluded, “[S]omething shifted for me in my view of [Complainant] at that point in time.” TR 650.

Following this meeting with Complainant, Baize testified she spoke immediately with her “trusted advisor” Smithson.³⁷ TR 650. Baize told Smithson that she was aware that he had been reviewing the provision on Respondent’s behalf, but that she needed him to step it up and look at things more closely. TR 651. She was “not sure what’s going on” and could not tell if Complainant is lazy or if he’s “selectively independently making decisions on what he should bring up or shouldn’t bring up.” TR 651. She characterized Complainant’s error as a “disturbing

³⁶ Complainant testified he had personal knowledge of McDermott and LaGambina committing “errors relate[d] to the historical deferred tax assets that had been brought forward in the company’s financial statements, and that was a significant factor in contributing to the imposition of the material weakness.” TR 221-22. They were not fired for these errors. TR 221.

³⁷ McDermott testified Baize also vented to him about the betrayal she felt regarding Complainant’s FIN 48 disclosure. TR 843. Prior to this event, McDermott remembered Baize was willing to tolerate Complainant’s personal issues because she felt Respondent needed his technical skills and she trusted him. TR 843. In McDermott’s opinion, the FIN 48 issue “was kind of the beginning of the end for [Complainant]” because “the trust issue went out the window”; “[h]e had let [Baize] be totally blindsided by Deloitte, which [wa]s not a good thing.” TR 843.

situation” and that was why she needed Smithson to “step it up in [his] review of this stuff.”³⁸ TR 651.

Baize’s affidavit provides that she “began the process of eliminating Complainant’s position and transitioning his responsibilities to others” after his FIN 48 error because she “realized she could no longer trust him.”³⁹ TX-E at 3-4. In fact, Baize testified she and Smithson “had some dialogue about the elimination of [Complainant’s] position”; however, she was not considering terminating him at that time. TR 690. At hearing, Baize admitted that notwithstanding the statement she made in her affidavit, she still asked him to get involved in the FA Remediation. TR 600.

D. The FA Remediation

1. April 2010 – Complainant’s Initial Involvement

Between March and April 2010, Complainant became involved in the FA Remediation after he demonstrated his “view of how that remediation should be conducted” to Baize. TR 82. Complainant testified Baize liked his approach, and informed him “she wanted [him] to be the technical reviewer for the work” and, when the project was complete, “to present this work to Deloitte because she liked the way [he] articulated and presented complex issues.” TR 83; *see* JX-6. At hearing, Complainant summarized his plan:

[U]ltimately the idea was to properly compute the company’s deferred tax liability and fixed assets. The support for that would be to ascertain proper tax basis in the company’s fixed assets. . . . [A]ll the various categories of book and tax basis differences would be identified, all the book and tax asset line detail would then be grouped to conform with those classifications; and ultimately, there would be one spreadsheet, which came to be known as the master file⁴⁰ which would house all that data.

TR 87; *see* JX-6. In addition, Complainant’s plan also called for quantifying purchase accounting variances with proper supporting documents,⁴¹ tracking of “impairment basis

³⁸ Smithson recalled Baize came to him, upset that Complainant knew about the FIN 48 error and yet, it was disclosed to her by Deloitte; not Complainant. TR 1003. Smithson testified Baize communicated: “I’m losing or lost trust in [Complainant]. I’m concerned about the judgment that he’s applying here. I’m going to need you, [Smithson], and PwC to start to get more involved in review efforts on the income tax accounting side.” TR 1003. Smithson confirmed that he and PwC became more involved at that time: “[I]n collaboration with [Complainant] we reviewed schedules for Q2. And in fact, kept doing it in Q3, as well.” TR 1003.

³⁹ Bartlett testified he had no recollection of Baize mentioning she wanted to eliminate Complainant’s position or terminate his employment with Respondent during this time frame. TR 810.

⁴⁰ “[T]he master file is one spreadsheet that contains by line item book asset in fixed assets and tax basis in fixed assets.” TR 86. When Complainant started working for Respondent, there was no master file. TR 86. Complainant insisted one be created so “everything [was] clear and concise in one file” and could be “lined up by unit identifier or asset number.” TR 86.

⁴¹ Complainant explained that purchase accounting variances were created “when the company made acquisitions of stock of a target business, from that transaction they would bring over the seller’s previous tax basis, so there would be a pocket of book and tax basis differences for that item.” TR 87.

variance,”⁴² and “a tax disposal analysis.”⁴³ Accomplishing all of these objectives would ensure the “company is carrying the proper tax basis on its books in order to make sure that its fixed asset deferred tax liability is properly stated on its financial statements . . . in a correct, clear, and auditable manner.” TR 88.

During the hearing, Complainant was asked “why this tax disposal analysis was necessary even though Deloitte would ultimately be . . . reviewing and auditing [Respondent’s] financial statements.” TR 96. Complainant explained why his plan was necessary in two parts. TR 96. First, “with respect to the Deloitte review, it’s a company’s responsibility to maintain proper books and records and to perform the best analysis that they can” because “[c]ompanies typically have more resources . . . [and] more hours to focus on their own work. Just because an outside auditor does not find something does not mean that a problem doesn’t exist.”⁴⁴ TR 96. Secondly, “with respect to the tax disposal analysis, the idea was to make sure tax deductions would not be . . . double counted” and to ensure “that for certain assets with book and tax basis differences, that those tax basis assets actually still existed at the measurement date.”⁴⁵

During a meeting on or around April 22, 2010, Complainant testified he outlined his proposal for the FA Remediation to Baize, Pam LaGambina, and Leslie Smith, a member of the tax team that reported to LaGambina. TR 85, 98; CX-45. He recalled that LaGambina disagreed with Complainant’s plan because “the books and records were not in good shape to do [a tax disposal analysis]” and the requisite “analysis would take about a year.” TR 99. Within the meeting, Complainant maintained his belief and told LaGambina the analysis needed to be done.⁴⁶ TR 99. Neither LaGambina nor anyone else at the meeting offered alternatives to Complainant’s proposal. TR 100. Baize testified at the close of the meeting, she asked Complainant to provide a summary of what was discussed during the meeting because “she

⁴² In order to know that you had a valid analysis, Complainant stated it was imperative to reconcile the “book and tax basis category known as impairment basis variance” with the “company’s income statements and trial balances.” TR 87.

⁴³ A tax disposal analysis is “an analysis by asset and line number of all the tax deductions—disposal deductions that the company has claimed on its filed tax returns.” TR 90. Complainant explained, “[O]ne of the main purposes of the tax disposal analysis was to make sure that the company was not double counting its tax deductions” and taking steps to avoid double counting was imperative; otherwise, the company would risk “overstating the company’s assets on its financial statements.” TR 90. The tax disposal analysis would also “prove current existence of tax basis assets in situations where there are book and tax basis differences.” TR 91.

⁴⁴ Complainant affirmed the role, responsibility, and authority Deloitte possessed in serving as Respondent’s auditors during the period in which the FA Remediation was conducted. TR 386-87. According to Complainant—who previously worked as an auditor for Ernst & Young—Deloitte’s team of auditors were responsible for reviewing the numbers and the disclosures in the 10Q and the 10K, ensuring those numbers were materially accurate, and locating support for whatever Respondent is presenting to the investing community. TR 387. In order for Deloitte to accomplish this objective, there were no restrictions on what the auditors could request in supporting documentation. TR 388. In the event Deloitte was unsatisfied with the documentary support provided by Respondent, Deloitte could decline to sign off on the financial statements. TR 388.

⁴⁵ Complainant further elaborated, if the tax basis assets did not actually exist at the measurement date, “there would be no possibility of sustaining any future tax depreciation deduction in a future tax exam,” resulting in “the company . . . carrying assets on its books that, in fact, didn’t exist, which would then have the effect of overstating the company’s balance sheet, its earnings, and its earnings per share.” TR 97.

⁴⁶ He explained during the hearing, “The absence of having proper books and records to support the analysis is not a good reason under any circumstances not to do the analysis.” TR 99.

didn't see a lot of note taking" and "wanted to make sure that there was good summary." TR 517; *see* JX-6.

At hearing, Baize was asked if she disagreed with any of steps Complainant set forth in the April 22, 2010 email. TR 519; JX-6. She replied, "It wasn't that I disagreed. I basically wanted his position put forth for [LaGambina] and everybody else who was looking at this and reviewing it for their consideration. This was one important lens on the project." TR 519. She further stated, "So whether I agreed verbatim to everything [Complainant] said, no I don't think I did. But I was—I wanted his input because of his role and his ability."⁴⁷ TR 519-20. Baize declared that in this email:

[Complainant was] not ensuring one thing or another. [Complainant] is presenting to me, as I requested, his view as to what the documentation should be that we put forth in an audit situation so that we can show where we are at on . . . the status of the tax fixed assets. Through this process we would find, and [LaGambina] was continuing to find, it was a continuous process, that finding places where things needed to be adjusted. And as we go through this process, we make the adjustments as they are presented. That's what this was presented to me for. This is what I asked. I did not make any assessment as to oh, this is going to be bad or oh, this is going to be good. It was, all right, let's get another viewpoint on the table, one that I respect from a technical standpoint, from an audit risk management standpoint that would be active as we present it to our auditors. And, by the way, it's a framework that may be helpful to go back and have [LaGambina] . . . kind of double-check numbers and things. Just another kind of checks and balance approach.

TR 523; *see* JX-6.

Complainant's attorney asked Baize, "You understood that one possible result of these steps that Complainant outlines in this email could be an adjustment to [Respondent's] deferred tax liability associated with fixed assets?" TR 520. Baize answered, "I understood when we completed our forensic accounting . . . approach to this that there would be adjustments. In fact, I would have been extremely shocked with all those assets and the lack of this sort of forensic approach, I would have been shocked if there weren't any adjustments at all." TR 520. Baize also confirmed those adjustments might require amended returns that would have an impact on the financial statement. TR 520-21. Baize testified she "didn't have any emotion" about whether the FA Remediation had a negative impact on Respondent's financial statement. TR 522. She elaborated, "If the information suggested that we had to make a negative or positive adjustment to the financial statement, then that's the adjustments we would make. It's not an emotional decision. You put forth the right numbers." TR 522.

Other than the tax disposal analysis—which was never completed because "[i]t was deemed not to be helpful or redundant or unnecessary," Baize could not recall which aspects of

⁴⁷ Baize affirmed she was not involved in the detailed work of the FA Remediation. TR 512. She relied on her "experts to really kind of make sure [she] understood the landscape, and [she] could continue to sponsor it and support them in whatever they needed so that they could do it properly." TR 513.

Complainant's April 22, 2010 email were ultimately incorporated into the FA Remediation.⁴⁸ TR 525.

LaGambina testified she agreed with most of the approaches that Complainant proposed at the meeting; in fact, she stated, "[I]t was in a lot of ways, what I had told [Baize] needed to be done." TR 911; RX-15; RX-17. LaGambina also stated Respondent did everything that Complainant suggested at the meeting, with the exception of the disposal analysis.⁴⁹ TR 911. LaGambina testified at length as to why Respondent did not conduct a tax disposal analysis:

A: [Complainant] basically said, . . . "[I]f you write it all up, and then if you don't do a disposal analysis, because we restate the basis, we're going to be wrong." But we never wrote it up. And we never . . . reinstated basis. So I don't know what a disposals analysis would have done for you. Book disposes of an asset. The way Oracle works, books disposes of it, you do the mass copy, tax disposes of it. Tax people have no ability to go—we have no access; we're locked out. It's a controlled environment accounting system, to go in and dispose and dispose of something. If book disposed of it, that means Deloitte audited that disposal and it got disposed for tax.

Q: Is the disposal analysis . . . predicated on the idea that tax had been arbitrarily written up in the book?

A: That we wrote things back up and they may have been disposed, we would have been disposing of them again, I think is what he was saying. And then when we had a meeting, he said, "[Y]our total exposure here is something like \$480 million of disposals for this reason." And I still don't understand that, but first of all we don't really dispose of assets. The only time we really do is if we sell off a business unit, which means a whole entity goes away. . . .

Q: When you say you don't dispose of assets, we're talking about fixed assets. We're talking cell tower, right?

A: Tower. We rarely dispose of them. We don't sell them. We might do a deal and get rid of some; we call them the "Dog Tower." But we're not in the business of selling towers. We are in the business of acquiring and running towers. So our disposals over the years are not that large.

TR 928-29. With the exception of this meeting, Complainant did not become involved in the FA Remediation until sometime during May 2010 when Baize was out on bereavement leave. TR 913.

⁴⁸ Baize estimated that over the course of the time Complainant worked for Respondent, she "may have agreed with 95 percent of the things that he said. Maybe 90 percent, which is pretty good." TR 525-26. Baize, however, "didn't agree with everything that he said. I had other people looking at it, and other people that I felt may have a different perspective and a more keen perspective on certain things, certain elements." TR 526. One such person with this "more keen perspective" was LaGambina. TR 526.

⁴⁹ LaGambina mentioned that Complainant, to the best of her understanding, also wanted "to write up all the assets equal book." TR 927. She testified at length as to why this would not make sense and about a conversation with McDermott in which he affirmed he misunderstood what he was asking for because that request did not make sense. TR 927-29. Accordingly, this task that Complainant may or may not have wanted completed was not done. TR 927-30.

2. April 26, 2010: Complainant's Review of Q1 – Line of Business Certification Questionnaire

On April 26, 2010, Baize sent an email to Complainant and asked him to review the attached “Line of Business Certification Questionnaire – 1st Qtr 2010” she received from Bartlett, and “confirm that [she] can sign this certification.” RX-16 at 1; TR 393-97. The questionnaire addressed accounting measures and SOX controls for the first quarter of 2010. RX-16 at 2-4. More specifically, Complainant, via Baize’s request, was asked to comment on: “any control issues in the quarter,” “any control issues not remedied at the end of the quarter,” “any matter constituting fraud,” “any complaints or claimed improper acts or omissions related to accounting, outstanding or uncovered,” “any environmental, litigation, or tax issues, or regulatory violations,” “all the representations and disclosures in the 10-Q true and accurate,” “any issues with anything being disclosed in the document either as to financial or non-financial items,” and “anything that should prevent Jim or Tom from attesting to the quality of [Respondent’s] financial statements and internal controls.” *Id.* In his response to Baize—which Complainant admitted would ultimately be relayed to Bartlett—Complainant did not raise any concerns; rather, he wrote: “I think we’re OK to sign with the attached.” *Id.* at 1; TR 393-97.

3. May 2010 – Complainant Becomes More Involved in the FA Remediation

On May 7, 2010, Baize’s husband “suddenly passed away” from a heart attack he suffered while moving Baize’s son into college. TR 103, 315. Complainant was “stunned” and “felt just awful about what had happened and the way [he] heard it.” TR 104. In support of Baize, Complainant “attended the wake of her husband, as well as the funeral.” TR 104. Baize returned from bereavement leave during the end of that month. TR 315.

Smithson took on a more hands on role and served as administrator in Baize’s absence. TR 913. He asked LaGambina for a status update on the FA Remediation.⁵⁰ TR 913. LaGambina informed him that she had previously told Baize, “I need help. I am nowhere near done.”⁵¹ TR 913. Bartlett, Smithson, and LaGambina had a meeting to discuss possible solutions to the issue. TR 914. Ultimately, the three decided to “get other members of [Respondent’s tax] department involved.” TR 914. The group decided to bring in Complainant because he should have time since “it wasn’t in the middle of a quarter” or “a quarter close.”⁵² TR 914.

⁵⁰ Originally, Smithson was not so intimately involved in the FA Remediation. TR 992. He explained:

I was another set of eyes for [Baize], giving her my perspective on work that was being done internally by the employees of [Respondent]. So analyses were being undertaken, she would ask for my view on reasonableness of those analyses and offering up insights that I may have based on my experience.

TR 992. Smithson’s role increased, however, when Baize left on bereavement leave. TR 995.

⁵¹ LaGambina further recalled, “Tom had said he wanted it done by the end of Q2, and I had told [Baize] I don’t think I’m going to be able to get this done. And it was not even done, close to being done.” TR 914.

⁵² Smithson testified Complainant originally told him he was too busy to get involved in the remediation efforts. TR 995. It was only after Smithson got Bartlett involved that Complainant assented to undertaking a more significant role in the remediation project. TR 995-96.

About ten minutes after LaGambina finished this meeting with Bartlett and Smithson, Complainant came to her office and asked what she wanted him to do. TR 914. LaGambina assigned him the task of “validat[ing] all the purchase accounting entries in the fixed asset database”—one of the areas that Complainant had initially suggested back in April. TR 914. The two of them agreed that it made sense for Complainant to take on that assignment. TR 915.

Complainant testified step one of the purchase accounting analysis called for working with Mike McDermott and LaGambina “to determine the population of stock acquisitions” so that Complainant could then “attempt to gather all the documents that were in place that would have supported the fixed asset deferred tax liability that had been recorded for each of those acquisitions.”⁵³ TR 114. Complainant had significant problems completing this task, because “for many of the stock acquisitions, the documents to support the fixed asset deferred tax liability that had been reported did not exist.” TR 115.

When Complainant reported this issue to LaGambina, “she told [him] to search in various spots. She pointed [him] to hard copies of files, as well as various locations on the company’s computer network driver to search for these documents.” TR 115. Complainant exhausted these potential locations and he was still unable to locate the requisite files. TR 115. When he disclosed this problem to LaGambina in mid-June 2010, “she told [him] that she did not believe that the proper tax basis had ever been properly recorded in connection with the recording of that same deferred tax liability on the company’s financial statements and, therefore, the support for the deferred tax liability was nowhere.” TR 115-16.

Complainant was “stunned” by LaGambina’s statement. TR 116. According to Complainant, “the deferred tax liability that had been acquired by the company’s stock acquisitions could not be supported”; therefore, “the company’s deferred tax liability . . . it was carrying on its financial statements was wrong.” TR 116. In order to remedy this deficiency, there would need to be an “offset . . . through the income statement, which would then affect the company’s net equity, earnings, and earnings per share.” TR 116. At hearing, Complainant differentiated the egregiousness of this error in comparison to the control deficiencies he uncovered in 2007:

While control deficiencies and poor underlying books are never good, for the most part the import of those was that tax depreciation would have either of been claimed in excessive amounts of potentially under-depreciated, on the company’s tax filings. But the result of those type of errors was really just a timing difference. It would have no impact on the company’s net equity or on its earnings. This error was different in that it would impact net equity and earnings.

TR 117.

