



# Public Employees for Environmental Responsibility

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To: Vanessa Sutherland, Chairperson, U.S. Chemical Safety and Hazard Investigation Board (CSB)

From: Jeff Ruch, Executive Director, Public Employees for Environmental Responsibility (PEER)

Re: Reply on behalf of CSB Managing Director Daniel Horowitz to Notice of Proposed Removal

Date: December 4, 2015

This is Dr. Horowitz's written reply to the November 16, 2015 Notice of Proposed Removal transmitted by CSB Board Member Kristen Kulinowski. Before rebutting the listed specifications of that proposal, we have three initial critical contentions:

## **I. Cited Actions Were Directed or Approved by Prior CSB Chair**

As detailed in the affidavit listed as our Exhibit I, virtually all of the actions of Dr. Horowitz cited in the proposal were undertaken either at the direction of or with the full knowledge and approval of former Chairperson Rafael Moure-Eraso, his direct supervisor for the period covered by the proposal's specifications.

The notion of disciplining a civil servant for following lawful orders of a presidential appointee undermines the very structure of the federal civil service and is utterly inappropriate. Moreover, following lawful directions of a superior cannot be characterized as conduct unbecoming a federal employee.

Apart from the crushing impact of this affidavit on the legal merits of the agency proposal, if as the current Chairperson you approve this proposal it will send the unmistakable signal to your direct-report employees that they may be subjected to later discipline by your successor for following your directions. That consequence would undoubtedly significantly impair an already challenging CSB management system.

## **II. "Conduct Unbecoming" Masks Lack of Identified Misconduct**

Rather than citing specific acts of what would clearly be understood as misconduct, the proposal is based entirely on alleged specifications of "Conduct Unbecoming a Federal Employee." This sweeping term is vague by its nature but is not limitless. Nor can it be used to justify transforming otherwise blameless behavior after-the-fact as "conduct unbecoming."

There are two limits on “conduct unbecoming” which all of the specifications fail to meet:

- a. The standards of conduct must be a matter of common knowledge or common sense, representing a standard of which the employee is presumed to be aware. Nowhere in the various specifications is there a delineation of what bright, commonly known and understood line Dr. Horowitz crossed. Given the convoluted, fact-specific situations cited, there is no identifiable standard of conduct of which Dr. Horowitz would be reasonably on notice [see *Coons v. Department of the Navy*, 15 M.S.P.R. 1 (1983)]; and
- b. Actions taken with the intent of improving the efficiency and efficacy of the agency are presumptively outside the scope of conduct unbecoming. With respect to of the specifications relating to subordinate staff, Dr. Horowitz strove to improve CSB operations, derived no direct personal benefit from them and undertook them in utter good faith.

### **III. Dr. Horowitz Is Being Punished for Simply Doing His Job**

The terms “retaliation” and “retaliatory” are scattered throughout these specifications, yet there is no accusation –and no basis in the record for charging – that Dr. Horowitz engaged in a “prohibited personnel practice” such as a violation of the federal Whistleblower Protection Act for taking a defined “personnel action” in connection with specified legally protected employee disclosures.

Since these are “specifications” the absence of this specific charge must mean that the term “retaliation” is used in a lay sense – that is Dr. Horowitz made decisions or took actions in reaction to changing events and actions of subordinates. However, that is precisely what a federal manager is supposed to do – make decisions in response to changing circumstances and events.

Unless the manager is taking actions for a legally prohibited reason, such as racial or gender discrimination, the civil service system accords great deference to actions taken in good faith. Significantly as noted, Dr. Horowitz is charged with no specific violation of law or regulation.

As Managing Director, Dr. Horowitz has had to implement a number of complicated and sensitive personnel and management decisions often under trying circumstances. Not all of his decisions were warmly received or universally accepted. Nonetheless, his management decisions reflect how he chose – under the supervision of the Chairperson –to accomplish the agency mission.

Yet, nothing in the proposal identifies a single action that Dr. Horowitz undertook which was illegal, contrary to federal policy or beyond his designated authority. Because some of his subordinates objected to his decisions or felt they were retaliatory does not make them any less legitimate.

Putting yourself in Dr. Horowitz’s shoes, if your decisions are to be judged principally by complaints lodged by dissatisfied staff, your tenure will indeed be a rocky one. To second guess

these management decisions, months or years after the fact, merely chills future managers from making the tough calls that agency leadership often requires.

We submit the following replies to the listed specifications:

### **Specification 1**

1. This Specification is premised on several major factual misstatements:
  - A. Dr. Horowitz did not “suspect that Mr. Lau had manipulated Vantage’s report to reach that conclusion” i.e. the conclusion that “senior leadership” was faulted for certain problems. Rather, Dr. Horowitz learned that he had manipulated the findings from the actual email search that was conducted.
  - B. What the emails confirmed was that Mr. Lau had been dealing improperly and secretly with the federal contractor, Vantage, to obtain and deliver a critical and one-sided written report (See Exhibit II).
  - C. Mr. Lau subsequently lied about his improper activities to Dr. Horowitz, his first line supervisor, and to one of the Board Members, Manny Ehrlich (See Member Ehrlich affidavit at Exhibit III) as he will further testify if called upon.
  - D. Dr. Horowitz had no knowledge that Chris Lyon was working extensively and in concert with John Lau on the Vantage project. Mr. Lyon had not received this as an assignment and he had never briefed Dr. Horowitz on any activities related to Vantage. Nor had Mr. Lau informed Dr. Horowitz of Mr. Lyon’s role. At the time, Mr. Lyon was supposed to be devoting his full energies to supporting the Deepwater Horizon investigation team on its much-awaited final report (See Lyon’s Work Plan and confirming email at Exhibit IV).

Notably, the agency List of Exhibits contains no official document evidencing that Mr. Lyon ever received approval to work on the Vantage contract.

2. Mr. Lau’s conduct in this matter could well have served as the basis for significant disciplinary action (See Ehrlich affidavit in Exhibit III). In determining the appropriate disposition of Mr. Lau both for his improper actions with the contractor and his utter lack of candor about what he had been doing, Dr. Horowitz sought direction from the Chairperson. Through him, the Chairperson’s outside HR consultant (Connie Harshaw) recommended a conservative course of action that was non-disciplinary and involved reassigning Mr. Lau to his actual position description of record, which was as Director of Human Resources (a non-supervisory GS-15), and had never been updated since he received the courtesy title of “Deputy Managing Director for Administration” in 2012.