LaGambina’s recollection of Complainant’s work on the purchase accounting analysis differs significantly from Complainant’s testimony. Despite assigning this task to Complainant, LaGambina testified found herself working on the validation of the purchase accounting analysis

⁵³ Complainant made a point to highlight that “fixed asset deferred tax liability was reported on the company’s financial statements.” TR 114.

much more than she anticipated. TR 915-26. Time and time again, LaGambina had to assist Complainant in finding the requisite documentation needed to support carry over tax and stock acquisitions. TR 915-26; RX-19; RX-20; RX-21; RX-22; RX-27; RX-28; RX-31; RX-33. She admitted that some of the documents “were more difficult to find than others”; in fact, some of the stock acquisitions were only in hard copy and not on Respondent’s shared T-drive or from small “mom and pop” companies with rudimentary bookkeeping.⁵⁴ TR 919, 923. Notwithstanding those limited, more difficult searches, LaGambina testified Complainant “often could not find what he was looking for”:

[D]uring this process, he came over to us and said, “You know, as much as [you] directed [me] to the T-drives, I can’t find anything. Every time, I can’t find anything.” I mean, the purpose of me assigning this to [Complainant], I was doing something else and we wanted his assistance and, you know, I would look and I would easily find most of this.

TR 923, 925.

McDermott testified the tax department was “pretty good” and “ke[pt] things moving forward for the most part” while Baize was out on bereavement leave, thanks in part to Smithson taking upon the role of administrator. TR 844-45. With Smithson’s assistance, Pam, Robin, and McDermott were able to carry on with business as usual. TR 845. Complainant, on the other hand, reverted back to his old habits. TR 845. McDermott testified Complainant worked from home some Fridays, spent a lot of time at the gym, if someone needed help with something he was often too busy, and would leave work earlier than most.⁵⁵ TR 845-46. The most egregious conduct Complainant engaged in during this time period was when he was spending an uncomfortable amount of time in Tricia Tice’s office. TR 846-47.

While Baize was out on bereavement leave, there was an expectation that the rest of the tax department would make extra efforts to ensure that operations continued to run smoothly. TR 319. Notwithstanding this expectation, McDermott had to approach Complainant during this period and ask him to stop spending so much time in Tricia Tice’s office because he was

⁵⁴ LaGambina recalled one particular file in which she directed Complainant to grab the hard copy of the file in Respondent’s penthouse—a little storage area Respondent maintained in a section of the cafeteria. TR 925-26; RX-31.

⁵⁵ Smithson testified, “I think that [Complainant] was very competent. He’s very competent in the area of income tax accounting.” TR 994. Regarding Complainant’s work ethic, however, Smithson did not consider him to be proactive and:

[F]ound [Complainant] to get the job done and answer the question at hand and it—full stop. . . . Meaning he was not going out of his way to be overly communicative or collaborative in explaining the issues that were at hand. And would do what needed to be done to answer the question so he could, I think, move on or put it to bed.

TR 994-95. On cross examination, Smithson elaborated that a more proactive employee would have been “more communicative with the team, so that there was a . . . collective development of a work plan,” “[a] more holistic work plan,” rather than habitually reacting to errors when they came up. TR 1019. “[T]he overall lack of proactivity came out in the [FA Remediation],” Smithson claimed, “but I saw it demonstrated in other areas when we were dealing with other matters.” TR 1020.

impeding her ability to complete her assignments in a timely manner. TR 320. After Complainant received this scolding, he approached Tice and repeated McDermott's comments; shortly thereafter, Tice confronted McDermott with his comments. TR 321. Complainant testified he relayed McDermott's comments to Tice because he did not want her to be blindsided by a negative review at the end of the year when she was anticipating a positive review.⁵⁶ TR 321-22.

Upon Baize's return from bereavement leave McDermott, whom Baize considered to be her "lifeboat guy,"⁵⁷ updated her on everything she missed. TR 652-57. Baize testified the update included what McDermott considered to be "serious personnel issues within the department": in particular, "with regard to [Complainant]." TR 653. Baize recalled that McDermott informed her that "[Complainant] did not respect his authority in leading the department in [Baize's] absence." TR 653. Baize learned that Complainant came and went as he pleased—including "pockets of time when he was out where nobody knew where he was"—and about the situation with Tice. TR 653.

Although both pieces of news infuriated Baize, the latter situation regarding Complainant's behavior with Tice was particularly egregious in her mind. TR 653. Not only was Complainant spending an uncomfortable amount of time with Tice—a subordinate who was in "development mode"⁵⁸ and not even within Complainant's group—but Complainant also disclosed McDermott's warning and statements about Tice's underperformance to Tice herself.⁵⁹ TR 654-55. Baize believed that a "mature, sensible director" would not have disclosed such statements to a manager who does not even report to him or her. TR 655.

⁵⁶ During re-direct examination, Complainant further elaborated that his desire to see Tice succeed was so strong because he was once her supervisor and "supported her promotion to manager the 2007/2008 timeframe." TR 467. Complainant also explained the topic of discussion during that time frame was about familial loss. TR 467. Complainant's wife's grandmother had passed away during that time frame, as did Tice's father. TR 467-68. He thought it would be helpful if they talked about it. TR 468.

⁵⁷ Baize elaborated on what she meant by "lifeboat guy":

[McDermott] is/was the best; he is the best. He was a person that I knew I could turn over the responsibilities of driving . . . and managing the team without me worrying about anything falling through the cracks. He was so dedicated and such a good person and just so capable. And I knew that . . . he in partnership with Kevin Smithson, could make sure that things ran smoothly, as smoothly as possible.

TR 652-53.

⁵⁸ Baize explained that Tice was in "development mode" because she was not performing up to expectations. TR 653. Complainant was aware of this fact, because he was involved in meetings in which underperforming employees were candidly discussed. TR 653-54.

⁵⁹ McDermott testified, "[W]ithin five to ten minutes" of rebuking Complainant for distracting Tice—an employee who was struggling to meet deadlines—Tice "came by . . . all upset, and said I understand you don't think I'm doing my job and I'm struggling with my work." TR 847. McDermott believed "the only way she could have heard it [wa]s [Complainant] went down and talked to her immediately about it, which really floored me because we are both directors" and part of serving in a managerial capacity is "deal[ing] with your personnel to discuss issues and address them. The fact that he went running back to her, I'm like, why would he do that? I was quite surprised and not happy about it." TR 847.

After McDermott finished briefing Baize about what transpired in her absence, Baize held a meeting with Complainant and McDermott in an attempt to “nip this [type of behavior] in the bud.” TR 656. Baize testified she indicated Complainant’s behavior was unacceptable and unbecoming of a mature director. TR 656. Complainant “did not look particularly pleased” and did not say much other than questioning the significance Baize was placing on the issue.⁶⁰ TR 657.

Following this meeting, Complainant’s behavior changed completely. TR 657-58. “Despite him being high maintenance,” Baize recalled, “he did show a certain level of respect toward me. And . . . he was respectful and professional After that, there was a definite shift in his acknowledgment of me, behaving in what I would consider respectful ways.” TR 657. For example, whenever the two passed in the hallway Complainant would not say hello and act as if Baize was not even there. TR 657. In the event that Baize was a couple minutes late to a meeting that she had scheduled, Complainant would leave while the rest of the tax team would wait patiently.⁶¹ TR 657-58.

Complainant acknowledged that McDermott chastised him for his distracting Tice, that he relayed McDermott’s concerns to Tice, and that he was again rebuked by Baize upon her return. TR 323. Complainant specified, “[Baize] asked me to stop having long conversations with [Tice].” TR 323. He also commented that he remembered McDermott “telling [him] that [he’s] talking too long to [Tice]” on one occasion, but could not recall whether that conversation happened numerous times. TR 323. Complainant testified, “I didn’t understand why [Baize] was so upset with me.” TR 324.

Over the course of Complainant’s involvement in the FA Remediation, Complainant’s relationship with Baize waned. TR 170. Complainant recollected, “Our meetings became more tense in nature. There were no jokes. There was no laughter like there used to be. And it seemed that she just did not have a lot of patience with me.” TR 170-71. He admitted that his behavior changed, in that it “was not as light and jovial as it had been in the past, because [he] felt [he] was unwelcome”; “[he] did not feel the warmth from her that [he] felt earlier.” TR 172.

On cross examination, when asked if he thought Baize’s loss of her husband could have altered her temperament, Complainant responded: “It’s my testimony that the joking and the warmth stopped because of the FA remediation. If there are other factors, I don’t know.” TR 317-18. Upon further questioning about whether Baize’s loss could have been the catalyst for her change of attitude toward Complainant, he maintained that he “didn’t cause it. It had nothing to do with him. I don’t know why that would reflect in how she acted towards me. . . . I don’t

⁶⁰ McDermott similarly testified Complainant’s “attitude was like I don’t know” and “almost like he didn’t do anything wrong.” TR 848.

⁶¹ Baize testified she discussions with Maryanne Ladino from Deloitte about Complainant’s behavior. TR 659. She recalled she told Ladino that she had a number of “lifeboat people”—a term she got from Bartlett—whom she could count on for support. TR 659. McDermott was Baize’s “key lifeboat guy,” LaGambina, and maybe Robin Webber were also highlighted as lifeboat people. TR 659. Baize informed Ladino that Complainant, on the other hand, did not seem to be a lifeboat guy. TR 659. McDermott recalled Complainant leaving meetings early if Baize was a couple minutes late, and having to go look for him once she arrived—“[i]t was annoying.” TR 849. Beyond those actions, he did not witness much of it. TR 849. He thought Complainant “was always disrespectful to her at times,” but “[n]ot always, I think at other times he was very nice.” TR 849.

understand why the death of her husband would result in her acting negatively towards me.”⁶²
TR 318.

4. May 24, 2010 FA Remediation Alterations

Originally, there was no deadline for the FA Remediation. TR 104. On May 24, 2010, however, Baize sent an email to Complainant and other members of the tax department indicating that “[d]uring today’s meeting we will hone in on critical path. We have to clear the decks to assure that this is completed for Q2. Tom [Bartlett] views this as our #1 priority.” CX-49. Complainant believed that this meant the tax remediation project needed to be completed by June 30, 2010. TR 104-07.

Baize confirmed that completing the project “for Q2” set June 30, 2010 as the due date for the project. TR 529-30; CX-49. This date, however, was aspirational. TR 530. Baize explained:

[H]aving worked with [Bartlett] for all those years, he wanted to make sure we’re prioritizing it properly and giving it our best effort. But understanding this, at the end of the day, we’re not going to complete a project on a given date just because . . . we have this internal aspiration for Q2. . . . [O]ften as a boss, you give—you’ll give a very demanding deadline to your people so they push, push, push, knowing that if it doesn’t get done in Q2, it will be soon thereafter, and we can put it to bed.⁶³

TR 530. Baize admitted that Bartlett “would have liked to see it completed in Q2.” TR 532. She could not speak to Bartlett’s expectations. TR 532.

During cross examination, Bartlett was asked about his expectations for the deadline:

[W]henver I set objectives, we try to get them done within reason. There are going to be things—there are going to be things that come up, complexity of projects and things like that are going to happen, such that you’re not going to be able to meet the specific deadlines on it. But when we set objectives and deadlines, we hope that they’re completed on time.

TR 808-09. Bartlett denied that Baize ever indicated the Q2 deadline was never going to be met or it was merely an aspirational goal. TR 809.

⁶² McDermott testified there was less warmth and humor in Baize upon her return. TR 848-49. He attributed this to the loss of her husband, who had been her rock: “She had a lot of stuff to work through, personal issues. Yeah, she—I’m sure she was distracted. Who wouldn’t be?” TR 849. LaGambina also recalled Baize “tried to have a little levity, but you could tell it was really forced.” TR 913. LaGambina, who considered Baize a very confident woman, testified “it looked like you could knock her over with a feather”; “so fragile.” TR 913. She also remembered Baize, who had an extensive wardrobe, telling her that she planned to alternate between two pairs of black pants with different tops so that she did not have to think about it in the morning. TR 913.

⁶³ Bartlett recalled setting a deadline for the FA Remediation sometime during this time frame. TR 793. “[T]hat’s pretty typical for the way I try to drive improvement within the business, and to put a deadline in there, to get it done, to get it behind us, and move on to many other things that’s going on within the business” TR 793.

Along with setting a deadline, Baize refocused Complainant’s assignments. TR 112-14. Complainant was directed to work alongside various members of the tax department in completion of “a roll forward of accumulated tax depreciation taken on returns,”⁶⁴ “purchase accounting analysis,”⁶⁵ and “481 adjustment schedules.”⁶⁶ TR 112-14; JX-7. Complainant testified “[t]his [wa]s a lot more” than his original task of “reviewing and oversight work” that he had discussed with Baize back in April. TR 113-14. “This [wa]s delving into the details of a lot of the work and—with respect to the purchase accounting analysis, that was a very intensive step in this remediation.” TR 114.

On June 4, 2010, Complainant sent an email to LaGambina, Shay, and Baize. TR 118; JX-10. Therein, Complainant sought to confirm his “understanding that the portion of the project is not being done on a cumulative basis (i.e. since inception), but instead is being analyzed for 2009 only” and guidance on how to resolve tax book basis for assets with “book/tax basis differences.” JX-10. According to Complainant, the only person to follow up on this email was Mike McDermott—an individual who was not even included on the email. TR 119. Complainant testified McDermott came to his office and told him “not to send more emails like this” because “Baize did not want sensitive matters put in emails.” TR 119, 474. This event was a “red flag” that made Complainant uncomfortable. TR 120. Complainant “thought that the whole objective of this remediation was to do the remediation in a transparent manner and it was never to be anything less than transparent.” TR 120.

At hearing, McDermott was asked by Respondent’s attorney about sensitive emails:

Q: Did you ever tell [Complainant] not to put sensitive things in emails?

A: From the standpoint of what?

Q: I don’t know. I mean, it’s not my allegation in this case.

A: If it was something where he was talking about an employee and he sent the thing, like a mass email to everybody, I would say you probably don’t want to do that, if that’s what you mean by “sensitive.”

TR 865.

5. Complainant’s June 17, 2010 Email

On June 17, 2010, Complainant sent an email to LaGambina, Baize, and Shay summarizing his conclusions about the purchase accounting analysis component of the remediation plan. CX-54; TR 126-29. He determined there were “tax basis assets in Oracle that

⁶⁴ This required Complainant to “summar[ize] . . . all the tax appreciation that [Respondent] had claimed on its filed tax returns” which would then serve as “a data point for the . . . 481 adjustment.” TR 113.

⁶⁵ A purchase accounting analysis is “an analysis to properly document all the book and tax basis differences that had been acquired by the company in connection with its stock acquisitions.” TR 113. According to LaGambina’s testimony and the emails she sent to Complainant and Shay in an effort to assist him in locating documentation, this was a task Complainant was already working on prior to Baize’s return from bereavement leave. See TR 915-26; RX-19; RX-20; RX-21; RX-22; RX-27; RX-28; RX-31; RX-33.

⁶⁶ This “step represented the forms to be filled out with the IRS to file for any accounting method change to correct the cumulative tax depreciation that [Respondent] had claimed on its previously filed tax returns.” TR 112-13.

did not have the proper supporting documentation”; “therefore, those assets needed to be removed from the Oracle system and ultimately the deferred tax effects of those assets needed to be removed from the company’s financial statements.” TR 128-29. At that point in time, the amount that needed to be removed from the company’s financial statements was “\$282 million.”⁶⁷ TR 128. At hearing, Complainant affirmed no one replied to this email and he never spoke with Baize about this email. TR 129.

Complainant testified if, after a company “uses its best efforts to locate the proper supporting documentation for that tax basis” and the documentation is still missing, the company can resolve the issue by two methods. TR 130. First, “the effects of that tax basis or the deferred tax effects need to be . . . removed directly from the financial statements, as the company should not be reflecting tax assets for amounts that it cannot produce documents.” TR 130. Or, alternatively, “the company should record what is known as a FIN 48 reserve against those assets.”⁶⁸ TR 130. “Either of those two approaches has the same bottom line effect in the financial statement”: the “reduc[tion of] net equity in the financial statements to reflect increased income expense, reduce earnings, and reduced earnings per share.” TR 130. Complainant testified, in addition to the June 17 email, he communicated these proper methods to Baize “at least twice in July 2010.” TR 137.

In contrast, “merely entering an asset into [the company’s] Oracle database” and “making that database available to a company’s outside auditors” does not constitute adequate documentation in and of itself. TR 132. In fact, “[a]bsent any proper supporting documentation, a mere data line entry into a database would . . . constitute nothing more than a data input error. There would be no basis under the principles of FIN 48 to show a tax asset as that line item.” TR 132.

Complainant’s attorney asked Baize if she understood what Complainant was stating in this June 17, 2010 email. TR 546. She replied:

I remember either putting this in front of Pam or forwarding it on. . . . On many of these occasions . . . Pam would say to me, [Complainant] doesn’t understand completely what he is looking at. I would say, just make sure that you understand, you know, that you’re on the same page. And you understand what he is saying, because I’m not—I can’t unpack it. I don’t understand it. It’s out of context. So just make sure you’re on board with this and get a meeting of the minds as to what all this is.

TR 546-47. Complainant’s email further asked, “So are you saying that you didn’t have an understanding as to what—?” TR 547. Baize explained:

⁶⁷ Complainant arrived at this number by applying a “40 percent tax rate” to the “deferred tax asset related to those assets”—totaling \$110 million. TR 129. The removal of this amount from the “financial statements would be offset by an income tax expense of \$110 million.” TR 129. In turn, that would “result in a reduction of net equity for the company of net earnings, as well as earnings per share.” TR 129.

⁶⁸ FIN 48 is “the accounting reference for accounting—for uncertain tax positions” and so “the reserve is computed based on the principles of that accounting pronouncement.” TR 130.

I didn't really spend a lot of time with this. . . . [I]n all fairness, I know this FA remediation is taking . . . for many of you four years, of people's lives, okay? This was I want to get it right.⁶⁹ It was really important. I was supporting and sponsoring the process. We weren't at a point when we were done. This was a work in progress. And I just wanted to make sure that, you know, at the end of the day, all of the smart people who understood the details were working together and understood and working from the same script. That was my role in this.

I would certainly not have taken one bullet point out of this huge project because if that were the case then PwC would have been all over that. Because you got \$282 million write off that you got to take care of. . . . [I] think this is the one where [Complainant] says that we got to get PwC—would also like to consult with PwC on this. This is a fairly complex area of accounting.

TR 547. Baize further clarified:

And when I say "possibilities" and "suggestions" for next steps, I'm not really going to look at this, and in the detail that we're asking you right now. I'm going to make sure that everybody in the projects knows what's going on. And the project leader understands what this is. That's not the tone that is presented here for anything that would cause me to suggest to do anything but what I did.