After receiving this advice, Dr. Horowitz again asked for direction from the Chairperson, who instructed Dr. Horowitz to proceed with this action using a written script prepared by the HR consultant (See Exhibit V, also Agency Exhibit 25, pages 1-4) not by Dr.

Horowitz at all and provided by the chairperson's consultant to Ms. Anna Brown, who was the COR for that contract.

Note that these scripts are in the Agency's own List of Exhibits yet the Agency ignores their existence in fabricating this Specification and ascribing the decisions to Dr. Horowitz.

3. An additional element of Mr. Lau's mismanagement of the contract facilitated the Vantage PowerPoint presentation being leaked to the House Committee on Oversight & Government Reform (OGR) on the very day that supposedly confidential briefings about it were held with CSB Board Members (See Ehrlich affidavit at Exhibit III, contemporaneous "memo to file" at Exhibit VI, as well as Exhibit VII, also as Agency Exhibit 15, at pages 21-23).

At that point in time, there was little doubt that this untimely leak to the Hill would be used to further embarrass CSB rather than improve organizational morale and climate – and that precise anticipated negative result immediately ensued.

4. Further, both Mr. Lau and Mr. Lyon improperly directed Vantage to keep their efforts to manipulate the report secret (See Exhibit VIII) – a request which made the lead Vantage contractor uneasy (See Exhibit IX and Agency Exhibit 15 at pages 17 and 18).
5. Despite the seriousness of his misconduct, Mr. Lau suffered no loss of pay or grade, or any disciplinary action (such as a warning, reprimand, or suspension) as a result of his actions. Thus, it is beyond ironic that this non-punitive reassignment is now characterized as "retaliatory."

## **Specification 2**

1. Specification 2 raises the same issues as Specification 1 but categorizes them as the "appearance" of retaliation. While the term is somewhat baffling, it belies the notion that what is described in Specification 1 was actually retaliatory – rather than just appearing to be so. We are at a loss, however, to grasp precisely what constitutes the "appearance" but not the reality of a retaliatory act.

Indeed, it does appear that the proposal needlessly proliferates the number of charges derived from a single node of facts, as if the contract law firm which prepared it was paid by the number of specifications.

2. The impetus for the title shift came not from Dr. Horowitz but from personnel consultant Connie Harshaw who contended that the use of informal or functional titles was not a good HR practice and that everyone needed to return to their actual titles (and PD's) of record. In Mr. Lau's case this was HR Director (a non-supervisory one person program), not Deputy Managing Director for Administration, which was the functional title given him in January 2012. Ms. Harshaw further stated that in a normal organizational structure, the HR function fit within and under Administration, not the other way around. She also believed that the Deputy position (while it was a 15, the same grade that

Lau/Brown/Robinson already held) should possibly have been competed rather than filled by lateral transfer due to EEO concerns (See Harshaw contract close-out report, Exhibit X).

3. As noted above, Ms. Harshaw also was consulted about the Vantage emails and Mr. Lau's false answers in response to questions about them. Ms. Harshaw considered the possibility of proposing disciplinary action, which she believed could be sustained based on the emails, but she considered the reassignment to be more conservative course of action as it did not involve adverse personnel action.
4. Ms. Harshaw worked directly for the Chairperson and Anna Brown was the COR for that contract. Dr. Horowitz was at arm's length from the contract because it was also being used as part of the SES recruitment for which he was a putative internal candidate.
5. As illustrated in reply Exhibit V and Agency Exhibit 25, Ms. Harshaw delivered written scripts for Dr. Horowitz, the Chairperson and Anna Brown, the COR. Dr. Horowitz's script told him to reassign Mr. Lau to his original and still existing PD and to report to Ms. Brown. Dr. Horowitz asked the Chairperson whether he wanted Dr. Horowitz to follow these instructions and he said yes. Dr. Horowitz then met with Ms. Brown and Mr. Lau to announce the change (as documented in Ms. Brown's contemporary notes of the meeting, Exhibit XI).
6. This Specification's sweeping reference to the "chilling effect your overall conduct had on employee morale and on employee willingness to express disagreement with you" is unsupported in the record produced by the Agency. It is also utterly unfair and inappropriate. Employee privacy precluded Dr. Horowitz and other senior managers from discussing Mr. Lau and Mr. Lyon's misconduct concerning Vantage. Any such perception would have been fostered by the un-contradicted reports from Mr. Lau and Mr. Lyon to other staff members rather than the silence of Dr. Horowitz.
7. Finally, if the agency believed that Dr. Horowitz's non-disciplinary action with respect to Mr. Lau was improper or unwarranted, it could have reversed it and restored his courtesy title of "Deputy Managing Director for Administration" and his supervisory functions at any time since March 27, 2015, when Chairperson Moure-Eraso resigned. However, that has not occurred, as three successive agency heads have not reversed this decision. The CSB website to this day shows Mr. Lau as Director of Human Resources with his name below Ms. Brown ("Director of Administration").

### **Specification 3**

1. Dr. Horowitz requested the email search because of unusual behavior concerning the arrival of Vantage's Mr. Wardlaw and the unexpected delivery of a PowerPoint to the full Board that was not requested. The retrieved emails then showed that all the multiple criticisms of "senior leadership" had been inserted by Mr. Lyon and Mr. Lau during their covert pre-review of Vantage's PowerPoint, which played out in secret over nearly a week.

2. The search Dr. Horowitz requested was to be conducted independently by IT staff and was limited to recent communications between Mr. Lau and Vantage. Dr. Horowitz did not personally access or search Mr. Lau's agency email account.
3. Dr. Horowitz did not violate Board Order 34, Section 32; in fact, this provision does not even apply to him. This guidance actually says nothing about a "detailed request to access agency records" – nor does it state anything about requiring a request, or requiring that a request be in writing. Instead it notes the broad authority of the chairperson to "authorize access to any CSB information system or government equipment to investigate computer misuse, misconduct of any kind, for any other law enforcement purposes, or to otherwise protect the interests of the CSB."

The responsibility for any consultation with the General Counsel rests solely with the Chairperson (to whom the GC reports) – not with any employee making a request.

4. On Feb. 12, Dr. Horowitz made a written request, by email, to the Chairperson for the limited search to be conducted after Dr. Horowitz verbally explained the specific circumstances to him and other top officials. On that same day, the Chairperson approved that request. (See Exhibit XII and Moure-Eraso affidavit at Exhibit I).
5. It is Dr. Horowitz' recollection, as well as that of Chairman Moure-Eraso and Member Ehrlich (see Exhibits I and III) that General Counsel Loeb was in the Chairman's office while the Vantage contract issues were being discussed and that he raised no objections to an email search. In any event, as soon as the emails were retrieved the following morning copies were provided to Mr. Loeb and he did not express any objection or concern about their having been obtained. Rather, all officials who saw the emails were extremely concerned about the contents since they showed a covert effort to alter the conclusions of the Vantage report by Mr. Lau and Mr. Lyon (again, see Ehrlich affidavit at Exhibit III).
6. Board Order 34 also specifies a "CSB Standard Log-On Banner" which appears every time a CSB computer is powered up. It reads:

"The CSB may monitor any activity or communication on the system and retrieve any information stored within the system. By accessing and using this computer, you are consenting to such monitoring and information retrieval. Users should have no expectation of privacy as to any communication on or information stored in the system."

Each user must then click "OK" before the computer can be used. This warning makes it quite clear to any CSB employee that a search of their emails by agency management could be expected and would not be untoward. In particular, communications or instructions from a CO or COR to a federal contractor using agency funds become part of the official contract record and have no expectation of privacy whatsoever.

#### **Specification 4**

1. The premise of this Specification is false, as previously indicated by the reply to Specification 1 and documented by Exhibit II. Dr. Horowitz only learned that Mr. Lyon was involved in instructing Vantage at all from the initial search that was conducted of Mr. Lau's emails early the morning of Feb. 13.
2. That search revealed Mr. Lyon's involvement and revealed that he had inserted the criticisms of "senior leadership" along with Mr. Lau, and had unsuccessfully encouraged Vantage to blame specific named individuals for the morale issues in their report (See emails in Exhibit XIII). Dr. Horowitz then requested a search be conducted of Mr. Lyon's communications with Vantage, which was approved in writing by Dr. Moure-Eraso in compliance with Board Order 34.
3. Furthermore the search of Mr. Lyon's email was conducted confidentially by the IT staff. Although Dr. Moure-Eraso was fully briefed on the Vantage contract concerns on Feb. 12 and Feb. 13, in the emails that would be sent to the IT staff Dr. Horowitz described the issue only as a "confidential personnel matter" in order to protect the interests and privacy of Mr. Lau and Mr. Lyon.

Thus, unless Mr. Lyon learned of this search and publicized it in some manner, there would be no way this could have a chilling effect on morale or general employee willingness to express disagreement.

4. There was later a much broader search of all agency emails related to Vantage that was requested by the House Oversight and Government Reform Committee that brought hundreds documents to light (including the Lau and Lyon emails, once again), but that search that was not instigated by Dr. Horowitz. Only this latter search had a potential chilling effect, since it forced the disclosure of sensitive documents such as Workplace Improvement Committee employee interview results, and most people in the agency knew about that search, and the results were given to the entire House committee.

Significantly yet ironically, since Mr. Lau and Mr. Lyon served as informants for Committee staff, it was their own efforts, not Dr. Horowitz's, which facilitated these events becoming public, leading to any chilling effect that might have been induced inside the CSB.

5. Finally, there was no personnel action taken against Mr. Lyon, only the IT limited search of emails. He experienced no change of official title, courtesy title, duties or assignments. This cannot be reasonably construed as either retaliation or the appearance thereof.

#### **Specifications 5-6**

1. Dr. Horowitz has known Ms. Robinson for 15 years and for most of those years they were close colleagues and friends, while they were in a lateral relationship within the CSB. When Dr. Moure-Eraso and the Board asked Dr. Horowitz to serve as managing director in 2010, Ms. Robinson perhaps presciently told him she believed he was "crazy"

to take the assignment, likely referencing difficulties in managing the CSB staff and the always challenging situation with disagreements among Board members.

2. The relationship became strained after February 2011, because of differing opinions about the hiring of Mr. Loeb by the Chairman. Dr. Horowitz found her position somewhat puzzling because prior to that, and as recently as the fall of 2010, Ms. Robinson had expressed many misgivings about the functioning of the CSB's Office of General Counsel, and particularly the often erratic behavior of Mr. Porfiri, the deputy general counsel who essentially ran that office.
3. Ms. Robinson notified Dr. Moure-Eraso and Dr. Horowitz on February 25, 2011, that she was filing a complaint with the OIG in connection with what she termed CSB governance. This occurred around the time of the planned hiring of Mr. Loeb, which was controversial among many of the Board Members and staff. The OIG subsequently referred these issues to the Office of Special Counsel (OSC), as they related to personnel practices.
4. Dr. Horowitz was deposed by OSC on May 3, 2012, and again January 7, 2014, in connection with these original complaints and with a set of "retaliation" complaints filed in the fall of 2012, after Chairman Moure-Eraso exchanged responsibilities between Mr. Loeb and former General Counsel Chris Warner. OSC considered Dr. Horowitz only as a "witness" not as a "subject official." OSC never made any findings of wrongdoing in connection with these matters. Both personnel actions in question (the hiring of Mr. Loeb and the exchange of duties between Mr. Warner and Mr. Loeb) were taken by Chairman Moure-Eraso, not by Dr. Horowitz.
5. Ms. Robinson periodically raised concerns about a variety of financial services issues, and would sometimes ask for legal opinions about governance or ask to receive direct orders before taking action on financial matters. In addition she appeared to be unhappy when Dr. Moure-Eraso and the management team decided to bring the contracting function in-house instead of the costly outsourcing to the Bureau of Public Debt (BPD) in West Virginia, as she had coordinated with BPD as a provider of procurement services for many years. Nevertheless, a survey later showed CSB personnel received much better procurement service from the in-house contract officials, Allen Smith and Amy McCormick, and at a lower cost to the agency. This was particularly crucial during accident deployments when the agency needed contractual services in short time frames.
6. Despite what appeared to be Ms. Robinson's unhappiness with various decisions, Dr. Horowitz treated her with fairness and civility. While he supported positive overall performance appraisals for Ms. Robinson (never lower than "exceeds fully successful"), in his FY 2011 draft performance appraisal, he did raise significant concerns about her job performance (contrary to the assertions in Specifications 5 and 6) relating to her budgetary work, including "a passive approach on budget planning and advocacy," a delegation of many of her key functions (like budget request narratives) to other offices, and a weak relationship with the Office of Management and Budget (OMB) that made it difficult to obtain needed budget increases (See Exhibit XIV).