TR 548. Complainant's attorney retorted, "So whether [Complainant] states that assets showing in current tax basis totaling \$282 million should be removed from the system, that wasn't something that you focused on?" TR 548. Baize replied:

No, not in the context of this email, no. . . . If you're in the context of this date and where we were at on this project and all of the moving parts, I wasn't going bullet point by bullet point. I don't even know how much of this I had read at the time it was sent. I was struggling reading this off of a page. . . . [A]bout a month before that, my 49-year-old husband had dropped dead unexpectedly from a heart attack in the arms of my . . . 19-year-old son. And . . . for you to suggest that my head was around this one bullet item in the context of all the items, and all the projects that you saw on that email to Tom Bartlett that I was looking at going, oh, gee, I'd better just, you know, hide this. Good luck. You know, the thousands of people these emails were copied to, including advisors of a big firm, to even suggest that, is insulting. This document, when I looked at it, I gleaned at it, and it was in the hands of much more capable people to sort through. And I trusted that when this came to completion, and all the pieces were done. We'd

⁶⁹ Smithson testified:

Baize's instructions to me were to assist her and the team in getting to the right answer. And there were more than one occasion where she would stay that to—certainly to me, and to others, that the outcome was not—it was getting to the right answer was the priority whether that was, you know, a negative or a hit to the income statement or a benefit.

TR 993-94.

have a, you know, I say completed—it's never really completed—but this landscape that we could look at and say, you know what, this is as far as we can take it. Let's put it—let's make sure we get it to our auditors and get them through it, and all get an agreement where we're going to land. This is not done.

TR 548-49. Baize did confirm that a “\$282 million reduction in tax basis would reduce Respondent by about \$113 million.” TR 549-50.

Within this June 17 email, Complainant's third bullet commented that Respondent's total tax basis was potentially understated by \$88 million. CX-54; TR 555. When asked if she recalled seeing that figure, Baize responded, “[W]hen I received this, I gleaned. I didn't go word for word on this; so at the time I doubt I read it.” TR 555. Upon further inquiry about how much she would have discussed this figure with LaGambina, Baize testified the conversation she remembered “would have been please make sure you understand all the points that [Complainant] has presented and that you come to a meeting of the minds on all of these items.” TR 556. When asked if “instruct[ed] Ms. LaGambina to add this \$88 million to the tax base?” Baize replied:

I'm going to answer the question no matter how many ways you ask the same question, even those in the context of a different bullet, I'm going to answer the same way. I don't remember looking at a specific bullet, seeing an item and saying book this. I wouldn't have done that. I didn't have enough understanding around this to be able to do that.

Instead, I took all of information that he was sending via email and forwarding it on, or forwarding to somebody, probably either Mike or Pam, or whoever, making sure they understood what was going on. There are times I didn't even know what he was talking about. Do you know what he was talking about? I know there's some emails that, end of the day, I don't recall a specific conversation around any of these specific bullets, suggesting that Pam do anything because I wasn't—I didn't have the capability, particularly at this point in time, to be able to say that. I wasn't in the leads on this.

TR 556-57.

6. Profit and Loss Hit

Complainant testified Baize stated, on more than one occasion, that “she was unwilling to take a [profit and loss] hit for the results of the [FA Remediation].” TR 133-34. He understood that to mean that Baize “was unwilling to record an expense in the income statement regardless of what the outcome of the [FA Remediation] was.” TR 136. Rather than “record the new fixed asset deferred liability . . . via the income statement, which indicates the liability increased was expense,” Baize “was unwilling to reflect the new fixed asset deferred tax liability that had been properly documented on the company's financial statements”. TR 136.

At hearing, Baize denied she ever told Complainant she refused to take a profit and loss (“P&L”) hit.⁷⁰ TR 551. Complainant’s attorney then asked Baize, “Did you at some point say you would not write off undocumented assets because the project wasn’t done?” TR 551. Baize replied:

I had said that I’m not going to make any adjustments to the P&L or otherwise until we’ve completed the forensic process. He was, you know, if it was in the context of a conversation where he was ready to just kind of do this and say, well there’s a billion I don’t know. I heard all kinds of numbers today that were undocumented. . . . [W]e’re not done; that’s what I would have said. I would have never said no P&L hit. No P&L hit. I mean, it’s ludicrous to suggest that.

TR 551. As of June 17, 2010, Baize did not consider the project to be completed. TR 551. Complainant’s attorney compared this testimony to her deposition testimony.⁷¹ TR 552-54; *see* JX-21. During the deposition, Complainant’s attorney asked Baize if she said that Respondent was not “pencils down” on the project during that point in time. TR 553. At deposition, Baize responded:

I said in that context of our due diligence on the [FA Remediation], it’s not “pencils down” at this point in time. If we got it down to a population of assets that we still can’t quite explain, or we don’t have information specific to those assets, we would not write those assets off at this point in time simply because the information isn’t right in front of us today.

TR 553. Thus, her hearing and deposition testimony were consistent.⁷² TR 553-54.

⁷⁰ McDermott explained that if the phrase, “we can’t take a hit on this” was ever used, it was used to indicate the FA Remediation was “not done yet” and there’s still work to be done. TR 862. LaGambina testified she remembered Baize discussing there would not be a P&L hit “very early on” in the FA Remediation. TR 951. She did not mean, however, she refused to take a hit; rather, at the time neither Baize nor LaGambina anticipated taking a P&L hit. TR 951. LaGambina also denied she ever heard Baize discuss managing the project to a particular result. TR 940-41. Smithson denied Baize nor anyone at Respondent ever stated that they refused to take a hit P&L hit or suggested that assets be written off even if there was insufficient documentation to do so. TR 998.

⁷¹ The Baize deposition was entered into evidence as JX-21. This exhibit does not include the entirety of the deposition; in particular, the portion of the deposition highlighted at hearing—page 210—was not included. TR 552; JX-21. I find, however, that Complainant’s attorney’s reading that portion of the deposition into the record, in addition to Baize’s confirmation it was read correctly, sufficient to consider the deposition testimony part of the record. TR 553-54.

⁷² Despite Baize and LaGambina’s optimism that they would not have to take a hit early on in the FA Remediation, LaGambina estimated that in June or July 2010, it became apparent that a P&L hit was inevitable. TR 951-52. She testified “things started getting rolling” at that point in time and it was clear that “there was definitely going to be a variance. How they were going to treat it, I don’t know. Deloitte may not have access to record it.” TR 951. LaGambina further explained that while the variance was definite, she was not sure how it would be treated:

Early on, Tom Millbury, who was the audit partner, wasn’t hung up on recording anything. He was saying, you know, my concern is you put a process around this. We have a variance; if it’s small, you know, I can live with it, as long as that doesn’t move. And then the audit partners change, because I think every five or seven years SEC makes the audit partners rotate and when the new partner came on, Gail McNaughton, she had a different stance on it. She said, oh, no, whatever it is, you’re booking it.

On June 23, 2010, Complainant sent an email to Baize, requesting a meeting to discuss his concerns about the FA Remediation. TR 137-40; CX-55. At that point in time, Complainant “had not seen steps followed that [he] had set forth to . . . Baize on April 22nd, and that she had enthusiastically agreed to . . . in order to ensure that the project was properly done and that it ended in a correct and auditable result.” TR 138. Complainant testified Baize rejected his request for a meeting, and told him “to go straighten it out with [LaGambina].”⁷³ TR 139.

7. Plug Asset

Complainant recalled both LaGambina and Baize suggesting the use of a plug asset—“a fictional asset”—during the FA Remediation. During a meeting that took place “on or around June 23,” LaGambina asked “why could a plug asset not be created, which would essentially bridge any variance in the financial statements between the deferred tax liability on the financials and the remediated deferred tax liability.” TR 142. Complainant was “shocked” to hear this and told her that it could not be done because it was an improper thing to do. TR 142. No one responded or disagreed with Complainant when he told LaGambina that it could not be done. TR 143. At hearing Complainant testified based on her comment, it was clear “that [LaGambina] did not want to properly reflect the results of the [FA Remediation] and reflect the required deferred tax liability on the company’s financial statements.” TR 142.

About a week later, in late June or early July 2010, there was a meeting between Baize, Shay, Smithson and Kate Scully of PwC, and Complainant. TR 143-44. Complainant recalled, that during that meeting, Baize “set forth the question that in the event that the remediated fixed asset deferred tax liability is an amount different than the fixed asset deferred tax liability that currently existed in the financial statements, why a plug asset couldn’t be created to eliminate the variance.”⁷⁴ TR 144.

Complainant testified he was “stunned”; he “couldn’t believe that the head of the tax department would actually suggest something that was so brazenly contrary to the accounting

I didn’t know how they would treat it. We could come up with something that potentially could be booked through the tax provision. It was Deloitte’s advice and sign off on would we record this.

TR 952-53. LaGambina could not recall when McNaughton came on from Deloitte before or after Complainant was terminated. TR 953. Notwithstanding Deloitte’s input, LaGambina testified the view from within the tax department “was whatever Deloitte was going to make us do. They had to sign off on it.” TR 953-54. On re-direct examination, LaGambina unequivocally affirmed that no one ever expressed that they were unwilling to take a P&L hit no matter what the results of the FA remediation were. TR 959.

⁷³ Per Baize’s instructions, Complainant testified he met with LaGambina and Complainant “asked her how she had addressed the email that [he] sent on June 17th.” TR 139. Complainant alleged that LaGambina told him she took the \$80 million tax basis amount that Complainant had referenced in his email and “added that amount back into the Oracle database at the instruction of . . . Baize.” TR 139-40; *see* CX-54. Complainant disagreed with this approach because “a tax disposal analysis” was needed “to ensure that those assets still existed.” TR 140. Complainant’s attorney never questioned Baize or LaGambina about this allegation at hearing.

⁷⁴ At the time of the meeting, it was unclear how big the variance was. TR 146. Complainant testified about a day or two later, LaGambina stated in a meeting in Baize’s office that the “gap between the new deferred tax liability and what was on the financial statements was \$350, \$375 million.” TR 147. Based on those figures, a plug asset would have been worth a billion dollars at that point in time. TR 147.

rules, especially considering that we had had the same conversation in front of [LaGambina] just a week earlier.” TR 148-49. He told her that “there was no way a plug asset could be created” and “further said to her in the event that this plug asset did get created, how would she deal with that”—i.e., he “asked her [if] would she take tax depreciation deductions in the asset.” TR 149. Baize explained, “that no tax depreciation would be claimed in that asset, but instead it would just sit out there and serve as a plug to bridge the gap between the deferred tax liability and the financial statements related to fix assets and the remediated deferred tax liability related to fixed assets.” TR 149. Complainant, again, “couldn’t believe she was saying this” and “based on what she was saying, it certainly seemed like she didn’t want to do the right thing.” TR 151. Complainant made sure to follow-up the meeting in which Baize brought up the term plug asset with an email.⁷⁵ TR 152.

LaGambina denied she ever heard anyone discuss the use of a plug number of any kind. TR 941. She also testified she never suggested a billion dollar plug number or any plug number—“[A]gain, this was going to be audited by Deloitte. I think a billion dollars; they would have been all over. I don’t.” TR 941. LaGambina did remember Complainant suggesting a “bridged asset”—an asset you create and leave it on there—within the context of a think tank session, “but it never went anywhere”; “[w]e never did anything with that.” TR 941.

Complainant’s attorney asked Baize whether she had a discussion with Smithson about the acceptability of having assets on the books without a documented tax basis. TR 561. Baize initially could not recall, but then admitted “it makes sense that I may have posed the question in the context of sort of brainstorming.” TR 561. She recalled having a meeting with Smithson and Complainant, in which she asked Smithson if he had “clients that put something in Oracle that says here’s a group of unidentified assets that we’re going to depreciate or whatever.” TR 561. Smithson indicated that yes, he has clients who do that; however, Respondent realized that such an approach would be “silly.”⁷⁶ TR 562.

Baize summarized that while this concept may have been discussed within the context a brainstorming session, it was “disregarded pretty quickly” and Respondent opted to “grind through asset by asset and make sure we [got] to the right results.” TR 562. Baize could not recall whether Complainant voiced any disagreements with the idea; regardless of whether he rejected the idea, by the end of the meeting that option was definitively off the table.⁷⁷ TR 562,

⁷⁵ Based upon my review of the record, it does not appear that this alleged email was entered into the record.

⁷⁶ Baize elaborated, “I seem to recall that [Smithson] said that he had clients who did have unidentified assets as something in their Oracle system. That’s what I thought, but he wasn’t suggesting that we did it. And maybe that was something, at one point in time they eliminated over time.” TR 562. Regardless of the amount of time spent on the question, Baize’s “recollection [was] that he did mention something to that effect but he said it’s too risky and I wouldn’t do it, ultimately.” TR 562.

⁷⁷ Unclear who was definitively in attendance for the discussion of this issue. When asked if Complainant had raised any disagreement at this time, Baize stated:

Within the dialogue, he was. He may have. I don’t know. I honestly don’t know. I don’t remember what [LaGambina] said, or [McDermott] said, or whoever else in the room said. I do remember that at the end of the day, before we left that room, . . . that solution was off the table.

TR 562-63. Baize also could not specifically recall when this meeting would have happened. She testified, “I don’t know the date,” but remembered:

582. She was adamant that no one used the word “plug” because “the implication of plug means you’re . . . just not doing the work.” TR 583. Regardless of whether the word plug was used, Baize noted that the approach of leaving unidentified assets on the books to bridge a gap was rejected.⁷⁸ TR 583-84.

Smithson testified, “I am not familiar with anyone suggesting a plug asset, per se.” TR 999. Smithson did recall, however, a meeting with Baize, LaGambina, Complainant, in which Baize asked:

[I]f there is not specific documentation around an asset or group of assets, and we have other evidence that demonstrates that we have that asset, that if that asset is actually in existence . . . could we put that asset in in bulk? So, for example, additions that were made in 2009, a specific timeline in 2009 of these assets, could we put a bulk asset in the system that said “2009 additions?” And [Smithson] said, yes, I have seen that done by clients. The issue with that, as I articulated, is if any of those assets are disposed of in the system, then you have to know what adjustment to make against that one asset. And so you’re really trading of one issue for a potential other one down the line because you need to understand the composition of the underlying asset so you could be in trouble when you try to dispose of, to the extent you do, any piece of the assets.

TR 999-1000. In light of his forewarning of “the risk involved of trading one issue for a potential later issue,” Smithson testified this concept was abandoned.⁷⁹ TR 1000.

8. Reduction of Liability Based on Memory

Complainant testified during the first week of July 2010, he was sent “preliminary versions or results of the fixed asset deferred tax liability” by LaGambina. TR 151. The multiple versions illustrated “that [the] variance was decreasing.” It started “at around \$350, \$370 million” in one version, decreased to “hundred-plus million dollars” in another, and “the last version [he] saw, that the variance had come down to approximately “\$50 million.” Complainant claimed he had a one-on-one meeting with Baize about LaGambina’s conclusions during the first week of July 2010. TR 152-55.

[B]eing in my office because we were—I think we were using the whiteboard . . . I’m not sure where we were in the project, but it was at one point when we just maybe had . . . a time in the project where it made sense to talk about as we’re moving forward, as we’re getting closer, we hoped, to the finish line.

TR 581.

⁷⁸ McDermott testified, “There was no mention of a plug. There was no mention of fixing things, cooking the books, nothing like that.” TR 862. Shay does not recall anyone suggesting the use of a plug asset. JX-24 at 152.

⁷⁹ On cross-examination, Smithson affirmed that there was no follow-up conversation. TR 1017. He testified, “It seemed to die in that . . . meeting where the . . . group decision was that’s not the best course of action, let’s keep going. So I had no further interaction or discussion with [Baize] on that point.” TR 1017.

In this meeting, he informed Baize he “had spoken to [LaGambina] about what her process was in developing numerous versions of the remediated tax basis and what her rationale was for making changes to tax basis that would of developed those numbers.” TR 153. Complainant reported LaGambina said “her and [McDermott] sat in a room and changed numerous line items” of tax basis “based on their memory.”⁸⁰ TR 153. Complainant told Baize that “recording tax basis amounts based on memory is an undocumented tax basis and that those assets need to either be written off the books or alternatively set aside with the FIN 48 reserve.” TR 154. Baize responded by stating “she had faith in Mike and Pam and that they must know what they’re doing.” TR 155. Complainant testified he was again “stunned” because “this was another statement to me that [Baize] was unwilling to follow the accounting rules.” TR 155.

Baize denied Complainant ever told her LaGambina and McDermott made adjustments to the variance based on nothing but memories and rough estimates; nor could she recall Complainant ever expressing concern about such action. TR 560-61. She further testified she was not aware of a \$300 million discrepancy between the deferred tax liability reported in Respondent’s book and what was reported in the financial statements during this time period. TR 557. Lastly, she could not recall having any conversations about McDermott and LaGambina reducing the discrepancy to \$50 million.⁸¹ TR 557-58.

McDermott denied that neither LaGambina nor himself ever made up values for fixed assets based on memory. TR 866. He claimed they would not have engaged in such an activity because that would have constituted fraud. TR 866. Even if they had wanted to engage in fraudulent conduct and make up numbers, those numbers never would have been approved by Deloitte. TR 866.

Similarly LaGambina also denied she ever told Complainant that documents didn’t exist, that numbers were just wrong, or that McDermott and herself ever considered making up valuations based solely on their memory. TR 933-34. Even if someone wanted to make up valuations that lacked documentation it would not work; “[Deloitte] asked for documentation of everything.”⁸² TR 933.

⁸⁰ When asked if he was aware of any specific instances in which LaGambina was dishonest, Complainant answered that he discussed numerous occasions during his direct examination; specifically, LaGambina’s “putting in numbers from memory.” TR 332. This testimony conflicted with the answer he provided during his deposition. TR 332. During his deposition, when Complainant was asked if he was “aware of instances in which [LaGambina] was dishonest,” Complainant responded: “I don’t know anything specific, but that was just my general feeling.” JX-23 at 75. Upon further questioning at hearing, Complainant maintained that his recollection of LaGambina’s actions was more accurate during the hearing before me than the deposition. TR 334. Complainant clarified he did not think LaGambina played a role in his termination. TR 334-35.

⁸¹ Baize did recall discussions about variances and the difference between what Respondent had supported in Oracle and what Respondent had in a separate calculation. TR 559-60. She remembered getting a variance of \$36 million via LaGambina’s analysis, but that the tax team did not stop there. TR 560. Rather, the tax team then “rolled up [their] sleeves” in order to see what was causing the variance and ensure that they knew what the right number was. TR 560. “At the end of the analysis,” Baize believed they “ultimately did come down to a variance number, to which Deloitte said, well, based on that, let’s make an adjustment to the P&L for that true up that needs to occur. And we end up—the variance ended up needing something like, on a gross basis, I think it was \$5 million. It was something significant. It was—well it was less than the \$36 million.” TR 560. She could not recall exactly when, but Baize believed they reached this conclusion sometime in Q3 or Q4. TR 560.