7. That weak relationship, among other problems, impaired the CSB's ability to seek additional funds that were desperately needed for the Deepwater investigation and the large case backlog which had accumulated before Dr. Horowitz was appointed Managing Director. Dr. Horowitz concluded this situation existed because of a pattern over the years of treating the OMB relationship as a mechanical exercise, without effective advocacy for the agency's needs, even while the GAO and EPA OIG were criticizing the CSB for not undertaking more investigations.
8. Dr. Horowitz was also concerned that Ms. Robinson had contacted OMB unnecessarily on minor financial issues, such as how to handle an individual Board member's air ticket during one of the frequent periods when there was fear of a government shutdown. She spontaneously contacted an OMB assistant general counsel seeking advice on the matter. Ms. Robinson often seemed to construe her role as "policing" the Board's presidential appointees and others, rather than offering them sound knowledgeable advice on how to resolve problems concerning very routine issues.
9. The handling of routine travel matters by Ms. Robinson and her staff was also a source of significant frustration over years for seemingly all CSB personnel who travelled, as their paperwork was subjected to excessive and often unjustified scrutiny, challenges, and delays, sometimes over expenses as small as a couple dollars. As recently as Feb. 5, 2015, following a trip to Houston where the CSB had an active field team at the DuPont accident site, Dr. Horowitz wrote to Ms. Robinson's supervisor Mr. John Lau, stating:

“During the trip to Houston I heard almost universal complaints about Dai's communications concerning travel. [Dai Nguyen was Ms. Robinson's sole employee and worked closely with Ms. Robinson] In one case numerous emails were exchanged over a rental car gas charge (which was charged through no fault of the employee, after the employee filled the rental tank prior to drop off). The total amount of this charge was about \$2, and yet a number of time-wasting messages were generated that obviously cost the government far more than \$2 in staff time, as well as the impact on morale and collegiality. In the end the employee asked to personally pay the \$2 rather than continue the string of futility trying to get it refunded, and being told to contact the rental company. To the extent Dai has time to pursue trifling issues like this it suggests there is unneeded bandwidth in that office. Please address this issue and I would like to discuss it with you on Monday.”
10. When Richard Loeb was hired, responsibilities for OMB liaison were largely transferred to him. This occurred on September 12, 2011, and the action which Dr. Horowitz communicated in an email had been approved by Chairman Moure-Eraso. The Chairperson had to approve such a change because Mr. Loeb reported directly to him, not to Dr. Horowitz.
11. Mr. Loeb was assigned the OMB liaison responsibilities because he had nearly twenty years of experience as a career senior executive at OMB, and had extremely detailed

knowledge about OMB budgeting processes, which no one at the CSB had. He had many key contacts at OMB. In contrast no one at the CSB had ever worked at OMB in any capacity. Mr. Loeb also had developed extensive negotiating skills with OMB during his time as the U.S. Office of Safety & Health Review Commission executive director, securing better OMB budget allocations for that agency.

12. Mr. Loeb also brought a number of other improved budgeting practices to the agency, including a financial “commitment” system that had been completely lacking, which led previously to large lapses of funds each year (from \$380,000 to \$770,000, or up to 8.5% of the annual appropriation). This was because it had been impossible under Ms. Robinson to determine how much money was actually available to spend on the mission during the course of the year. Ms. Robinson was unable to rationalize budgeting at CSB which operated under the unusual system of having the whole agency appropriation pre-allocated by a Board vote among a large number of individual offices that had no incentive to carefully manage their budgets or to return unneeded funds.
13. On June 20, 2012, Dr. Horowitz transferred responsibility for overall liaison with the EPA OIG from Ms. Robinson to Ms. Anna Brown. Ms. Robinson continued to oversee the interactions with the OIG in connection with the OIG’s annual financial audit. Ms. Brown handled the programmatic work of the OIG such as evaluations of the contracting program, the investigative program, and the IT program.
14. This alignment made more sense since the IT and contracting functions reported to Ms. Brown, anyway. In addition, the Chairperson and Dr. Horowitz had a legitimate concern that, to the extent Ms. Robinson was raising complaints to the OIG on governance and other issues (as stated in her February 25, 2011, email), she could not also simultaneously serve at the agency’s liaison to the OIG on many of the same topics about which she was filing complaints. This conflicted dual role was unfair to agency management, as the Chairperson could not be confident that the management position was being accurately or fully conveyed to OIG, especially on matters where Ms. Robinson was pursuing governance or other complaints. It also put the employee in an awkward spot. The decision to transfer OIG liaison responsibilities in June 2012 was authorized and directed by Chairman Moure-Eraso and was not retaliatory in nature. Nor was Ms. Robinson discouraged in any way from continuing to bring complaints to the OIG.
15. Ms. Robinson’s FY 2015 performance plan, drafted by Mr. Lau and approved by Dr. Horowitz on December 4, 2014, contains three elements of which only one directly related to financial activities. Ms. Robinson’s second performance element was titled “CSB Mission Operations” and included such tasks as “leading” the investigation protocol development project, and completing three protocol sections between February and June 2015 for Board vote. It also included serving on the Workplace Improvement Committee and implementing its recommended actions, and working as part of the Recommendations team supervised by Dr. Susan Anenberg, including developing Most Wanted program procedures, a spring 2015 PSM hearing, and FY 2015 action plan metrics.

16. On July 28, 2014, Dr. Horowitz sent an email to whole agency announcing the appointment of Ms. Robinson as one of the six members of the permanent Workplace Improvement Committee (WIC). This was an important assignment for improving the agency's climate and morale. Part of his rationale for choosing Ms. Robinson was that her serving on the WIC would provide with a forum for channeling her various concerns about the agency into a more positive direction. Dr. Horowitz spoke with her directly about this important and time-consuming assignment and she expressed her appreciation for the selection.
17. The last performance appraisal of Ms. Robinson in which Dr. Horowitz participated (FY 2014), contains a number of statements made in the first-person by Ms. Robinson as part of her self-assessment that directly rebut any allegations against Dr. Horowitz concerning financial management, including:
  - "Budget documents (requests, tracking, reporting) were submitted in accordance with established guidelines."
  - "Weekly and monthly [budget] updates were prepared throughout the performance period." And
  - "CSB [financial] practices are in accordance with law, regulation, and policies, as demonstrated by an unqualified audit opinion." (see Exhibit XV)
18. On March 10, 2015, Dr. Horowitz met with Ms. Robinson in his office at 3:30 p.m. to discuss the recent change that had been directed by Dr. Moure-Eraso, i.e. to have Anna Brown direct the administrative program instead of John Lau. According to contemporaneous notes he prepared that evening, Ms. Robinson was "visibly upset with the changes though she maintained a mostly professional demeanor. She repeatedly stated that Anna was 'incompetent' (she said this at least 3 times)." (See contemporaneous notes in Exhibit XVI).
19. In this meeting, Ms. Robinson suggested that instead of reporting to Anna Brown, she could report directly to Dr. Horowitz (again, contemporaneous notes in Exhibit XVI). Her request for this reporting relationship belies any claim that Ms. Robinson sincerely believed that Dr. Horowitz was a retaliator.
20. During his tenure as her first- or second-level supervisor from 2010-2015, Ms. Robinson did not suffer any adverse personnel action, any change of title or duty station, any loss of pay or grade, or any retaliatory action whatsoever. She received overall positive performance evaluations, usually at the outstanding level, and cash awards. While some responsibilities were shifted away from her (on Dr. Moure-Eraso's instructions or with his full approval), Ms. Robinson also gained many new responsibilities for key initiatives that were more substantive in nature. In short, Dr. Horowitz made legitimate and well-supported management decisions concerning Ms. Robinson which he believed would improve agency operations and best utilize individual talents that were available.

## **Specifications 7-8**

First, these two Specifications are parallel and both rest on the inaccurate premise (see preceding reply) that there was an act, or the appearance of, or a conspiracy to commit, retaliation.

Second, these Specifications are at odds with the facts in that:

1. Contrary to his testimony to RGS, Mr. Lau shared many of the concerns about Ms. Robinson's performance and actions within the agency with Dr. Horowitz. He also shared the concern that (after Dr. Horowitz had significantly simplified the internal budgeting process starting in 2011) there was simply not enough work in that area to justify a two-person office consisting of Ms. Robinson (GS-15) and Ms. Nguyen (GS-13), who had a historic one-on-one reporting relationship.

On January 10, 2012, Mr. Lau wrote Dr. Horowitz an email suggesting a variety of non-financial tasks that could be assigned to Ms. Robinson. In addition to memorializing the suggestions Dr. Horowitz had made, Mr. Lau suggested some of his own, which he called "farther out possible task[s] for Bea." These included that she could be "detailed up to 50% to the Office of Recommendations to implement the Most Wanted recommendations program" and that she could "work with [Senior Investigator] Bill Hoyle to develop and implement [the] investigators' training program." (See Exhibit XVII).

It had long appeared to Chairman Moure-Eraso, Mr. Lau, and Dr. Horowitz that virtually all the day-to-day budgeting and travel work was being performed by Ms. Nguyen, with Ms. Robinson simply performing periodic oversight and number checking, and not having a full plate of responsibilities herself. Accordingly over the last several years a number of important responsibilities were added to Ms. Robinson's performance plans, such as responsibility for developing and seeking Board approval for investigation protocols and for the implementation of the agency's Most Wanted recommendations program. Both of these were critical, high-profile assignments that were prominent in the agency's strategic and action plans. These responsibilities were more significant and important than the responsibilities (OMB liaison and OIG liaison) that had been reassigned from Ms. Robinson in 2011-2012.

2. Finally, it beggars belief (given all of the various investigations of management officials by the Office of Special Counsel and others) that Dr. Horowitz would have suggested to anyone such as Mr. Lau or Mr. Lyon that they join him in developing a scheme to improperly retaliate against Ms. Robinson for disclosures she may or may not have made to investigative agencies and committees. If Dr. Horowitz or anyone had recommended to John Lau or Chris Lyon that the agency engage in what could be characterized as a prohibited personnel practice, one would have expected (as the HR director and as a senior attorney, respectively) to have directly and immediately raised that issue with the Office of Special Counsel for investigation.

Mr. Lau's statements to RGS show that he was in contact with OSC concerning his own issues, but there is no assertion that he ever raised any issues to OSC concerning retaliation (or a plan of retaliation) toward Ms. Robinson. They are being raised for the first time now, years after-the-fact, in these Specifications.

Third, Dr. Horowitz made no secret of his concerns with Ms. Robinson's performance and her approach to some of her core financial oversight tasks.

Specification 7 concerns Dr. Horowitz consulting Mr. Lau, the HR Director, about a personnel issue. This was not a conspiracy. It was instead an attempt to sound out options about how to best utilize personnel. Presumably, these are matters which should benefit from consultation with HR.

Specification 8 concerns Dr. Horowitz consulting Chris Lyon, a senior agency attorney who had worked on CSB personnel cases, about legal rights and options. Again, this was not a conspiracy. Instead, it was a manager seeking legal advice about the merits of different approaches for addressing potential personnel issues.

The fact that Dr. Horowitz consulted colleagues, including the head of HR and legal staff, about alternative approaches is not objectionable or even close to misconduct. Instead, these Specifications are a misdirected effort to penalize Dr. Horowitz for making efforts to better utilize limited human resources within a small agency.

Finally, these Specifications further illustrate the "damned-if-you-do; damned-if-you-don't" double standard being applied to Dr. Horowitz. In Specification 10, he is taken to task for alleged failure to consult with staff. He is taken to task for consulting, as part of some bogus "conspiracy to be a manager" charge.