⁸² In fact, when Deloitte did conduct an audit of Respondent’s final product, LaGambina recalled it was one of the most thorough audits she has ever been a part of: “I will tell you that audit ran for weeks. It was one of the most

9. Master File and Sign Off

Approximately a week after this one-on-one meeting with Baize, Complainant participated in a meeting with Baize, Smithson, and Scully. TR 156. Complainant recalled that Baize asked him what he needed in order to sign off on the FA Remediation. TR 156. At hearing, he was asked what he thought Baize meant by the term “sign off.”⁸³ TR 157. He replied, “I understood sign off—that she was seeking my approval on the results of the [FA Remediation].” TR 157. Complainant told Baize that in order for him to sign off on this FA Remediation, “the plan [he] set forth in April 22nd, which included a properly completed master file and the steps behind it, needed to be completed.” TR 158. Also, “once tax basis had been reestablished, those amounts needed to be entered into the Oracle database and then tax depreciation needed to be systematically recalculated, and that those would then feed into a properly completed master file.” TR 158. Complainant did not sign off on the plan during this meeting. TR 159.

In a meeting that took place sometime after the meeting in which Baize asked what was needed for Complainant to sign off—“maybe roughly July 15”—Complainant informed Baize and LaGambina that the FA Remediation required a goodwill analysis,⁸⁴ a historic impairment analysis,⁸⁵ and tax disposal analysis.⁸⁶ TR 159-60. LaGambina rejected the idea of completing a goodwill analysis and Baize did not say anything in response. TR 161. A goodwill analysis was never completed so long as Complainant worked at Respondent. TR 161. In contrast, Complainant testified he saw versions of a historic impairment analysis, but did not see a final version prior to his termination. TR 162. Lastly, in response to Complainant bringing up the tax disposal analysis, he recalled that Baize “snapped” and said “we’ve been over this before. [LaGambina] has already told you that the books and records are in good shape and we’re not going to do this—we’ve already agreed not to do this.”⁸⁷ TR 163. Complainant responded, “I

intense audits I’ve ever been through. They look—they requested everything. And I was a point person, so I would walk through with them with everything.” TR 934. As a result of their thoroughness, Deloitte “found a few things that [Respondent] missed” and as Respondent found them, LaGambina recalled, “[W]e just kept adjusting.” TR 934.

⁸³ Respondent objected to the question at hearing, because Respondent’s attorney asked Complainant extensively during the deposition as to whether he knew what she meant and he repeatedly said no. *See* TR 156-57; JX-23 at 233-37.

⁸⁴ A goodwill analysis “is a summary by acquisition of both the book goodwill and tax goodwill amounts from the date of the acquisition until the measurement date, which is 12/31/09.” TR 159.

⁸⁵ A historic impairment analysis is a “summary schedule of all the assets that have been historically impaired for book purposes by asset number and line item.” TR 162. Complainant proffered that this analysis was necessary to “in order to verify that category of book and tax basis differences and that history analysis needed to be reconciled to the company’s income statements and trial balances to . . . verify its validity.” TR 161.

⁸⁶ As the tax remediation plan continued on without including Complainant’s tax disposal analysis, Complainant highlighted that offline assets—i.e., “a tax basis asset that is not being maintained within the Oracle database and, therefore, does not have a unique identifier that would have been ascribed to it had it been maintained in the Oracle database”—were a significant issue. TR 102. These offline assets created two problems. First, there were “issues with properly tracking [assets] and attaching them to the related book basis because they didn’t have a related identifier.” TR 103. Secondly, “there was another issue of whether these assets actually existed at the current measurement date.” TR 103.

⁸⁷ Complainant testified, to the best of his knowledge, there was no alternative method to ensure the accuracy of the numbers without conducting a tax disposal analysis with a physical inventory. TR 449. Complainant never spoke to

had not agreed to this, and I still believed that this analysis needed to be done.” TR 163. Complainant testified at that point in time, he felt his efforts to ensure the project “would be accurate and audit ready” was unwelcome:

I felt like I was a roadblock. And the periodical fixed asset team meetings to discuss the project, I felt like I was on an island by myself. And I felt that the— eventually, that the only purpose of these meetings was to pin me down at the day where I would approve this remediation, regardless of whether or not the proper accounting procedures had been done.

TR 164.

Within the last week of July 2010, Baize asked Complainant to sign off on the tax remediation project for a second time. TR 165. In a meeting between Baize, Smithson, and Complainant, Baize allegedly told Complainant he “needed to sign off on this project before [he] left for vacation” because the CFO was not going to wait until he “came back from vacation for [Complainant] to finish.” TR 165. Complainant denied her request and “told her that in order for [him] to sign off on the project, [he] still needed a properly completed master file.” TR 166.

Eventually, on or around July 30, 2010, Complainant received a master file from Ryan Scadding, a “[PwC] tax person.”⁸⁸ TR 166, 584-85, 997; JX-15. “It was [Complainant’s] understanding at that point in time that [Respondent] thought the amounts were final and [he] was asked to review and approve it.” TR 472. On August 2 and 3, Complainant “worked through” the 360,000 lines of data in the master file with Scadding and Shay.⁸⁹ TR 167. Complainant was not “provided with all the underlying supporting documentation that went into the creation of the master file.” TR 168. The two day collaboration enabled Complainant to “produce a spreadsheet where [he] summarized the results of [his] findings” which he sent to LaGambina, Smith, Shay, and Smithson on the morning on August 4, 2010.⁹⁰ TR 172; *see* JX-19; CX-114.

At hearing, Baize affirmed the FA Remediation was not completed by Q2, 2010. TR 533. She denied that the project was not completed because of Complainant’s insistence on the creation of a master file. TR 533; *see infra* pp. 52-55 (discussing Baize’s August 23 email

Smithson or anyone from PwC about achieving the objective through a different accounting method. TR 450-52. He did not know whether the auditors at Deloitte thought a tax disposal analysis with physical inventory was necessary. TR 452. Complainant never heard of Respondent conducting the tax disposal analysis before or after his termination. TR 452. When asked if Deloitte’s conclusion on the FA Remediation must be wrong if they did not complete a tax disposal analysis, Complainant testified, “I have no knowledge how they reached the conclusions that they did” and confirmed that it’s possible Deloitte “got it right.” TR 452-53.

⁸⁸ Baize confirmed that Scadding was the PwC employee tasked with assembling the master file. TR 563. Baize further acknowledged that the master file facilitated review of the data contained within it and created a good audit trail. TR 563.

⁸⁹ Complainant considered Shay to be “his right-hand man” and affirmed “whatever concerns [he] had about the FA remediation [Shay] was aware of.” TR 340. In fact, Shay co-authored Complainant’s August 3 memo. TR 341-42; *see* JX-16. As of the date of this hearing, Shay still worked for Respondent. TR 343-44.

⁹⁰ During his deposition, Shay denied that it would have been appropriate to describe the FA Remediation as complete—“[T]here was more work to be done, disposal analysis in the undocumented tax basis” and “[t]here [was] undocumented tax basis to be looked at.” JX-24 at 164.

regarding the master file and Complainant's signing off). Baize could not recollect whether the creation of a master file had even been started by June 30—the end of Q2. TR 533. Baize maintained that not meeting this deadline was foreseeable: "I mean, we just wouldn't have been completed by Q2. It was an aspiration that just really wasn't going to be met."⁹¹ TR 533.

As indicated by an email sent by Baize to Smithson on July 8, 2010, the assembly of a master file did not begin until sometime after July 8. CX-56; TR 540-44. When asked if there was a time at which she came to believe a master file was a good idea, Baize elaborated on her thought process:

I always just wanted to make sure whenever a suggestion was made, because it takes time, and it costs money. It's my role to assess and do the sort of balance out what we're being asked to do, . . . on that balance. . . . [Y]ou know, there's a lot of things that people can do for different things, but you have to—I have to kind of discern being redundant. Is it something that's going to really help us move it forward? Is it going to help us determine further accuracy?

TR 541. Baize further explained that at some point she must have concluded that the master file would indeed be a good idea, despite the amount of money it would cost. TR 541. In reaching that conclusion, she utilized Smithson as a final check to make sure the investment in creating the master file was worth it. TR 542.

LaGambina testified Complainant's suggested master file "turned out being a very useful tool in the [FA Remediation]." TR 931. LaGambina explained the master file was a compilation of a "book/tax cost comparison reports."⁹² At that time, she had approximately fifty legal entities, and each legal entity had its own file and book/tax cost comparison report. TR 932. The overall volume of the documents worried Complainant:

I remember him thinking what if something is double counted in each report, which really can't happen the way Oracle works, but it's still very helpful. He basically stacked those book tax cost comparison reports. We ended up with a global domestic listing of all our book and tax fixed assets lined up next to each other. And as we found adjustments, they were made—they were made manually in that report and tracked in an offline file. Because essentially these would have to be pushed through Oracle. They couldn't be pushed through contemporaneously, because you needed an IT person. We couldn't do it.

TR 932. At the time of the hearing, LaGambina stated the master file was something Respondent still used. TR 932.

⁹¹ In a discussion about failing to meet this June 30 deadline, Baize clarified "this is not unusual, to put dates on a page that constantly have to be changed and reiterated." TR 537. She further admitted that while "[i]t's always our aspiration to do the right thing," that "sometimes we miss deadlines, yes. As was demonstrated by the 300-plus tax returns that were in arrears when I walked in the door in 2008." TR 538.

⁹² This report contains book cost and tax cost and analyzes "[i]f it's different, why is it different? If it's not different, is that correct? Should it be different?" TR 931-32.

10. July 29, 2010: Complainant's Review of Q2 – Line of Business Certification Questionnaire

On July 29, 2010, Baize sent Complainant the same questionnaire Complainant was asked to review on April 26, 2010, with a request that Complainant confirm he agreed with Baize's comments before she signed.⁹³ RX-46; RX-99; TR 397-98. Complainant replied, "Agreed. We may want to hold this pending resolution of the CTA item." RX-50. During cross examination, Respondent's attorney explored Complainant's response. TR 397-414. Respondent asked for a clarification regarding what Complainant meant by "Agreed": "[W]hat you were intending to agree with was Ms. Baize's responses on Exhibit RX-99, correct?" TR 403. Complainant responded, "Yes." Respondent's attorney also asked, "The CTA item has nothing to do with fixed assets; does it? It's a foreign currency issue of some kind, right?" TR 402. Complainant replied, "Yes." TR 402. Respondent then asked, "So that's not relevant to your case at all, correct?" TR 402. Complainant stated, "Correct." TR 402.

Respondent's attorney further delved into the details of the questionnaire. TR 403. In confirming there was nothing wrong with Baize's belief, Complainant reported to Baize that there were no "control issues not remedied at the end of the quarter." TR 403; RX-99; RX-50. Respondent's attorney asked, "Now, is it your testimony, sir, as you sit here today, that there were control issues at [Respondent]?" and Complainant replied, "There were poor controls over fixed assets." TR 403. Upon further questioning, however, Complainant admitted there was no reference to this concern in his response to Baize, nor did he say anything about control issues or concerns. TR 403-04.

Next, Respondent's attorney compared the response Complainant provided in his answer to Baize in comparison to his expert report. TR 404; RX-99; RX-50; CX-109. Respondent reiterated the questions provided in the questionnaire concerning fraud, inaccuracies, or other improprieties that transpired during that quarter. TR 398-411; RX-99. In his response to Baize, Complainant affirmed none of those issues arose during last quarter. TR 404; RX-99.

Complainant's expert report, however, contains a section titled "Specific Instances Where Baize and/or LaGambina Made Representations That Are Tantamount to Accounting Fraud." CX-109 at 14. Within this section, Complainant discussed the fraudulent and illegal consequences surrounding Baize's statement, "I'm not taking a P&L hit for this" and LaGambina and Baize's suggestion, "Why can't a tax asset be created equal to the unsupported DTL/ (or DTA)?" *Id.* After briefly elaborating on how he believed those statements indicated "a willful disregard of accounting rules" and "fraudulent activity," Complainant concluded, "The statements above provided additional concern to me that Baize might attempt to commit securities fraud with respect to [fixed asset deferred tax liabilities]." *Id.* When asked to explain the disparity between the questionnaire and his expert report Complainant explained that in the

⁹³More specifically, the Q2 – Line of Business Certification Questionnaire asked Complainant to comment on: "any control issues in the quarter," "any control issues not remedied at the end of the quarter," "any matter constituting fraud," "any complaints or claimed improper acts or omissions related to accounting, outstanding or uncovered," "any environmental, litigation, or tax issues, or regulatory violations," "all the representations and disclosures in the 10-Q true and accurate," "any issues with anything being disclosed in the document either as to financial or non-financial items," and "anything that should prevent Jim or Tom from attesting to the quality of [Respondent's] financial statements and internal controls." RX-99; *see* RX-16.

report he was “stating there was a potential for accounting fraud” and “potential fraud-related issues.” TR 406.

Question nine of the questionnaire asked: “Have you reviewed and evaluated the information contained in the 10Q? Are all the representations and disclosures in the 10Q true and accurate? If you have any issues with anything being disclosed in the document as to either financial or non-financial items?” TR 410; RX-99. Complainant confirmed Baize’s response, “Review is still in progress.” TR 410; RX-99; RX-50.

Bartlett explained the significant role these questionnaires played at Respondent:

The point of the form is at every quarter-end and year-end, I go through a certification process to ensure that the financial statements are, in fact, reasonably accurate. And this is a way that I used to gather information from all of the business. And so we have a form here that we send out, that . . . the team completes, and they can, in fact, pass it down to their organizations to ensure accuracy of the statements they’re providing to me. And then I sit down with each one of those that a filling out the certifications, and I go through the results with them. And, again, the objective is so ensure that all of the information that’s going on with our business is made aware to me. And then that becomes the basis for what gets included in our financial statements and in our SEC form 10Q or 10K at the end of the year.

TR 796. Bartlett also confirmed that he “absolutely” expected an employee who “had a belief that a financial statement was imminently going to be misstated, hadn’t been yet been misstated, was imminently going to be maybe, in the next quarter,” to note this concern in the questionnaire response. TR 796. If an employee had a belief that Respondent’s financials were misstated and did not report this belief on the questionnaire, Bartlett testified the employee would be subject to disciplinary action “in addition to termination.” TR 796.

11. July 30, 2010: Complainant Approved Revised Draft of 10Q, Audit Committee Slides, Q2 Clearance Memo, and Tax Provision Memo

Complainant received a revised draft of the 10Q disclosure from both McCormick and Baize. TR 411-12; RX-67. He testified reviewing the tax disclosure of the 10Q was part of his job. TR 412. No one ever attempted to limit the amount of information he reviewed about the 10Q because a correct and accurate 10Q is vital—once finalized it is available to the investor community and affects whether people buy, hold, or sell Respondent’s stock. TR 413. Despite Complainant’s concerns about the net earnings being wrong in light of the undocumented tax basis, Complainant did not include these concerns on the 10Q draft he received on July 30.⁹⁴ TR

⁹⁴ Complainant affirmed that he “never had a subjective belief that the information contained in the 10K or 10Q that [he] actually reviewed was materially wrong.” TR 349. When asked if he “never believed that the information that was filed with the SEC was wrong, Complainant responded, “Again, I felt there was a possibility that [it] could be wrong.” TR 350.

413. When confronted with this fact at hearing, Complainant stated, “I knew the company had undocumented tax basis in their books, I didn’t make any changes in here.”⁹⁵ TR 413-14.

Baize also asked Complainant to review audit committee slides. TR 414-15; RX-56. Complainant acknowledged at hearing that these slides—which contained financial income statements—would be presented to Respondent’s audit committee. Complainant reviewed the document, and replied to Baize, “Looks good.” RX-59. Baize forwarded Complainant’s response to Bob Meyer and instructed him to present any questions he might have on the document to Complainant.⁹⁶ TR 417. Shortly thereafter, Complainant and Baize worked together to resolve a “withholding tax reversal.” TR 417-18. After they fixed the problem, Complainant forwarded their edits to Meyer in which he initially joked—“Bob I have a late tax entry for you. Just kidding”—before providing the change that Baize and he decided was necessary. TR 418; RX-56; RX-58. Despite the fact both Complainant’s expert report and testimony emphasized that net income, net equity, and earnings per share were incorrect, he did not include any mention of these concerns during the review of the audit slides. TR 419; RX-58; RX-59.

On the same day, Meyer also sent Complainant and Baize a Q2 clearance memo full of “a summary of key points to review with [Taicet]” and asked them to review his characterization of the data.⁹⁷ TR 421; RX-66; RX-68. On August 1, 2010, after reviewing Meyer’s memo and Baize’s input, Complainant responded, “I agree with all Susan’s comments. The ties to the E and P does not describe the FIN 48 qualitative of 1.2 million, which is probably too much detail anyway. All other items look fine.” RX-66; RX-68. At hearing, Complainant admitted his comment does not have anything to do with the FA Remediation. TR 423. Furthermore, Complainant also admitted his response as a whole did not include anything about the FA Remediation nor the need to reduce net equity, net income, or earnings per share. TR 424. Complainant did briefly comment on a section titled, “Material Changes in 10Q”; however, his comment was limited to suggesting an “opening balance sheet changes” and then “no other

⁹⁵ Reviewing and ensuring that the 10Q is an accurate account of Respondent’s financial statements was one of Complainant’s tasks. TR 364. During cross-examination, Complainant testified he was aware of undocumented tax basis, which would result in the net equity being overstated; however, he did not make an effort to alter the 10Q to reflect this overstatement or inform Baize, Bartlett, or Taicet of his concern. TR 365-67. Respondent’s attorney asked, “[I]t’s your testimony that you believed the information contained in the 10Q to be inaccurate and if you didn’t fix it, you would have been committing securities fraud; is that right?” TR 365. Complainant responded, “Yes.” TR 365.

⁹⁶ Bob Meyer was the controller of the company in 2010. TR 383. His job was to assemble all of the financial information and the other information that’s going to be presented to the investor community. TR 383. Complainant confirmed that “it’s important that the information he gets from . . . different departments is accurate” and that he himself “endeavor[ed] to provide him with accurate information.” TR 383-84.

⁹⁷ Initially, Complainant denied he worked with Meyer to ensure that accurate tax information was included on the 10Q. TR 384. Rather, Complainant insisted he “worked with [Baize] to make sure that the information got to the 10Q.” TR 384. Shortly after this clarification, Complainant testified he, with “assistance” from Meyer, developed SOX controls for the purpose of ensuring the financial information in the 10Q and the 10K being sent to the investor community was materially accurate. TR 391-92. Complainant also acknowledged that Meyer would email Complainant questions relating to the 10K or 10Q, and Complainant would answer his questions. TR 384. Complainant maintained, however, that if he had a subjective belief that the information contained in the company’s financial statement was materially wrong, he would not report it to Meyer—he would report it to Baize. TR 385. Regardless of whether Complainant had a duty to inform Meyer, Complainant never informed him of his concerns about the tax information included on the 10Q. TR 384-86.

significant changes.” TR 425. During cross examination, when Respondent asked if he intended to communicate to Meyer that “there were no internal control issues with [Respondent],” Complainant responded, “I communicated that to Susan.”⁹⁸ TR 427.