### **Specification 9**

1. This Specification is simply and demonstrably false. Dr. Horowitz did not use his position as managing director, GS-15, to obtain appointment to a limited term SES position. The authority to confer a limited term SES appointment was vested in the agency head, i.e. Dr. Moure-Eraso.
2. The Chairperson used the authority under 5 CFR § 317.603 to appoint Dr. Horowitz to the position, which does not require the use of merit staffing procedures. It only requires a determination by the appointing authority (Moure-Eraso) that the candidate was qualified for the position, which Dr. Horowitz manifestly was. In fact, Dr. Horowitz was the only incumbent in the position since 1998 who had any significant, relevant technical and educational qualifications for this position.
3. This appointment of Dr. Horowitz was approved by OPM on April 20, 2012, after receiving a letter from Moure-Eraso and other forms, which were prepared by Mr. Loeb and/or Mr. Lau. Dr. Horowitz had no involvement in completing or transmitting these materials.

The PD for the limited term SES position and the draft letter from Dr. Moure-Eraso to OPM were prepared by Mr. Loeb and sent to Mr. Lau and Dr. Moure-Eraso via email on March 27, 2012. Dr. Horowitz did not generate these materials, nor did he develop the

proposed focus of the position on the Deepwater Horizon investigation (although that was at the time by far the CSB's largest case).

Thereafter, Dr. Horowitz received a letter from Dr. Moure-Eraso offering him the position, which he accepted.

4. The agency's top civil servant had always previously been an SES position. Three prior Chief Operating Officers (as the position was known previously) – Phyllis Thompson (1998-2000), Chris Warner (2000-2002), and Charles Jeffress (2002-2004), all held SES appointments. Dr. Horowitz was the only one of the four who held the position (by then known as Managing Director) as a GS-15 from September 2010 to April 2012, and then from March 2015 to the present.
5. This appointment resulted in a salary increase of about \$24,000 but Dr. Horowitz did not become eligible for SES bonuses, because of the limited nature of the appointment. Absent this salary increase, Dr. Horowitz's salary would have remained the same as several staff who reported to him but had far lesser management responsibilities.
6. Dr. Horowitz had previously served as Managing Director from 2010-2012 at the same exact salary he received as Director of Congressional, Public and Board Affairs, a GS-15 position that he held from 2005-2010 and which supervised only about four employees. The responsibilities of the Managing Director position are also significantly greater, including supervising most agency employees and overseeing the whole agency's budget execution and all investigations and recommendations, subject to the direction of the Chairperson. The higher salary also reflected the much higher complexity and stress of the Managing Director position.

Dr. Horowitz was understandably reluctant to continue in this role if the compensation had remained flat with his prior position. Dr. Horowitz expressed this concern to Dr. Moure-Eraso during discussions of salary in April 2012. Thus, the pay increase reflected catching his salary up to significant added responsibilities Dr. Horowitz had undertaken without additional compensation.

7. The arrangement also reflected and recognized a significant salary savings realized elsewhere in the CSB. Dr. Horowitz's prior position as Director of Congressional, Public, and Board Affairs (GS-15) was never filled after he became Managing Director. He thus also continued performing most of his duties as well for the whole five years. For most of his Managing Director tenure, CSB employed only one GS-13, a remote employee, in the media/public/video/Congressional program. This arrangement saved the agency far more than the temporary \$24,000 pay increase.
8. Based on documents that came to light in the spring of 2014 during the House OGR investigation, Ms. Robinson worked behind the scenes in May 2013 with Board Members Griffon and Rosenberg and staff member Bill Hoyle to develop a complaint to OPM concerning the limited term SES appointment. The draft complaint, which appeared to be in final form and was presumably filed with identified officials at OPM, raised

virtually the same topics as the current Specification 9. The topics of the 2013 complaint included “Duties Before and After the Promotion Have Not Changed,” “Board Member Concern Over Managing Director’s Performance,” “Board Involvement in SES Decisions,” “Board Policy – Open and Fair Competition.” (See emails in Exhibit XVIII).

OPM, which had approved the appointment in 2012, took no action on this complaint and never apparently contacted the agency about it to gather any information. Dr. Horowitz now stands in the anomalous position of facing proposed removal for having accepted a promotion that was approved by OPM, and then apparently allowed to continue by OPM even after a complaint was filed a year later.

9. Finally, this Specification on its face makes little sense. It accuses Dr. Horowitz of having “created the appearance that you misused your position” to obtain a temporary SES slot. The use of the term “appearance” suggests that Dr. Horowitz did not actually misuse his position but somehow gave unspecified persons the perception that he might have.

Besides being utterly absurd, the Specification would create the perverse result that a civil servant should be punished for accepting a lawful promotion.

### **Specification 10**

This Specification alleges a “pattern of management decisions constituting neglect of your duties as Managing Director.” Before refuting the specifics itemized as subparagraphs, some salient points falsify this broad-brush indictment of Dr. Horowitz’s performance as Managing Director:

1. Dr. Horowitz received “outstanding” ratings in every single performance review since he arrived at the agency in 2000. These reviews were conducted by a number of different agency heads, including acting executive Poje, Chairman Merritt, Chairman Bresland, and Chairman Moure-Eraso. He consistently received cash performance awards based on these outstanding ratings.
2. The quality of his work – particularly in establishing, developing, and supervising the agency’s safety video program from 2005 to 2015 – was recognized in numerous awards received by the CSB, including –
  - The American Chemical Society’s Howard Fawcett Chemical Health and Safety Award;
  - The European Process Safety Centre Award (marking the first time this prestigious award was given to a recipient in the Western Hemisphere);
  - The MERLOT national online educational group’s first award for “exemplary” teaching and learning material; and
  - Individual videos he produced received a total of 21 national CINE Golden Eagle awards and regional TIVA-DC Peer awards, including two recent awards for

videos to which Dr. Horowitz contributed, which were the subject of a laudatory news release by the current Chairman on Nov. 18, 2015.