Bartlett described what a clearance meeting is and its utility in his process:

After we complete all of the certification meetings, our controller, Bob Meyer, who participates in all of the certification meetings with me, prepares a memo that then he and I, our general counsel present to our chairman, my boss. And so we sit down with him and address all of the particular issues that we’ve uncovered and how we addressed them, as a result of the recertification process. So that’s why it’s a clearance meeting with the CEO, my boss and me.

TR 799; *see* RX-66. He then confirmed that this clearance meeting and Complainant’s clearance memo is a part of his certification process, to make sure that the financial statements are accurate. TR 799.

Complainant sent Baize, and copied Shay, an email with an attached tax provision memo for the second quarter of 2010 provision and detailed analysis of the effective tax rate. TR 428; *see* RX-65. Complainant affirmed at hearing that he and Shay authored the document to be sent to Bartlett and Meyer.⁹⁹ TR 428. When he sent this document to Baize, Complainant “was intending to tell her what [he] knew.” TR 429. He clarified, “These are normal steps that were in every quarterly division memo. I didn’t write anything about the [FA Remediation]. I had already discussed that with her a lot of times.” TR 429.

Bartlett testified the tax provision memo is a document he “absolutely” relies on as part of his certification process. TR 798; RX-65. Although Bartlett could not specifically recall attending a meeting to discuss this particular memo, he is certain a meeting would have taken place because he always held a meeting at the end of each quarter to discuss it. TR 798. Bartlett testified during this meeting—in which Complainant would have been a participant—“there was

⁹⁸ During his deposition, Complainant’s thoughts on the prospect of informing Meyer were conflicting. *Id.* at 157-59. At deposition, he stated the opposite of what he testified to during cross examination: he affirmed that he would have in fact told Meyer if he had a subjective belief that the financial statements were materially wrong; however, he never told Meyer this because he never reached that conclusion. TR 385; *see* JX-23 at 83, 157. Shortly thereafter, Respondent’s attorney asked, “You didn’t believe in your capacity as head of reporting and risk management for the tax department that you had any obligations to” report these concerns to Meyer, and Complainant stated, “I believe my obligation was to report whatever I saw and thought to my supervisor.” JX-23 at 159. On redirect examination, Complainant stated that he reported his concerns to Baize and not Meyer, out of respect for the chain of command. TR 479

⁹⁹ Bartlett explained what a tax provision memo is:

[A]t the end of every quarter the tax group prepares all of the detail relative to the tax entries that were, in fact, included on our financial statements. And it’s very lengthy. There’s a lot of information here, as you can see from all of the letters. But this is a typical memo that I would get at the end of the quarter to help me understand exactly what was going on in the quarter and to understand if there are any particular issues.

TR 797-98.

a lot of discussion that would go on at the time relative to fixed assets to making sure that they were done right and [Complainant] . . . and the rest of the tax group were working together to make sure that they had addressed all of the particular issues that were going on at the time.” TR 798-99. Bartlett denied that Complainant raised any concerns about Respondent not properly writing off assets in the FA Remediation during that meeting or in any other meeting. TR 798.

In summarizing these documents—namely, the line of business certification questionnaire, revised draft of 10Q, audit committee slides, Q2 clearance memo, and tax provision memo—Complainant reviewed and approved on July 29 and 30,¹⁰⁰ Respondent’s attorney asked:

The bottom line, sir, is that in none of the documents that we just looked at, the quarterly questionnaire for July, the CEO clearance memo, the Audit Committee slides, the tax provision memo, or even the 10Q itself, did you make any changes whatsoever to any of the numbers or any of the disclosures to identify any of the issues you’re now raising in this case, true?

TR 429. Complainant responded, “Yes.” TR 429. Respondent’s attorney further inquired, “And you were just hoping against hope that somehow the information you had given to Ms. Baize would have filtered through to Mr. Bartlett and Mr. Taiclet before they signed the 10Q with the inaccurate information; is that right?” TR 429-30. Complainant replied:

I told her what I had known. And I knew there was undocumented tax basis at that point in time. And I didn’t know if there were other documents coming or not. My concern was that the project was going to be incorrectly conducted, and that’s what I had told her consistently.¹⁰¹

TR 430.

During re-direct examination, Complainant defended his not raising any issues during this series of emails: “I was very careful about what I put in emails and what I didn’t put in emails. I know what I told Susan, and I felt that every time I put something inflammatory in the email, all that it was going to do was further erode the relationship.” TR 475; *see supra* p. 23 (discussing McDermott’s chastisement of Complainant on Baize’s behalf). Also, at this time, Complainant did not in fact know that Respondent’s financial statements were wrong. TR 475.

Complainant did not feel he had a responsibility to report his concerns to Ladino, Smithson, or anyone else at Deloitte and PwC.¹⁰² TR 472-73. The only person Complainant

¹⁰⁰ During Complainant’s deposition, Respondent’s attorneys asked Complainant to review a number of documents. TR 222-25; *see* RX-16; RX-50; RX-53; RX-56; RX-58; RX-66; RX-65; RX-67; RX-68; RX-99. At hearing, Complainant affirmed that none of the documents he was asked to review mentioned any potential misstatement of deferred taxes relating to fixed assets. TR 225.

¹⁰¹ Bartlett testified his office was located fifty feet from Complainant. TR 790. He also affirmed that there were times when he would have direct communications with Complainant about work issues, and that there were no restrictions on Complainant’s access to Bartlett during the work day. TR 790-91.

¹⁰² Complainant met with members of Deloitte’s tax team about the tax remediation project. TR 388-89. He specifically recalled meeting with Maryanne Ladino, the “top tax person in the account.” TR 389. Complainant

needed to report issues with was his supervisor, Baize, because he thought it was important to work within Respondent's chain of command. TR 472-75.

After a review of the line of business certification questionnaire for Q2, tax provision memo for Q2, the Q2 clearance memo, and Complainant's estimated net operating losses, Respondent's attorney asked Bartlett:

Q: With regards to the documents that I just showed you, . . . if an employee knew or believed that there was something imminent that was going to have a result in a material misstatement of earnings or have a[n] impact on the financial statement, what, if anything, would you expect that employee to do with regard to reporting it?

A: Tell me immediately

Q: And if you learned that an employee in a director level knew something like and didn't tell you, what, if anything, would you do?

A: Discipline action, as we talked about before.

Q: And would that potentially include termination?

A: Very well could have.

TR 801-02; RX-46; RX-53; RX-65; RX-66.

12. Complainant Worked from Home on July 30, 2010

On Friday, July 30, 2010, the same day in which he confirmed the accuracy of numerous, significant financial documents, Complainant worked from home. TR 368. This date was noteworthy because it was the Friday before the earnings release at the end of the quarter.¹⁰³ TR 369. Complainant testified the day was not a more important day than normal for the tax department.¹⁰⁴ TR 369. He also emphasized he did not know "Bartlett and the controller, Mr. Meyer, were seeking additional information, as necessary, from tax people about the tax information was going into the Q" during that day because such "inquiries typically went to [Baize]." TR 369.

confirmed: their task was to "go over the tax prep information" and "address any information that was going into the 10Q"; Ladino was "free to ask [him] any questions that she wanted" or "for any support that she wanted"; and Complainant was "to provide her with any information that [he] felt was material and relevant to [Respondent's] 10Q." TR 389. Respondent's attorney then asked if Complainant ever "told Ms. Ladino, or anyone from Deloitte, that [he] believed the numbers in the 10Q were wrong," that "the numbers even might be wrong," that he "believed that there was any fraud going on at [Respondent], or that "there were serious internal control issues." TR 390. Despite the fact Complainant confirmed all of that information would have been "very relevant" to an auditor and that he had ample opportunities to inform anyone at Deloitte of these concerns, he testified he never told Ladino or anyone else at Respondent about his concerns. TR 390.

¹⁰³ Bartlett confirmed that on July 30, 2010 the "earnings statement was imminent"; "that would have been right at the time that we would have been issuing the second quarter." TR 800. McDermott recalled "it was probably the earnings release and the call that the CFO was going to have on Monday." TR 851. He further explained that following the call following the earnings release was a "key date for the CFO" because the call consists of the CFO answering an "awful lot" of questions from analysts and investors. TR 851.

¹⁰⁴ In contrast, McDermott confirmed that it is important to have senior tax people on the reporting side in the office to prep Bartlett for the call related to the earnings. TR 853.

Complainant was aware, however, that McDermott conducted an earnings release call with the analysts to follow the company prior to the release of the 10Q. TR 372. Complainant also knew that net operating losses—sometimes referred to as “NOLs”—were typically discussed during this call. TR 372-73. In accordance with Complainant’s testimony, McDermott contacted Complainant on July 30 and inquired about “information relating to the net operating losses of the company”—the same net operating losses that Complainant’s complaint and expert report indicated was materially overstated at that time.¹⁰⁵ TR 370-71, 853; RX-57; CX-84 at 30-31; CX-109 at 19.

Complainant sent an email to McDermott and Bartlett with the requested information without indicating that he believed the net operating losses were materially overstated.¹⁰⁶ TR 374; RX-53. Notwithstanding Complainant’s testimony about net operating losses typically being discussed during McDermott’s earnings release call, Complainant testified, “I did not know that this was the number that was going to be discussed in the analyst call.” TR 376. Complainant never indicated to McDermott nor Bartlett that he believed the figures he sent in the email were materially overstated. TR 377. At hearing, Bartlett confirmed that he believed the NOLs provided by Complainant were accurate; neither Complainant nor anyone else indicated that the figures provided by Complainant might be inaccurate.¹⁰⁷ TR 800-01.

Complainant testified later that afternoon, at 1:59 PM, Baize emailed Complainant inquiring as to whether he was in the office. TR 378; RX-55. Complainant responded at 1:59 PM, “Working from home,” to which Baize replied, “You need to run these decisions by me first. Also, pls cc me on any information provided to [Bartlett] so I am in the loop. Thanks.” RX-55. Complainant recalled that he “didn’t really understand” Baize’s email, because he knew that she was aware of their agreement regarding Complainant’s ability to work from home.¹⁰⁸

¹⁰⁵ McDermott testified to the significance of Bartlett having the NOL information:

Well, again, when he is dealing with analysts, he gets a number of calls. The NOL was viewed as a tax asset. A big tax asset that helps shelter our income from taxes, so it impacted cash flow and it’s something that was important to the analysts. And so he would need this number because, you know, the question could come up on it during the call. He had to be prepared.

TR 853-54.

¹⁰⁶ Complainant testified he could not have changed the numbers on his own; he would have needed authorization from Baize. TR 476. Complainant believed that Baize would have been furious if he changed the numbers without her permission; she “wanted [Complainant] to run everything through her.” TR 477. Notwithstanding the email, Complainant maintained that he did in fact tell Baize the numbers were wrong. TR 477.

¹⁰⁷ McDermott also testified he had no reason to think that the numbers provided by Complainant were inaccurate. TR 854. If Complainant or anyone else had indicated the numbers might be inaccurate, McDermott would have informed Bartlett and Baize of this concern. TR 854.

¹⁰⁸ During her deposition Kimberly Foster, Complainant’s wife, testified Complainant started working from home every Friday beginning in May 2010. TR 368, 762. At hearing, Foster confirmed her deposition testimony recited by Respondent’s attorney:

Q: Prior to that had he ever worked from home?

A: Oh yeah.

Q: How frequently?

A: It wasn’t that often, but there was something where he was able to do Fridays. He had an agreement with his boss where he could stay home on Fridays, because I remember it was nice.

The weather was getting nicer. I'm like oh, yeah, that would be great, you know, you don't have to go off on the train.

Q: So what would you do on Fridays when he would stay home?

A: Well, you know, I would have lunch for him.

Q: Uh-huh.

A: You know it was nice having him home instead of having him take the train and that whole thing. I would get sick for him, because I hate the train. He hated the train too.

Q: How long a period of time was he working from home on Fridays at American Tower?

A: It wasn't that long. It was maybe—you know, that started, I want to say maybe that year or two.

Q: Would you say possibly that spring or May?

A: Yeah.

Q: May-ish of 2010?

A: Yeah, exactly. But before then, it was always five days a week.

Q: Okay.

A: And if the weather was bad and the transportation was down, everybody had an agreement that everybody would work from home. They were reasonable.

Q: But the Friday, the Fridays home started in about, you think about May, 2010?

A: I think.

TR 765-67. Notwithstanding Foster's deposition testimony—which was elicited a week prior to the hearing—she presented an errata sheet at hearing. TR 767. According to both her errata sheet and her testimony at hearing, she confused Complainant's employment with Respondent and SECOR—one of Complainant's subsequent employers—during the deposition. TR 768-70. Respondent's attorney attempted to resolve the conflict at hearing:

Q: [A]re you affirming or disavowing your testimony here, in deposition testimony that there were some times at [Respondent] that he worked from home on Fridays?

A: Yeah, I don't know. I can tell you if it was snowy or really bad storms, that he stayed home and didn't take the train.

Q: Okay. Who did you review your deposition testimony with before you filled out the errata sheet?

A: Review it with? I read it myself. I read the whole thing. No one read this.

Q: And you, yourself, caught that mistake on your own without any discussions with anybody?

A: I did. And—yes.

Q: So let me ask you here, under oath, just so we're perfectly clear. Are you testifying that your husband did or did not work from home on Fridays in the May 2010 time period at [Respondent]?

A: That he did or did not?

Q: That's my question.

A: I do not recall.

Q: So it's possible that he did?

A: Possibly.

TR 769-70. Despite her correction, Foster confirmed at hearing that Complainant did not take the train when he worked for SECOR. TR 766. When asked about his wife's deposition testimony, Complainant stated, "That's completely false. . . . Her memory is flawed." TR 368. In response to Respondent's attorney asking Complainant, "It's your contention . . . that you had carte blanche to work from home whenever you felt like it?" Complainant stated, "On occasion, using my best judgment, yes." TR 368. Respondent's attorney asked Complainant, "Now, as part of your deal with Ms. Baize that you could work from home whenever you thought it was appropriate, did you have to let her know where you were or could you just work from home and whatever?" TR 377. At first, Complainant did not remember; upon further questioning, however, he replied, "If I knew she was going to be in the office, I would have told her." TR 378.

TR 380-81. Also, Complainant did not send Baize the information that he sent to Bartlett and McDermott earlier that day, because he “assumed by [her] email that she . . . had already seen it.”¹⁰⁹ TR 382.

Baize recalled that by July 30, she was growing less and less confident that Complainant’s “head [was] in the game on the tax reporting side,” his negative energy and lack of respect for Baize was growing, and she was “really . . . struggling from bereavement.” TR 662. Baize sent an email to McDermott at 1:55 PM inquiring if Complainant was in the office, because she had an inkling he was not. TR 664; RX-57. McDermott responded three minutes later:

He has not been in his office all day. I do not believe he is here. I did see an email from him first thing. Tom was asked me [sic] what the 6/30 balance of the NOL is. I left [Complainant] a voicemail on his cell and he responded to Tom directly via email.

RX-57. Baize was furious and testified no one in her department had carte blanche to work from home whenever they felt like it.¹¹⁰ TR 666. Baize elaborated:

As a courtesy, I would expect them to, at the very, very least let me know. But given the fact that I wasn’t in the office, . . . good judgment would have seemed to dictate that we would have had a dialogue about it, and [Complainant] would have explained to me what was going on and why he needed to be home and . . . this was what he planned to do to accommodate. . . . There was just none of that dialogue.

TR 666. The fact that Complainant was working from home without permission on July 30, 2010—the day that the department was trying to “finalize all the release information”—upset Baize that much more: “[O]ne would expect, you know, boots on the ground . . . to be able to . . . [be] there physically to be able to address questions to, you know, Bob Meyer, Tom Bartlett and others.”¹¹¹ TR 667.

In hopes of learning what led Complainant to work from home without authorization, Baize sent Complainant a blank email with the subject line: “are you in the office today” at 1:59 PM. RX-55. Complainant responded, “Working from home.” *Id.* Baize was furious about Complainant’s response and explained why she found this disrespectful at the hearing:

¹⁰⁹ On re-direct, Complainant explained that he understood Baize’s instruction to be prospective—not retroactive. TR 479.

¹¹⁰ McDermott believed he did not have permission to work from home whenever he wanted. TR 850. From McDermott’s perspective, one needed to ask permission to be able to work from home. TR 850. He testified, “I think if I didn’t show up to work, she would have been very annoyed, understandably.” TR 850. Even if he hadn’t asked beforehand and he ended up working from home, McDermott still would have let someone know: “I would actually ask if I could. And if something happened that I couldn’t make it, I would let them know.” TR 851.

¹¹¹ Baize was not in the office that day because Bartlett had insisted she not work Fridays in an effort to help her ease her way back to the workplace after her bereavement leave. TR 667.

What an incredible jerk.¹¹² I just couldn't believe the audacity and the arrogance of this man. . . . [I]f I had a situation where I was working at home and I'd forgotten to . . . I didn't run a courtesy by my boss and say, geez, you know what, I'm sorry, this is what—I'm working at home. This is what's going on. This is why. This is why I felt comfortable. . . . I still would have been very angry because he didn't use good judgment. But there was that "working from home, what are you going to do," you know? Yeah. That's how I interpreted it.

TR 669. Baize ultimately replied to Complainant, "You need to run these decisions by me first. Also, pls, cc me on any information provided to Tom so I am in the loop. Thanks."¹¹³ *Id.* Notwithstanding Baize's email, Complainant never forwarded the email he sent to Bartlett at 8:45 AM that morning. RX-61.

Approximately an hour and a half after Baize learned of Complainant's whereabouts, Baize emailed Bartlett because she was "embarrassed that we didn't have our tax reporting person there or me there" prior to an earnings release. TR 670; RX-63. Within her email, Baize apologized for her absence, noted that she feels she is getting her strength back and will be back in on Fridays, and told Bartlett, "In the meantime, Mike (my life boat guy) assured me that he will make sure you get what you need whether it be from me or [Complainant]/Larry. Thanks Tom." RX-63. Bartlett replied via email one minute later, "He has and no worries we are good to go." *Id.*

Baize spoke to both McDermott and Smithson about Complainant's actions on July 30. TR 675; RX-60; RX-62. Baize told them both the same thing: she could no longer work with Complainant.¹¹⁴ TR 665-676. In addition to relaying this decision to McDermott and Complainant, Baize drafted a memorandum to describe why Complainant's employment at Respondent must come to an end. TR 676; RX-100.

¹¹² McDermott testified Baize had every right to be angry:

[S]he's at home. She's got these things she's working through. It's a key date in the reporting process. The CFO, when he wants something, he doesn't want to be looking for people to get it. She was out of the loop, which she shouldn't have been. He could have called her and say what gives; she's going to say I don't know; and she's going to look like an idiot. . . . Totally blindsided. So I can understand why she was upset.