3. Dr. Horowitz was the principal drafter of what is likely the agency's most important and influential recommendation ever, the agency's first "urgent" recommendation which was approved by the Board in August 2005 and issued to BP. This recommendation led to the establishment of the Baker Panel in 2005, a blue ribbon commission chaired by James A. Baker III which spent \$30 million investigating and reporting on BP's safety culture.
4. The individual examples itemized in this Specification are largely unsupported, stale (many going back to 2011 and 2012) and presented without context. These allegations appear to have been generated based on a few individual witnesses' verbal claims that were not accompanied by any documents – claims that could be easily been refuted had the agency performed any objective investigation of their veracity, using documents that were readily available to the agency.

Further, as explained below, these allegations, in no way, constitute evidence of mismanagement, neglect or conduct unbecoming a federal official:

- (a) ***Investigation Planning:*** Dr. Horowitz did direct staff to work on an investigations completion plan in fall 2011. Several days of meetings were held at the Denver office concerning the plan. Unfortunately the draft plan called for terminating a large number of cases on which the agency had already committed and expended significant resources. The DC based team had limited input into the plan and expressed misgivings about it from the moment it was unveiled. The plan conceded "there are unresolved competing policy views between completion of smaller products within FY-12 versus the challenge of bigger, more complex investigations with recommendations with national impact." (See Exhibit XIX).

On Monday, October 31, 2011, Dr. Horowitz informed the Denver office director by email that the Chairperson and he wanted to have "further discussions" on the draft investigative plan developed the previous week. The Chairperson shared many of Dr. Horowitz's concerns about the proposed termination of cases and other issues.

Nonetheless one of the team leads from the Denver office, presumably on instructions from the Denver office director, proceeded to send the draft plan to each of the Board members and ask for individual meetings (bypassing Dr. Horowitz completely on the requests). The investigative team leads were then chastised directly by the Chairperson for not observing the chain of command, and for not developing a consensus product before it was sent to the Board. (Note that they were not chastised either primarily by Dr. Horowitz or for having developed a plan.) The Chairperson then communicated to the other Board members that the plan needed more staff work.

The initial draft plan was not abandoned. CSB staff, including Dr. Horowitz, continued to do planning around all the cases, and over time they implemented most of the significant initiatives that were discussed in the plan, including:

- Production of FY 12 reports, recommendations and videos;
- Development of investigator training and career ladders; creation of a most-wanted recommendations program (June 2012);
- New investigative screening procedures (February 2012); and
- Investigative scoping procedures (informally applied and then approved by the Board in January 2015).

However the plan for terminating or relegating “low priority” cases was not adopted.

In time, CSB staff under Dr. Horowitz’s management developed draft final reports on a number of these cases (NDK Crystal, Horsehead, Millard, and Carbide Industries) which were approved by the Board. These reports were important achievements and received positive feedback from affected communities and other stakeholders.

- (b) ***Operating Budgets***: This allegation is utterly untrue. The CSB has continued to produce annual budget plans and submissions to OMB and Congress, with Board approval. These budget plans lay out fiscal priorities for the agency in substantial detail.

The practice that CSB did stop was having budgets that were pre-allocated by individual office and by individual budget object class (BOC). This system, which appeared unique to the CSB, had proved unwieldy and resulted in inefficient spending and large budgetary lapses each year. It required up to four budget staff to administer (an excessive number for a tiny agency of 40) and it created as many as 10 competing budget directors throughout the agency scattered through all the various offices and programs, some of which were as small as one person.

Significantly, there is no Board Order defining or even describing what the “operating budget” is or how it is to be implemented; this was essentially an unwritten creation of individual budget staff. For example, Board Order 27(6)(a) indicates that an “operating budget” is just one of three optional approaches for the Board to approve spending.

After 2011, Dr. Horowitz was never directed by his supervisor, Dr. Moure-Eraso to prepare an “operating budget” – instead he had provided Dr. Horowitz with a delegation of authority for spending up to \$50,000, which he exercised.

Generally on a weekly basis, Dr. Horowitz reviewed the budget spending and projections from the financial staff and made adjustments and spending decisions within this delegation of authority. These weekly tables were available to anyone who might ask, and on a quarterly basis detailed spending reports were provided to the Board. Neither Dr. Moure-Eraso nor other Board members raised any concerns about the spending that was reported in these quarterly reports.

In fact, there was a closer and more responsible supervision of the budget than had existed prior to Dr. Horowitz's tenure as Managing Director. It was a well-known fact within the CSB that most individual office budgets, which existed prior to 2010, were inadequately managed, since there was effectively no incentive for individual offices to actively manage these budgets or to return any money once it had been pre-allocated to them. His management addressed these issues and resulted in increased spending on mission activities and decreased budgetary lapses at the end of each fiscal year.

- (c) ***Investigations Group Training:*** This allegation is also not supported by a review of the record. For example, on May 21-22, 2014, and again on June 25-26, 2014, Dr. Horowitz convened two days of human factors/safety culture training for the entire investigative group and other interested staff and members (See agenda in Exhibit XX). This was conducted by Professor Najm Meshkati, a leading expert in the field worldwide.

Dr. Horowitz oversaw many other training sessions, seminars, and exercises, such as a day-long mock deployment exercise on March 26, 2015, involving the investigative staff and others (See agenda in Exhibit XXI).

Besides supporting all these initiatives, and approving funding for them as necessary, Dr. Horowitz had to spend considerable time juggling schedules to stage all-investigator training days (or weeks) as many investigators preferred going individually for short courses or professional development.

During his tenure, Dr. Horowitz put in place streamlined procedures for acquiring investigator training using the authorities under the Government Employees Training Act of 1958 (GETA). Previous to his tenure, all training requests were unnecessarily handled as contract procurements through the Bureau of Public Debt, which led to great complexity and delay and little actual training occurring. For example, in the fall of 2010, critical training on offshore drilling technology, needed by the Deepwater Horizon investigative team and available at low cost from a local university, was blocked by the Bureau of Public Debt through a mistaken application of contracting rules.

In addition during FY 2015, Dr. Horowitz implemented a program for all employees to have individual development plans (IDP's) – the first time this was done on a comprehensive basis.

In fact and contrary to this Specification, an objective review of the record shows that more training occurred during Dr. Horowitz's five-year tenure as managing director than during any other era.