TR 858.

¹¹³ Baize testified, "[I]t's always been protocol whenever you send something to [Bartlett], that I would be cc'd on it, particularly if I'm not present to see what he's sending." TR 671-72. Baize believed it would look bad to Bartlett if she was not in the loop. TR 672. Similarly, McDermott testified, "If there is an issue where the CFO reaches out to me, or anybody else for that matter at that level, I loop them in. It's just protocol." TR 856; RX-61. McDermott thought it would have been more appropriate to include Baize on the email instead of himself, in compliance with the chain of command. TR 857.

¹¹⁴ McDermott recalled Baize contacting him "when the whole thing transpired"; "she was very upset." TR 855. She indicated that she was going to speak with human resources and move forward to terminate Complainant. TR 855. At that time, she asked McDermott to draft a memo that summarized his experience working with Complainant. TR 855. Smithson also testified he spoke with Baize shortly after Baize emailed him on July 30. TR 1001. He remembered Baize being irate because Complainant had worked from home, without asking for permission, on a day that was "a critical time because it was final numbers for Q2." TR 1002. Baize told him, "I've had it. I can't deal this any longer. I've got to figure out what to do here. I'm going to talk to HR." TR 1002.

Baize affirmed at hearing she made the decision to terminate Complainant on or after July 30, 2010.¹¹⁵ TR 601. By that time, she “was losing trust in him,” felt he was stirring up trouble and failing to follow the critical path like a team player. TR 602-03. In fact, ever since Complainant did not disclose the FIN 48 error to Baize in April 2010, Baize recalled developing “real concerns” and “wanted his work reviewed.” TR 660. She wanted “to make sure that whatever he was doing, there were a number of other people looking at it.” TR 660. This worked reasonably well up until July 30. TR 660-61. According to Baize’s affidavit and testimony at hearing, Complainant’s failure to forward any emails sent to Bartlett and his working from home without authorization from Baize were both significant factors that led to Baize “snapping” and deciding to terminate Complainant.¹¹⁶ TR 612-13.

13. Build Up to Termination

After the weekend, on August 2, 2010, Baize sent her memorandum to Brenna Jones, “SVP of human resources,” and set up a meeting for that afternoon to discuss their options for the termination of Complainant.¹¹⁷ TR 678-79; RX-76; RX-100. In response to outlining the reasons why she could no longer work with Complainant and wanted him terminated,¹¹⁸ Baize recalled Jones saying something along the lines of “it’s about time.”¹¹⁹ TR 680. Jones proceeded to then lay out the options they had for Complainant’s termination. TR 681-83.

¹¹⁵ Within her affidavit, Baize had written that she began eliminating Complainant’s position after the FIN 48 error in April 2010. TX-E at 3-4; *see supra* 11-13. She testified eliminating Complainant’s position and terminating him were two different things. TR 601-02. Elimination of his position would have involved “[t]ransitioning him from a reporting position to something else in the company, as we discussed” because Baize “couldn’t trust him with the tax reporting.” TR 601-02.

¹¹⁶ In addition to the primary events of July 30, 2010, Baize mentioned that “there were a couple incidents too where we were in meetings.” TR 661. For example, Baize recalled one meeting in particular in which Baize took note of a mechanical error that Complainant had missed. TR 661-62. She summarized, “it was just a lot of the things that just didn’t make me feel like his head was in the game.” TR 662.

¹¹⁷ In addition to Baize’s memo, Jones also received memos from McDermott and Webber after the August 2 meeting with Baize. TR 969-72; RX-71; RX-73; RX-100. Jones took all of these documents with her to Respondent’s legal department. TR 971-72. Webber’s memo was limited to the discussion of one incident in which she alleged that Complainant told one of Webber’s team members she could leave early because Webber was absent. RX-73. Webber noted that she thought it was inappropriate for a director to suggest to a senior associate that it was okay to leave early if his or her supervisor was absent. *Id.*

¹¹⁸ Jones testified she agreed with Baize’s assessment. TR 968. Jones’s believed that Complainant was “rude, arrogant, condescending, and . . . disrespectful” throughout his tenure with Respondent. TR 967-68. Taking into consideration Complainant’s “cavalier attitude” about his FAS error; his poor behavior during Baize’s bereavement leave, in particular his working from home on Fridays; and, his actions on July 30, Jones believed Baize could no longer work with Complainant. TR 965-68. Jones confirmed that Complainant received training on Respondent’s conduct policy and appropriate workplace behavior. TR 975-77; RX-5; RX-8; RX-94.

¹¹⁹ According to Baize, the human resources department never had a particularly good relationship with Complainant. TR 681. Jones’s testimony confirmed Baize’s statements. TR 961-63. Jones did not approve of Complainant during the interview process, and her opinion did not change about Complainant during his time at Respondent. TR 963. She recalled that the “feedback that [she] received from others [wa]s that the way he communicated to people was rude,” he submitted “last minute requests for information,” he was “loud and curs[ed]” in the copy room, and, in one instance, was the subject of a complaint from another season ticket holder when he was loud and belligerent at a Red Sox game he attended via Respondent’s tickets. TR 963.

They first discussed a PIP—a last chance agreement for an employee to improve their behavior or else they’ll be terminated. TR 682. Baize rejected that idea because she “didn’t think his behavior [could] be changed.” TR 682. Similarly, Baize rejected the idea of terminating Complainant for cause because “as much as [Complainant], disgusted her at th[at] point, [she] knew he had a wife and two children” and she could not bring herself to terminate him without a severance. TR 682.

Jones then suggested that if Respondent was still planning on transitioning to a REIT—which scaled back the tax reporting function significantly—then they could “accelerate that plan, and by doing so, . . . eliminate [Complainant’s] position as titled; he would leave immediately and that would allow a severance package for his family.” TR 683; 968-69. Ultimately, they concluded that was the best course of action and planned to terminate him after Complainant shared his progress on a couple different assignments projects.¹²⁰ TR 683-85. Jones testified Baize never mentioned the FA remediation to her amidst these termination discussions, nor did Jones know what it was. TR 980.

Jones clarified at hearing that although Baize had reached a decision on how she would like to terminate Complainant, “the final decision had not been made” at that point because Jones still needed to talk to the legal department. Jones recalled telling Baize, “I told her as part of our process, we had to check with legal, which I would do.” TR 969. As demonstrated by an email Jones received on August 3, 2010, it was clear that legal had approved Baize and Jones’s plan to terminate Complainant. TR 972; RX-80.

Bartlett testified Baize must have had a conversation about terminating Complainant before it occurred; however, he could not recall the specifics of the conversation or when it occurred. TR 811. To the best of his recollection, Bartlett testified Baize indicated Complainant’s performance “wasn’t meeting her needs” or “her standards” and his particular skill set was going to be “less significant” after the transition to a REIT:

[T]here were issues associated with [Complainant] and with [herself]. And she thought it was in the interest to do it. In fact, she needed a different skill set within the business. We were becoming a [REIT]; we had no REIT skills within the business; and we needed to find REIT skills within the business.

TR 811, 814. Bartlett responded, “I said [Baize], it was her group, so she felt that that was in the best interest” and testified Baize “didn’t say, obviously, anything that I was opposed to, otherwise, I would have opposed it.” TR 812. Beyond that, Bartlett could not recall any more specifics as to Baize’s reasoning for terminating Complainant at that point in time. TR 812.

On August 3, 2010, Baize sent LaGambina an email in which she stated “Sandy is out on vacation starting on the 5th and I’m claiming pencils down on his work. I’m not getting a sense that he is following the critical path we laid out last week.” CX-62. At hearing, Baize explained

¹²⁰ Baize did not initially plan on terminating Complainant prior to his two week vacation. TR 683-84. Due to the way their respective vacations fell, however, Baize concluded that terminating him on August 4 was best. TR 683-84. This gave her an opportunity for everyone on the tax team to fully understand Complainant’s progress on the FA Remediation before terminating him. TR 684.

that she felt Complainant was slowing down completion of the FA Remediation: “I didn’t get the sense there was any urgency on getting this work done in light of the fact that he was going to be out for two and a half weeks.” TR 587. Notwithstanding this disapproval of Complainant’s vacation, LaGambina also took a vacation in August 2010.¹²¹ TR 590-91; CX-74 at 1.

When LaGambina received the meeting invitation regarding a “fixed asset hand-off,” to be held on August 4, 2010, she had no prior knowledge that Complainant was being terminated. TR 937-38; RX-86. LaGambina knew Complainant was going on vacation for two or three weeks—a long time to be away from the office by Respondent’s standards. TR 937. In order for the FA Remediation to accommodate Complainant’s absence, LaGambina thought the meeting was set to provide Complainant with an opportunity to “get us completely up to date where he was, what was open, so that we could continue to keep the process moving.”¹²² TR 938, 954-55.

On August 4, 2010, Complainant discussed his conclusions with Baize, LaGambina, Smithson, and Smith. TR 174-75. Within this meeting, he “said that there is \$219 million of undocumented tax basis at this point in time.”¹²³ TR 176. Complainant testified Baize did not say anything in response to his disclosure. TR 176.

LaGambina testified even before the meeting was concluded, she was confident she could account for a large portion of the undocumented assets Complainant had claimed. TR 939. LaGambina testified Complainant had not accounted for an FAS 143 write-off that occurred in 2004—a write-off she brought to Complainant’s attention sometime during the FA Remediation. TR 939. During the meeting, LaGambina asked Complainant if he “look[ed] at the 109 work papers because there’s a schedule in there of \$542 million of assets that we ran off.” TR 939. Complainant affirmed he looked and stated nothing was there. TR 939. Following the conclusion of the meeting, LaGambina pulled the 109 from the shelf, and discovered what she

¹²¹ Baize was also asked if she took a vacation during August 2010. TR 588-89. She stated that she had meetings in Brazil and St. Paul and, as part of that trip, she scheduled a weekend for her son for his twentieth birthday in Rio de Janeiro. TR 588-89.

¹²² On cross-examination, Complainant’s attorney thoroughly examined LaGambina as to whether she knew Complainant was going to be terminated on August 4, 2010. TR 955-59. Despite Baize’s email that provides the August 4 meeting was a “hand-off” meeting and she was claiming “pencils down” on Complainant’s work because he wasn’t “following the critical path,” LaGambina maintained that she did not know Complainant was being terminated that day; rather, she believed Complainant was leaving for vacation and Baize wanted his responsibilities to shift back to LaGambina. TR 957; CX-62.

¹²³ The exact number of undocumented tax basis that Complainant believed existed as of August 3, 2010 was \$219,484,070.00. TR 175; CX-114 at 2. Complainant drafted a memo, dated August 3, 2010, with the stated purpose of “document[ing] the process for reviewing tax cost basis in fixed assets at 12/31/09.” TR 176; *see* JX-16 at 1. The very last line of Complainant’s memo declared: “Currently undocumented tax basis is at \$233.4 million.” TR 176; JX-16 at 3. Complainant never got a chance to send the memo to the addressed—Baize, LaGambina, and Smith—because he was terminated before he could do so. TR 177. During his deposition, Complainant testified:

My intention in writing that memo was so that I could clearly remember what I had done with respect to reviewing the master file. My intention was at some point in time to distribute that memo to the team to be transparent about what was done and what was not done.

had assumed to be true—approximately \$89 to \$100 million of the \$219 million that Complainant claimed was undocumented was in fact documented.¹²⁴ TR 940.

LaGambina did not consider what Complainant presented at the August 4 meeting to be conclusions. TR 935. She explained:

[W]e had this book/tax cost comparison file, which became the master file. And . . . all these assets, book and tax should be the same. You're done. And then there was the group of assets that we still didn't know if book and tax were right. Well, book is book, but we didn't know if tax was right. We had to have a pivot table of all the assets and put them in buckets that he felt—he called them undocumented assets. So these were assets that still needed additional research.

TR 936. LaGambina testified she “didn't agree or disagree” with what Complainant communicated that day because “[h]e just said these still need to be looked into” and “[Baize] said to me, Kim, do you have enough information here so that we can look into them.” TR 936.

Smithson testified about the impact that the August 4 meeting had on the process:

I recall that there—it was required that we continue to analyze the schedule that was discussed at the August 4th meeting. There were to-do's. . . . LaGambina had several to-do's around that schedule. We were assisting her in completing that information. We were in the same state in the middle of August, in terms of i[t] being fluid and open. Items were nailed down and concluded from that August 4th meeting, but other adjustments came up in mid-August as well.

TR 1010. Complainant's attorney asked, “Did you have numbers that you were working from that you believed were moving towards final?” TR 1011. Smithson stated, “No more the mid-August were the numbers moving towards being final than they were August 4th.” TR 1011.

E. Complainant's Termination

On August 4, 2010—the same day that Complainant disclosed \$219 million of undocumented tax basis at a meeting with members of the tax team—Baize sent Complainant a request for a “[q]uick meeting before Complainant le[ft] on vacation” at 4:00 PM in Baize's office.¹²⁵ TR 177; CX-66. Upon arrival, Complainant learned that Michael McCormick, from

¹²⁴ During cross examination, Respondent's attorney asked Complainant about LaGambina's actions during and after the meeting. Complainant could not recall LaGambina: telling him that she knew where some of the documentation exists for some of the assets he claimed were undocumented, asking him if he reviewed the binder with the FAS 141, 142, or 143 in it, or LaGambina finding \$100 million of what Complainant claimed were undocumented assets in binders that were accessible to everyone. TR 433-34. Respondent asked, “But it's fair to say, sir, at the end of the day, even your number of \$219 million was way off, correct?” TR 434. Complainant responded, “It was – that was based on the two-day review that I had done.” TR 434.

¹²⁵ On August 4, 2010, Baize and Jones exchanged emails about Complainant's termination. TR 973-74. During their correspondence, Jones wrote: “Thanks, keep it short and simple. Organizational change you are making based on the needs you have going forward.” TR 973; RX-88. Jones testified this is advice she would have given to any manager who is terminating someone—“Not talking about his conduct, she wasn't trying to rub his face in the fact

Respondent's legal department, was also participating in the meeting.¹²⁶ TR 178. Baize informed Complainant that conversations with Bartlett resulted in a decision to restructure the tax department—a reorganization that would eliminate Complainant's position. TR 179. She also handed Complainant his termination letter at that time.¹²⁷ TR 181-82; *see* CX-67.

Complainant was given thirty minutes to vacate the building. TR 179. McCormick and another of Respondent's attorneys walked with Complainant to his office. TR 180. Complainant gathered as many of his personal belongings as he could. TR 180. On his way to the elevator, McCormick thanked Complainant for his professionalism. TR 180. Sensing that McCormick felt badly, Complainant told him that he "knew he had nothing to do with it," and testified he would have shaken McCormick's hand if he had had a free hand. TR 180. Complainant's position was not filled by an external candidate; rather, Webber took over Complainant's tax reporting duties.¹²⁸ TR 686.

At hearing, Complainant highlighted four reasons why he did not believe Baize's justification for his termination. TR 181. First, if he was terminated because of changing business needs, "why would there be any need to have me escorted out of the office followed by lawyers at a half an hour's notice?" TR 181. Second, if the transition to a REIT prompted his termination, that transition was "nowhere near imminent." TR 181. Third, Baize had previously told Complainant that "he was a multitalented tax athlete, and she had told [him] that my skills would be useful in a [REIT] setting and that there would be further opportunities for [him] in that setting." TR 181. Lastly, the timing of his termination was suspicious; just earlier that day, Complainant "had given [Baize] a spreadsheet telling her that large material amounts of tax basis needed to be written off the company's financial statements." TR 181.

Complainant does not believe he was terminated in response to changing business requirements, Complainant being disrespectful to anyone, or an error that he made in April 2010. TR 182-84, 303. At no point during his employment with Respondent did Complainant receive a formal warning, an "informal warning," or placed on "any form of remedial improvement plan." TR 52-53. When asked if he thought he was improperly terminated, Complainant responded in the affirmative and explained:

At . . . Baize's request, I participated in an internal investigation. And during the course of the investigation, I made her aware of accounting rules that were being broken and proper books and records not being maintained in computing the

that people didn't like working with him, found him abrasive and rude." TR 974. Jones characterized this as a "fair" approach that they try to use whenever they terminate an employee. TR 974.

¹²⁶ Baize testified McCormick participated in the meeting because she did not feel comfortable being alone with Complainant and wanted someone else in the room to witness the conversation. TR 685.

¹²⁷ Complainant's termination letter mirrors what was stated during the termination meeting; he was being terminated because of "certain organizational changes." CX-67.

¹²⁸ Smithson confirmed that PwC continued to work with Respondent following Complainant's termination. TR 1004. In fact, Smithson stated that he specifically worked on tax reporting issues for which Complainant had been responsible. TR 1004. Smithson did not do this work alone, however: "It became a collaborate exercise. We took on more of their review work. Pam LaGambina took on more of the work. Larry Shay and Edison Sanchez, so it was sort of split. Sandy's responsibilities were really split between—internally between Pam, Larry, and Edison, with PwC reviewing. TR 1004. Shay testified at deposition that Complainant's duties were split between Webber and PwC. JX-24 at 168-69.

deferred tax liability for fixed assets. And I understand that accounting rules and books and records to be properly maintained are all required by SEC statutes and regulations.

TR 183-84. Complainant did not receive a going away party or letter of recommendation from Respondent. TR 184, 187. Respondent did not transition to a REIT until January 1, 2012. TR 188. Also, Complainant did not believe anyone else within Respondent's tax department had experience with REITs when he was employed there. TR 188.

During her deposition, Baize testified she told Complainant he was being terminated "because of an organizational change" she was making based on the needs of the company. TR 603; JX-21. Baize admitted at hearing she was not honest when she met with Complainant—she did not reveal that she "had snapped and . . . could no long work with him." TR 603. Baize elaborated: "I did not lie. And the reason why I did not lie is it was a matter of if, not a matter of when, in terms of transitioning in and eliminating his role. He knew that to be true. The timing of the elimination was because I was no longer—it just came to a point where I snapped with him."¹²⁹ TR 604.

At the time of Complainant's termination, no one within Respondent's tax department had experience with REITs. TR 606; JX-21 at 287-88. Other than Complainant, no other employee was terminated as a result of Respondent's conversion to a REIT. TR 606.

Complainant testified the FA Remediation "was represented to [him] as complete" prior to his termination. TR 353. This directly conflicted with Complainant's deposition testimony. TR 354; JX-23 at 266-67. During the deposition, Respondent's attorney asked Complainant if he considered the project to be completed when he made his findings at the August 4 hearing, and Complainant stated, "No." JX-23 at 266-67. Respondent's attorney further inquired if anyone in the meeting told him that they considered it to be completed, and Complainant replied, "They did not say that." *Id.* at 267. After reciting this deposition testimony at the hearing, Complainant also affirmed Baize never told him in a subsequent meeting or email that the project was complete. TR 354-55.

¹²⁹ During her deposition, Baize admitted that he was "terminated because he was disrespectful and [she] could no longer trust him." JX-21 at 272. She further stated at her deposition:

[I] couldn't work with him anymore because I didn't trust him. I didn't feel he was really somebody I could rely on to do his job. And in the end, he was so disrespectful to me, that why would I put any more energy into this person considering all the years of energy and time and effort that I put into this man?

Id. at 275-76.

F. Aftermath

On August 4, 2010—the same day as Complainant’s termination—and August 6, 2010,¹³⁰ Baize sent two emails regarding a presentation to Bartlett on the status of the FA Remediation. TR 616; CX-69. The first email sent on August 4, addressed to Smithson, was in preparation for an update meeting with Bartlett. CX-69. Respondent’s attorney highlighted Baize’s comments that the remediation project was a “basis study” which represented where the team thought they were “landing,” “a 481 adjustment which means prospective only, no financial b/s or income statement impact,”¹³¹ “potential soft spots,”¹³² and, more significantly, that “[t]he auditors will need to be reassured that there is no P&L or prior adjustment issues.” TR 617-20; CX-69.

Complainant’s attorney asked, based on this email, that Baize was “certain as of August 4th that there would be no hit to the P&L.” TR 618. Baize testified, “At that point, presumably we didn’t expect one. But as I’m reading this, I’m really not quite sure. I mean, the DTL adjustment, we would have a DTL adjustment, that would have P&L, so I’m not quite sure what I’m referring to in that sentence.” TR 618. Complainant’s attorney countered, “You, in fact, state that the auditors will need to be reassured that there is no P&L or prior period issues?” TR 619. Baize explained:

On the 481 adjustment, that’s what that must be, what I was referring to. Because there is—it’s not—this is not a matter of me misleading or not misleading. When there’s a DTL adjustment, there is a P&L adjustment, so there would be, in fact, a P&L adjustment.

So I’m not really quite sure—I’m not saying no P&L adjustment because that’s not possible. But I’m referring to the 481 adjustment, which is prospective and would have no P&L adjustment. That’s what I’m—that’s the only thing that makes sense to me that I could be referring to.

¹³⁰ The August 6, 2010 email was sent by Baize to Smithson, LaGambina, and McDermott. CX-69. The brief email is a forwarding of the August 4, 2010 email Baize sent to Smithson. *Id.* In addition to forwarding the earlier message, in which Baize described as the framework for the presentation to McDermott, Baize told LaGambina that she “will need to finalize your numbers and be ready to present to us so that we can craft our story as I’ve outlined below.” *Id.*

¹³¹ Smithson testified about his understanding of Baize’s email:

As I mentioned, if at that point in time if we had a balance sheet only adjustment, then that’s what a 481(a) adjustment would mean, and it would be the reclass of one deferred item for another deferred item. But again, that was also completely in process because even after that, we discovered that there was a significant—there were significant items that would not perhaps be 481(a). So this was a status—a high level, sort of, status of here’s—here Mr. Bartlett is where we think we’re coming out around the fixed assets at this point in time.

TR 1021-22. He also indicated that this resulted in several more to-dos. TR 1022.

¹³² Baize explained, “At the time we were advised, prior to [Complainant’s] departure, that the adjustment was a 481 adjustment. Since after PwC looked at it and did their review, determined that a significant part of it was not a 481 adjustment. Again, this is at a point in time where we were pre-review.” TR 617. As for her statement concerning the lack of income statement impact, Baize explained: “[W]hat I’m saying is there’s no financial or balance sheet/income statement with respect to the 481 adjustment, which was not, you know—the soft spot that I’m referring to are the items that are not documented and so forth that we need to spend more time on.”

TR 619. Complainant's attorney pointed out that Baize's email did not contain any of that explanation; however, Baize retorted that the email was just "a real quick blurb. It's not a comprehensive email." TR 619.

After he reviewed the email at hearing, Smithson was asked if at that point in time, "you had concluded there would not be an income statement impact as a result of the FA remediation?" TR 1013; CX-69. Smithson testified:

[T]here was never a discussion with—we weren't in a position at that point to lay out what our income statement or balance sheet impact would be at that point. So I would not have had a discussion . . . suggesting what the adjustment should be. Nor do I think [Baize] would, either.

TR 1013.

On August 18, 2010, Baize sent an email to Smithson and McDermott as a follow up from a recent meeting with Bartlett. CX-74; TR 624-27. The email contained a series of "to-do's to wrap up the tax fixed asset/§481 work." CX-74 at 1-2. Baize testified:

[B]asically, when I say to-dos to wrap up, that's our critical path. But within each of these bullets, there's lots of work to be done. And, in fact, a lot of things changed through the review process of PwC. So I'm trying to keep a critical path moving with this project. And so that is what I'm representing here. I didn't want to see this project come to a conclusion, I wanted to keep it moving.

And I did want it to wrap up. And this is at that point in time sort of the critical path items that I would have expected to see done so that we could get to that point.

TR. 625-26. Baize confirmed the FA Remediation was ultimately unfinished at the end of the third quarter and, during this time frame, Deloitte's audit and Respondent's uploading of assets into the Oracle system were outstanding.¹³³ TR 627.

At hearing, Smithson was asked to review the August 18 email that recapped the meeting with Bartlett, and asked him to summarize what he remembered of the meeting. TR 1014; CX-74. He stated:

So at that point in time, the status of the fixed assets, and the concern was or the issue was that we were trying to figure out if this was just a reclass of one deferred tax item for another deferred tax item; so the fixed asset deferred tax item against a net operating loss deferred tax item. And if that was reclass, we want to understand what that reclass was and there was work around that—what that—to the extent it was—that was the answer, what the reclass was.

¹³³ The uploading of assets into Oracle was not completed by the end of Q3. TR 627.

And then it was just part of that exercise, there would need to be adjustments made because lives were incorrect, so a 481(a) adjustment is when you go in and adjust and do an accounting method change, which is why we're talking about our national office calculating what that adjust would need to be.

TR 1014-15. Smithson further denied they had reached final numbers at that point in time, nor were "they wrapping things up."¹³⁴ TR 1015.

On August 20, 2010, Complainant's counsel at that time, Jim Conroy, sent a letter to Respondent "asking [Respondent] to conduct an internal investigation to investigate the circumstances under which [Complainant] was terminated." TR 189; *see* CX-73. This prompted Respondent to conduct an investigation.¹³⁵ TR 189. Complainant voluntarily participated in the investigation and met with Respondent's "external legal counsel, Roger Lane, without compensation." TR 189-90.

Respondent's conclusions were summarized in a memo. TR 190-203; CX-77. The first paragraph of the report provides its objective: "[Complainant] prepared and delivered a summary of his review of the Master File, which is a component of the FA Remediation. The purpose of this memo is to reconcile [Complainant's] analysis to our conclusions regarding the final results." CX-77 at 1. Ultimately, Respondent concluded that approximately "\$97mil of tax basis" had to be removed from the remediated tax basis calculation due to "undocumented assets." *See id.* at 6. Complainant testified such a write-off of assets would result in a reduction of earnings and earnings per share.¹³⁶ TR 202.

¹³⁴ When Complainant was terminated, Smithson stated Respondent had not yet reached a final result on the FA Remediation; rather, the numbers reached by Respondent by August 4 were still tentative. TR 1005, 1009. Smithson testified numbers did not reach a point on finality until sometime in October:

When we finished our pre-audit in the October timeframe, and handed that over, there were—it became subject to review by Deloitte. And, in fact, even during the Deloitte audit phase when they were—we were still working through it, we handed that over to Deloitte with what we believed was a sound adjustment to be made with a few items. So I would say that it did not, until Deloitte had finalized their review and the adjustment was booked in the annual report in the Form 10K, were the adjustments completely finalized.

TR 1009-10.

¹³⁵ Bartlett had no involvement in the investigation launched by Respondent. TR 803-04. He testified, "I knew that it was going on, but there was a wall between general counsel and the audit committee and me. So other than knowing that there were a lot of documents that were being produced, I knew nothing of it, nothing of the substance of what was going on." TR 803.

¹³⁶ Within his expert report, Complainant notes that his subjective belief was objectively reasonable because Respondent actually wrote off some of its tax basis. TR 434-35; CX-109 at 19-21. During cross examination, Complainant acknowledged that the amount Respondent wrote off, \$97 million, was approximately \$122 million less than the \$233.4 million dollars Complainant believed needed to be removed. TR 437. Complainant admitted that accounting for undocumented assets and adjusting their tax basis in accordance with the law was what he wanted Respondent to do all along. TR 437-38. Complainant stated, however, that he "was repeatedly asked to approve the project that just wasn't done. And at the point in time I was asked to approve it, there wasn't a document attachment basis out there that needed to be written off." TR 438. Regardless of what Respondent ultimately reducing its tax basis, at the time Complainant was there, "they didn't seem to be or weren't going to do that." TR 438.

Complainant's attorney asked Baize about the conclusion of Respondent's "substantiation memo": "Did [Respondent] conclude with respect to \$97 million in undocumented tax basis that [Complainant] was, in fact, correct, that there was \$97 million in undocumented tax basis?" TR 638; CX-77. Baize answered, "No. [Complainant] said there was \$200-some million, and \$97 million of that was undocumented." TR 638; CX-77 at 6. Complainant's attorney retorted, "But he did identify \$97 million in undocumented tax basis?" TR 638. Baize stated, "Yes." TR 638.

On August 23, 2010, Baize sent an email to Meyer in which she stated, "The irony of all this, is that we accommodated [Complainant] by extending the timeline out several weeks to get his 'sign off.'" CX-74 at 1; *see* TR 564-71. Baize testified Complainant required accommodation because he would not sign off on the FA Remediation until the master file was complete. Baize explained:

[T]he master file was a good way for him to take a look at all information so that he could make sort of an individual assessment as to where he felt the holes were, the weaknesses were in the analysis. So he would have wanted the master file completed so that he could take a look at that and see it from the perspective that he was comfortable with. The master file format was a format that he was comfortable with for his review.

[T]he master file was something that was suggested, which was a good suggestion, which we ultimately did. The master file . . . helped facilitate review, as you pointed out. But the master file was really a reorganization of the information that was already put together by Pam LaGambina.

[B]ut I don't think that the master file, if we opted not to go with the master file, we still may have gotten comfortable at some point reviewing the information, maybe in a different way. But I wanted him to look at this information.

TR 565-66. Baize testified the completion of the master file did not conclude the FA Remediation; rather the master file became part of the process:

[B]asically we were waiting for [Complainant] to complete his part of the project, which was a review of the master file as part and parcel of this [FA Remediation]. But it wasn't like he was going to complete the master file and say, okay, we're done. It's like okay, we're getting closer. And, you know, we're getting more comfortable.

And, by the way, [LaGambina], let's continue to use this master file format as we finish this project. This seems to be a good format that everybody likes because she understood all of the information, the way it was organized, the way she had it. She understood it all. But as I expressed to [LaGambina], you know, it's not just about you understanding it. You know, we have to be able to present it and tell the story and say here's the information. Here's, you know, how it works. And this is how, you know, how we get you comfortable.

And Sandy's view was a master file, and PwC agreed, was a good format to bring outside people who weren't in the REIT through information they wouldn't otherwise understand.

TR 567. Complainant's attorney asked Baize if she was pressuring Complainant to sign off during this time period. TR 567. Baize stated, "I was pressuring him to get his work done," and further elaborated:

Sign off in the context of completing his review of the master file. And here's where I was getting to, all right?

As you pointed out, there are a number of emails that came across where he laid out areas where he thought there were holes in the analysis. And I said to him, look, what I—you know, there's emails—I can't put together. I can't begin to put together all these emails and think through this.

What I would like you to do, I want you to bring me a cohesive . . . presentation to me, that I can understand to a certain extent, and that others working on this project understand, where you think the population of weaknesses are with this project. Because—and, by the way, things change, you know. June 17th, . . . I don't think that he was making the same suggestions prior to when he left.

At the end of the day, he presented us with a summary of here's where I think we are and based on my review of the master file and my reviews of all the things that I have been a participant in, this is where I think we're at.

And at the end of the day, it came down to the \$200 million of undocumented assets. At that meeting, on August 4th, . . . the folks are in the room, including Pam LaGambina, Larry Shay, PwC folks, all of the players who were boots to the ground on this, basically I made sure I went around the room and I made sure everybody understood what was being presented and what needed to be done to fill in these holes and gaps that [Complainant] had presented. That was the aspiration I expressed in that room.¹³⁷

[Complainant] was sitting right there. I told him, you did a good job. I know this was hard for you to get this done in the time given. When the master file came across, I guess I didn't want to present animosity to him because I really felt that—I really was pleased with this deliverable he gave us. And I just wanted to make sure that—I knew I was going to be terminating him. I wanted to be sure that all the people in the room understood that document and we were using that in trying to reconcile what he was presenting.

¹³⁷ On July 25, 2015, an email from Baize to Smithson and Scully indicated Baize did not anticipate the FA remediation being completed by Q2. See JX-13. "As an aside, I spoke with Maryanne and she has assured me that this is not a Q2 worry. That being said I want to ready to articulate process, where we are, and what Deloitte can expect at the end of this in event I am concerned by Deloitte audit." *Id.*

TR 568-69. Respondent's attorney asked Baize to clarify what Complainant needed to do to indicate that he has signed off on the master file. TR 570. She explained that if Complainant signed off, this meant that "he has identified through the master file analysis that he is able to identify the weaknesses, as he sees it, in the [FA Remediation]." TR 570. Baize acknowledged Complainant did "exactly what [she] asked him to do." TR 570. Complainant's signing off, however, was not signing off on the FA Remediation as a whole:

I didn't consider him to have signed off on the complete project, no, because we weren't done. But he had basically looked at the master file, which, you know, it was the predominant amount of information and I had—he had used that as a way to crystallize his concerns that, you know, regarding the undocumented of assets and so forth, he used—that was kind of his way, you know, being able to kind of put everything together in one sort of document as opposed to fragmented email.

That's what I needed. I needed a complete sort of here's where you think we are right now, but we're not done. [LaGambina] was still working on things. [Complainant]—what's being represented here is that he's signing off on this entire project. As he pointed out, I mean, we've been kind of selectively suggesting that I don't—Susan does this. And Susan does that. Well, he did not have the authority, nor did I give him the authority to sign off on this complete project. We had PwC who had to—we were going to have them go through a pre-review

TR 570-71.

Smithson testified he never heard Baize ask for a sign off from Complainant; however he does remember a status report:

I heard in that August 4th meeting, prior to [Complainant's] vacation, to provide a status report of the schedules that we had so that [Respondent] and the team working on fixed assets could take it from there, understood what the status was, so that whoever could complete the exercise and continue working on the project.

TR 1018. Complainant's attorney asked Smithson to elaborate on Complainant's remaining exercises at that time and what the outcome of the analysis was. TR 1018. Smithson explained: "At that point there was a schedule that showed \$400 million adjustment that needed to be made. And so what the team needed to understand was [Complainant's] analysis to get to the \$400 million and to figure out what the remaining to-do's were associated with that item."¹³⁸ TR 1018. He further explained the outcome:

¹³⁸ Although Complainant was unfamiliar with the organization of PwC employees, he acknowledged that Smithson, Scadding, and Scully all worked on the tax remediation project. TR 336-39. Complainant recalled seeing Smithson "in some meetings," but did not know how "hands-on" his role was in managing the remediation plan with Baize. TR 336. Complainant testified he has no reason to think Smithson is dishonest; however, he does not remember stating that Smithson is an honest guy during his deposition." TR 337. Complainant also had no reason to think that

That there was a decision or there was a discussion at that meeting around what the remaining to-do's were associated with that item. Pam had identified an adjustment to that \$400 million immediately in that meeting. There were a few other remaining to-do's. There was a discussion around thinking it—looking at it from a different perspective than the one that [Complainant] had. So there was a list of follow-up items and to-do items.

TR 1018-19. He could not recall what the final outcome of the \$400 million was. TR 1019.

On November 9, 2010, there was a meeting of the audit committee. CX-80. The notes of the meeting indicate that Baize provided a thorough tax remediation update.¹³⁹ *Id.* At hearing, however, Baize could not recall attending the meeting. TR 628-30.

Deloitte issued a report on February 28, 2011 to the “Audit Committee of [Respondent] and the management of [Respondent].” TR 203; JX-20. Within the report, Deloitte indicated they “have identified and included in the attached appendix certain matters involving the company’s internal control over financial reporting that we consider to be significant deficiencies under standards established by the PCAOB.”¹⁴⁰ TR 205; JX-20 at 1. In fact, Deloitte discovered the “monitoring processes to ensure that the income tax balances are complete and accurate [we]re not operating effectively, and limit the [Respondent]’s ability to timely identify and correct errors.” TR 205; JX-20 at 2. Deloitte also noted:

During Q3, certain audit adjustments to deferred taxes were detected in the testing of the company’s fixed asset balances associated with the process intended to remediate the book to tax basis difference on fixed assets. Additionally, as the end of Q3 the process of remediating the fixed asset tax basis was not yet complete.

Smithson was trying to manipulate the project to a particular result or involved in a conspiracy with Baize to terminate him. TR 337.

¹³⁹ More specifically, the notes of the meeting provide:

Ms. Baize then provided a tax remediation update, noting the primary focus on validating the Company’s financial statement representations around NOLs, to refine the tax NOL for REIT timing consideration and to develop a best-in-class framework for monitoring depreciation and amortization in a post-REIT environment. Ms. Baize then discussed the areas of remediation impacting the tax NOL, including, among other things, acquired loss studies, validation of tax assets, the reassessment of accumulated depreciation since 1995 and further validation of the cumulative excess tax benefits from employee stock option exercises. Ms. Baize concluded by presenting the results of these efforts with respect to the Company’s 2009 NOLs, noting the ongoing work with respect to tax fixed assets, NOL monitoring, E&P computations for a potential REIT conversion dividend and the continuing management of the PLR process.

CX-80 at 1-2.

¹⁴⁰ At hearing, Complainant explained that a significant deficiency is a “deficiency or a combination of deficiencies that work together that make it that there is a possibility that there could be an error on the company’s financial statements that may not be timely caught.” TR 205.

TR 207. At hearing, Complainant opined Deloitte’s findings indicate that there was a significant deficiency within Q3, and because the remediation was not completed by Q3, it “could result in the income tax balances related to fixed assets not being correct and being able to be detected on a timely basis.”¹⁴¹ TR 209.

Complainant testified he brought this lawsuit because Respondent refused to provide him with “a proper reference to find employment,” to proffer a better reason other than a restructuring to justify his termination—“which would be a more believable reason to a future employer”—to keep him on payroll while Respondent conducted their internal audit investigation, and because he believed Respondent broke the law by the way it conducted its FA Remediation and terminated him. TR 260. Respondent “left [Complainant] no alternatives” and he wanted to “correct those injustices.”¹⁴² TR 260.

Complainant believed Baize wanted “to manage the FA remediation to a particular result” and when Complainant became an impediment she wanted him to be terminated.¹⁴³ TR 297. During cross examination, Complainant could not suggest what Baize’s motive would have been to steer the FA Remediation to a particular result. TR 297. He did not know of any financial incentive or motivation that would have influenced her decision making ability. TR 297.

¹⁴¹ Complainant’s report cited to Deloitte’s significant deficiency memo—a document he did not work on, nor know about, because Deloitte created it months after his termination—as substantiation that his belief was objectively reasonable. TR 439; *see* CX-109 at 20. More specifically, Complainant averred in his report, “Deloitte had no choice but to impose a significant deficiency upon [Respondent] in part due to faulty processes with respect to the [FA Remediation].” TR 441; CX-109. During cross examination, Complainant admitted that he does not definitively know any of the reasons why Deloitte issued this significant deficiency other than what he read in the document. TR 442. He believed, however, that Deloitte reached this conclusion because Respondent “had not uploaded the assets in Oracle. And also, there’s not an adjustment to the fixed asset balance.” TR 443-44. Complainant admitted during cross examination that his FIN 48 error was one of the reasons Deloitte believed there was significant deficiencies in Respondent’s internal controls. TR 444; JX-20 at 2; JX-23 at 320-21.

¹⁴² Within the initial complaint filed in this case, Complainant’s former attorney had summarized that by mid-July 2010 Complainant “had concluded that [Respondent’s] net U.S. Operating Loss Carryforward (“NOL”), a specific, key item in its Financial Statements . . . was materially overstated.” CX-84 at 26; TR 357-59. At hearing, Complainant retracted what was written in his complaint stating, “I don’t think that statement was correct”; “If I had a chance to rewrite this, I would write overstated with respect to Alltel assets.” TR 359. Complainant insisted that “it’s [his] complaint that those statements were potentially wrong. [He] was concerned that they would end up being wrong.” TR 361. After Complainant had attempted to attribute the inaccurate statement in the complaint to his original attorney, Respondent’s attorney emphasized that Complainant’s expert report also contains “an unqualified statement that [Complainant] had concluded that Respondent’s financial statements were wrong” without any mention of the potentiality Complainant discussed at hearing. TR 362; *see* CX-109 at 4. Complainant retorted, “I knew the company was carrying undocumented tax basis at the point I last reviewed the files. And the logical conclusion of that would be that net equity would have been overstated.” TR 362. Complainant testified his expert report did not allege that Respondent’s conclusions were wrong; rather, that the ultimate result of the FA remediation process should be a reduction in [Respondent’s] net equity. TR 363. Shortly thereafter, Complainant also stated, “I didn’t know no matter what it needed to be reduced. I knew there was undocumented tax basis and that would have resulted in the reduction of net equity.” TR 364.

¹⁴³ Hierarchy of authority within Respondent’s tax remediation plans: Leslie Smith, senior tax account, reported to LaGambina; Sanchez reported to Shay who, in turn, reported to Complainant. TR 338-39. Complainant did not consider any of these individuals to be involved in the conspiracy to manage this project to a particular result. TR 339.

Complainant affirmed Bartlett, the CFO, “had made it very clear that he wanted the [FA Remediation] done correctly.” TR 298. Complainant could not recall the conversation in which Bartlett explicitly told him that “it was [Bartlett’s] view that gets it right, even if it causes a restatement to the financials”; however, Complainant’s previous attorney stated in a letter to Respondent:

After Mr. Bartlett became the company’s [CFO], he too stressed the importance of accurate tax numbers and sound tax processes. To his credit, Mr. Bartlett told [Complainant] explicitly to be sure to get the numbers right, whatever the consequence might be, including, if necessary a restatement of the company’s financial statements.

TR 298-99; CX-73 at 3. Even after Respondent’s attorney had Complainant review this letter, Complainant maintained he could not recall the conversation with Bartlett. TR 300.

Bartlett’s testimony mirrored Complainant’s comments about his desire to ensure the financial statements were correct. Bartlett explained that he did not have concerns about how the FA Remediation might come out:

[R]elative to the kind of culture that . . . we have within the business, I just want to make sure that we have within the business, I just want to make sure that the statements are right, and the tax books are right. And in this particular item, two perspectives, one is we had, and still have, a significant amount of net operating losses within the business. So even if, in fact, depreciation was wrong and it created a taxable income situation, we had plenty of NOL, so it was never a cash concern within the business. And candidly, from an investor perspective, that’s not how we’re valued, based upon cash flows, cash flow growth.¹⁴⁴

And this would have resulted in a change in the provision or a write-off of assets, which would have been well below the cash flow line. So it wouldn’t have an impact from an investor perspective. It wouldn’t have had an impact from a cash perspective, but more importantly, I wanted to get the darn thing right.

TR 793-94. Bartlett did confirm, however, that writing off over a hundred million dollars of net income from Respondent’s income statement would be a significant event; if fact, it would be a significant and material event. TR 817.

Bartlett further acknowledged that if the head of the tax department learned from one of her direct reporting employees that the employee believed Respondent has \$282 Million of undocumented assets that needed to be written off, the tax department head should pay attention because it’s an important factor. TR 817. Bartlett noted, however, he was never aware of Baize attempting to or considering not writing off assets that were undocumented; nor did Complainant approach him and indicate that this might be the case. TR 818.

¹⁴⁴ Bartlett further explained during cross examination “when you are a high growth company, like we are,” investors typically use “cash flow performance as opposed to net income”—i.e., “the recurring cash flows that a business generates.” TR 815.

G. Complainant's Tangentially Related Litigation

In response to an interrogatory issued by Respondent, Complainant admitted he was a defendant in a lawsuit, commenced in November 2011, which concerned a dispute over legal fees. TX-A at 14-15; TR 275-76. Complainant requested the law firm of DeFranceschi & Klemm, P.C. ("D&K"), "perform some legal research on the tax consequences of awards to SEC whistleblowers in three different states." TX-B at 2. D&K billed Complainant for its services and, as testified by Complainant before me, he did "not immediately" pay them. TR 278. As a result, D&K sued Complainant and the court granted a "bank account attachment freezing \$8,000" of Complainant's money. TR 278.

In an effort to get the bank attachment lifted, Complainant appeared before the Boston Municipal Court, at which time he submitted an affidavit. TR 279. Complainant declared, under the pains and penalties of perjury, that he "has no outstanding debts with my service provider—I have paid my primary advisor (James Conroy) over \$200,000 in the last 15 months, and my account is current." TX-C at 2. Complainant testified he "made that statement to convey that [he] do[esn't] owe anyone any money and [his] bills get paid." TR 281.

During the hearing before me, Complainant admitted he had a "handshake agreement" with his friend, Mark Finst. TR 268-71. The terms of the agreement called for Finst to pay the majority of Complainant's legal expenses from Conroy and, in the event that Complainant won, Complainant would then reimburse Finst. TR 269. In accordance with this agreement, Complainant testified he had only paid Conroy approximately \$60,000 whereas Finst had paid approximately \$200,000. TR 273.

Complainant admitted the statement in his affidavit to the Boston Municipal Court—in which he alleged, "I have paid my primary advisor over \$200,000"—"was an incorrect statement."¹⁴⁵ TR 281; TX-C at 2. Upon further questioning by Respondent's attorney, Complainant maintained he understood the difference between debts incurred and paid, and his statement was not intentionally false; rather "that statement was inaccurate." TR 279-82.

IV. DISCUSSION

Section 806 of SOX, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. Section 1514A(a) states, in relevant part:

(a) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner

¹⁴⁵ Complainant also did not mention his handshake agreement with Finst in his response to Respondent's interrogatories—another document "signed under the pains and penalties of perjury." TR 266, 272-74. More specifically, in response to an inquiry about his damages, Complainant listed his attorney fees paid to date was \$250,000, and neither mentioned Finst or that he himself only paid a fraction of those fees. TX-A at 23; TR 273-74.

discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, 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) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) 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); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a).

An action brought under SOX’s whistleblower protection provisions is governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), at 49 U.S.C. § 42121(b). *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 10 (ARB Oct. 9, 2014); *see* 18 U.S.C. § 1514A(b)(2)(C).

To prevail, a complainant must prove by a preponderance of the evidence that: “(1) he or she engaged in activity or conduct that the SOX protects; (2) the respondent took unfavorable personnel action against him or her; and (3) the protected activity was a contributing factor in the adverse personnel action.” *Fordham*, ARB No. 12-061, slip op. at 10; *Sylvester v. Parexel Int’l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011); *see* 29 C.F.R. § 1980.109(a).

If the complainant proves that protected activity was a contributing factor in the personnel action, the respondent may nevertheless avoid liability if it proves by “clear and convincing evidence” that it would have taken the same adverse action in the absence of the protected activity. *Fordham*, ARB No. 12-061, slip op. at 10; *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011); *see* 29 C.F.R. § 1980.109(b).

A. Protected Activity

The employee’s reasonable belief of a violation must be scrutinized under both subjective and objective standards. *Welch v. Cardinal Bankshares Corp.*, ARB Case No. 05-064, (ARB May 31, 2007); *see also Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, 93-ERA-00006 (July 14, 2000). The employee does not need to show that the employer’s conduct actually caused a violation of the law, but must show that he/she reasonably believed the employer violated one of the laws or regulations enumerated under SOX, any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud

against shareholders. *Welch*, ARB Case No. 05-064; *see also Halloum v. Intel Corp.*, ARB No. 04-068 (ARB Jan. 31, 2006).

The subjective reasonableness requires that the employee actually believe the conduct being complained of constitutes a violation of pertinent law. *Day v. Staples*, 555 F.3d 42, 54 (1st Cir. 2009); *see also Harp v. Charter Communications, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009). The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee. *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008); *see also Welch*, ARB Case No. 05-064, (ARB May 31, 2007).

Accordingly, protected activity under SOX is essentially comprised of three elements: (1) report or action that involves a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders; (2) complainant's belief concerning the activity must be subjectively and objectively reasonable; and, (3) complainant must communicate his concern to either his employer, the federal government or a member of Congress who has the requisite reviewing ability. *See Swinney v. Fluor Corp.*, 2014-SOX-00041 at 4 (ALJ Mar. 31, 2015); *Harvey v. Safeway, Inc.*, 2004-SOX-00021 at 29 (ALJ Feb. 11, 2005).

In the matter before me, Complainant alleges he reported concerns about the FA Remediation's fraudulent shortcomings to his immediate supervisor Baize. According to his testimony and the record as a whole, these purported complaints were expressed in meetings with Baize and various members of the FA Remediation team or in private dialogue with Baize.¹⁴⁶ There is a dearth of documentary evidence relating to Complainant's protected activities. In an effort to overlook this conspicuous lack of documentary evidence, Complainant testified he did not put sensitive matters in email because he was previously rebuked and warned by his supervisors not to do so. As a result, I find Complainant's credibility is at the heart of his appeal for protection under SOX. I carefully observed the Complainant at trial during his lengthy direct examination and cross examination. I observed his demeanor, his interactions with the questioner and listened carefully to his responses. I will address that credibility prior to analyzing the June 17 email, the August 4, 2010 meeting, and the private conversations between Complainant and Baize. *See supra* pp. 24, 46-48.

In my review of the record, I found several things that cast doubt on Complainant's veracity. The most damning example of Complainant's lack of credibility was the dishonesty he demonstrated before the Boston Municipal Court. *See supra* p. 60. In reviewing the affidavit he submitted to that court, along with his trial testimony, I am certain Complainant knew precisely what he was doing when he declared, under the pains and penalties of perjury, that he paid his previous legal counsel over \$200,000. *Id.*

Complainant attempts to use the Merriam-Webster dictionary to shield his credibility by arguing that the semantics of the affidavit did not affirmatively state that he himself financed the entirety of the attorney bill. Cl. Br. at 13 and note 13. This argument falls flat and does not

¹⁴⁶ Complainant's analysis failed to definitively delineate the protected activity he claims he engaged in. *See* Cl. Br. at 14-15. The glaring lack of specificity in Complainant's analysis does not mention details or dates in which Complainant engaged in protected activity. *Id.* As a result, I will rely on upon my interpretation of the record.

persuade me—I believe, as argued by Respondent, that Complainant signed that “incorrect statement” for the sole purpose of lifting the hold on his bank account. Re. Br. at 25-26. I believe that Complainant, with this financial objective in mind, intended that “incorrect statement”—that he paid prior counsel over \$200,000 on his own—would be more persuasive to the judge than the truth: he only paid a fraction of attorney’s fees and costs while a friend settled the remainder of the debt.

My concerns about Complainant’s trustworthiness continued to grow during the trial because of the many contradictions and inconsistencies in testimony. For example, Complainant testified at trial that Respondent informed him the FA Remediation was complete by the time he was terminated, but at deposition, Complainant stated the opposite. *See supra* p. 50.

At trial Complainant testified about incidents of LaGambina’s dishonesty, he downplayed his interactions with Meyer, he claimed he did not put sensitive matters in emails because of McDermott’s warning, and he testified there was only a potential the Respondent’s FA Remediation was materially misstated. This trial testimony was undercut by either deposition testimony or documentary evidence. More specifically, Complainant testified at deposition that he could not cite specifics about LaGambina’s dishonesty but that it was just a general feeling he had about her. Also, his deposition and trial testimony indicated a closer working relationship with Meyer than he originally attempted to portray. Complainant’s original SOX complaint and his expert report both unequivocally concluded the Respondent’s FA Remediation was materially misstated and McDermott’s warning did not stop Complainant from sending sensitive emails. *See supra* pp. 37-38, 41, notes 80, 142.

In light of the deceitful affidavit and the substantial contradictions at trial, I find it appropriate to assign very little credibility to Complainant and his testimony. In stark contrast, Respondent’s witnesses were candid and forthright and their testimony established a consistent narrative documenting the FA Remediation and the Complainant’s involvement. Based on that witness testimony, I discount Complainant’s claims that he engaged in protected activity when he had private conversations with Baize. Similarly, I find Complainant’s allegations to be baseless concerning the “P&L hit,” “plug assets,” and LaGambina and McDermott’s substantiation of assets by memory. These allegations are dependent on his version of the truth versus the testimony of Respondent’s witnesses. I accord little to no weight to Complainant’s assertions. *See supra* pp. 24-31.

The only events potentially qualifying as protected activity are the June 17, 2010 email and the August 4, 2010 presentation. In the email and presentation, Complainant proffers that there were fixed assets lacking proper documentation that could result in a reduction on Respondent’s financial statement. However, nowhere within his email or within testimony about what was said at the August 4th meeting does Complainant explicitly—or implicitly—indicate that Respondent was engaging in fraudulent behavior in violation of SOX. In contrast, it appears Complainant was doing what was expected of him—identifying outstanding issues that Respondent’s team needed to resolve prior to providing their work product to the outside auditors, PwC and Deloitte. Accordingly, I find that Complainant did not engage in protected activity; he failed to demonstrate by a preponderance of the evidence that he provided or

attempted to provide information about purported violations of federal law or SEC rule or regulation relating to fraud against shareholders. *See supra* pp. 24-26, 47-48.

Even if the email and presentation could be considered protected reports of prohibited behavior under SOX, I find that neither the email nor the presentation could overcome the subjective and objective standards imposed by SOX. Turning first to the subjective nature of Complainant's allegations, neither the email nor presentation included any indication that Complainant believed he was reporting potential SOX violations; in contrast, it appears he was doing nothing more than assisting in Respondent's ongoing, iterative process to complete the FA Remediation. Complainant's act of signing off on multiple documents, i.e. the line of business certification questionnaire, the revised draft of 10Q, the audit committee slides, the Q2 clearance memo, and tax provision memo, is further evidence in my mind that he did not intend to assert that Respondent was in danger of violating SOX. Complainant's communications (the email, the presentation and the sign offs) to Baize, McDermott, Bartlett, and Meyer were all consistent in that none of them raised concerns about SOX violations. *See supra* pp. 35-40.

If Complainant had a subjective belief that he reported a violation of a federal law or SEC rule or regulation relating to fraud against shareholders through either the June 17 email or August 4, 2010 presentation, his belief is not objectively reasonable. Complainant is a seasoned, experienced tax professional who worked for years at preeminent accounting and auditing firms, and served as his own expert witness in this matter. As a result, Complainant's subjective belief must be analyzed through the most critical of lenses. *Allen*, 514 F.3d 468, 477 (5th Cir. 2008) (holding CPA to objective standard of an expert).

Based upon the testimony elicited at hearing and the documents entered into evidence, I find it is entirely unreasonable for a person with Complainant's education and experience to think he was reporting a SOX violation when the FA Remediation was incomplete at the time of his termination. Baize, LaGambina, McDermott—and even Complainant himself during his deposition—all uniformly testified the FA Remediation was not nearing completion at the time of Complainant's termination. In fact, in response to both the June 17, 2010 email and the August 4th presentation, these witnesses interpreted Complainant's input as merely an indication there was more work to be done before they could present their conclusions to PwC and Deloitte for review. As a result of the internal, ongoing work effort on the FA Remediation, Complainant could not have reasonably believed Respondent violated, or was about to violate any of the SOX provisions. *See supra* pp. 48, 54-57; *see also Allen*, 514 F.3d 468, 477 (5th Cir. 2008) (holding inquiries about internal financial reports innocuous); *Swinney*, 2014-SOX-00041 at 4 (ALJ Mar. 31, 2015).

Solely for the purpose of any appeal, and based on the record in this case, in the event protected activity could be found, it would be my finding that Complainant would have been terminated from his position at American Tower Corporation despite any protected activity. Testimony from Respondent's witnesses, in particular, Susan Baize convinced me that Complainant, while technically competent in his area of taxation, lacked many other skill sets for being a successful employee. Baize was a credible witness and her testimony elucidated the problems she had with Complainant in the workplace.

Complainant had problems communicating with others, he lacked effective interpersonal skills, he was physically unavailable at times, he failed to keep superiors informed on important topics/deadlines, he failed to follow the chain of command, and he lacked good judgment. All of those deficits contributed to him being terminated. While Ms. Baize gave Complainant a “clean slate” in the beginning and later attempted to groom Complainant for a higher position, his lack of insight in conducting himself at work caused her to decide his technical skills did not outweigh his shortcomings. Baize testified credibly to the issues she had with him that led to this termination.

V. CONCLUSION AND ORDER

Based on the foregoing, I find that Complainant never engaged in protected activity, nor did he subjectively nor objectively reasonably believe any of the alleged conduct of Respondent involved a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders.

Accordingly, **IT IS HEREBY ORDERED** that Sandeep Joshi’s claim under the Sarbanes-Oxley Act is **DENIED** and his complaint is **DISMISSED**.

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When 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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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(e) and 1980.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).