- (d) ***Approving Agency Action Plans:*** This allegation also has no basis in fact.

Per Board Order 1, “annual performance plans” may be adopted by Board through a vote. There is no provision for the Managing Director to approve action plans himself. Nor is there a CSB requirement that there be such plans.

During the fiscal years while he was Managing Director, Dr. Horowitz worked with staff to produce many draft action plans and present them to the Board. The most recent such effort is a prime example. For FY 2015, he led a staff exercise to prepare an action plan in summer 2014 and presented that to the Board on September 29, 2014, just before the beginning of the new fiscal year. Here is what then ensued:

- On October 3, 2015, Member Griffon replied that he planned to discuss the plan in a “Board business meeting” but he never did so, even after he became acting chairman in April 2015;
- A quorum meeting was held on October 17, 2015, and Mr. Griffon made some suggestions for the plan, which were then incorporated by Dr. Horowitz;
- Working with staff managers in his regular weekly meetings, Dr. Horowitz continued to update the plan and re-presented it to the Board on Feb. 3 by email and again on May 4, 2015, and again on May 5, prior to one of the public business meetings Mr. Griffon had convened;
- On May 6, 2015, Mr. Griffon wrote back to Dr. Horowitz: “My plan is to ask that the Board take time to consider the final draft plan and get comments to you in the next week or so. After that, we can vote on a final product (which should be in a form that can be released to the public -- no staff identified, etc.). No vote at this meeting”; but
- None of the Board Members ever did comment on the action plan, including Mr. Griffon, and no vote was taken through the end of the fiscal year on September 30, 2015.

As should be apparent from this recitation, although Dr. Horowitz developed or supervised the development and updating of draft action plans, he had no authority to “approve” them, as stated in the Specification. Indeed he tried in vain on multiple occasions to interest the Board in considering and approving an action plan.

Moreover, the Board has not approved or even considered any action plan for FY 2016, which is already well underway, despite Dr. Horowitz’s total lack of involvement in the process since he was placed on administrative leave on June 16, 2015.

- (e) **Investigation Reports:** This is the only part of the Specification that is accurate in part but it is also largely irrelevant.

Dr. Horowitz is not a Board Member and he does not approve investigation reports. The Managing Director's comments are a discretionary part of the review process. No staff member in the agency is tasked with reviewing and commenting on *all* investigative reports, and none has ever done so.

It is accurate that Dr. Horowitz had overall responsibility for the Office of Investigations as well as at least 3-4 other offices. It is also true that he did not always provide specific written comments on investigation reports, but generally did.

However, this in no way constitutes neglect of duties for the following reasons:

- The agency already has a large number of people commenting on the reports before publication including peer investigators, investigation supervisors, recommendations staff, attorneys, Board members, companies, unions, stakeholders, contractors, technical editors, external subject matter experts, and even members of the public in certain instances;
- There were much more extensive reviews conducted while Dr. Horowitz was Managing Director than during any prior era. Prior to his tenure, CSB rarely used external experts as peer reviewers, but Dr. Horowitz generally required that this be done. CSB had never put a draft report out for public comment before his tenure, but under Dr. Horowitz it did that on several occasions (DuPont-Belle, Chevron, Tesoro). The CSB also did not have a procedure for obtaining report reviews from labor unions, where applicable, but under his direction such a procedure was drafted and approved by the Board. The CSB also developed and approved a procedure for involving accident victims and families members in the investigative process, while Dr. Horowitz was Managing Director.
- The investigative teams did not suffer from a lack of comments on draft reports; in fact they sometimes complained that the number of comments was already excessive and it was time consuming to resolve all of them. Generally, Dr. Horowitz followed a process of triage with drafts; in some cases the drafts should be sent directly to the Board to resolve policy issues, while in other cases the reports needed extensive revision, e.g. by a technical editor, so he would send them back to the teams and assist them with obtaining those services;
- The agency does not have an approved internal protocol, such as a Board Order, on investigation report reviews that would require the Managing Director to review and comment on all reports. In fact, there is no one staff member who is required to comment on all reports. If the managing director were required to do this (which he or she was and is not) then he or she would be the only one; and
- Dr. Horowitz did not have commenting on draft reports as an element or required task on his annual performance plans, and this issue was never raised at any time as even a minor performance criticism by his rating official(s).

In sum, Dr. Horowitz's failure to comment on every single draft report in no way resulted in agency work going "undone", as alleged in this Specification. To the contrary, Dr. Horowitz's efforts greatly increased both the quantity as well as the quality of these reports.

- (f) ***Performance Improvement Plan***: This item suffers from an inaccurate premise. Dr. Horowitz was not personally asked or directed by any Congressional committees "to explain how Agency performance could be improved." Any such Committee requests were directed to the Chairperson or the Board as a whole.

Dr. Horowitz did have a staff level meeting with a two House appropriations aides on July 1, 2014. Along with interest in the CSB's work, they asked for concrete steps concerning the remaining case backlog and the perception of turmoil at the agency (this was shortly after the June 2014 House Oversight Committee hearing, which had shown three of the Board Members in discord, as well as the complaints of staff investigative team leaders against the Board). The following morning he wrote an email to the CSB managers titled "parting thought" prior to a 10-day planned vacation spanning the July 4 holiday (not an "extended leave" as stated in the Specification). He asked the managers to begin development of a simple, measurable "improvement plan" with 4 or 5 pertinent points that, as envisioned, could easily be conveyed to Congressional and other stakeholders.

On July 14, 2014, Mr. Lau responded on behalf of other managers with an email containing a laundry list of ideas, in bulleted format (about 19 items in all). There were a number of problems with this laundry list:

- Some were just old ideas that had been floating around the agency for a long time;
- Some posed unusual legal and civil service challenges, such as holding staff "elections" of representatives to the Workplace Improvement Committee;
- Many were overly general, unmeasurable, or simply not very helpful, such as "drop cases that we can't investigate";
- One of the 19 items reads in its entirety "improve operating policies and procedures to enhance the efficiency of [the] entire agency e.g. consistency across investigation teams by XX/XX/XXXX"; and
- Another proposed to initiate a "rebuild of the entire agency leadership structure including implementing a collaborative leadership model." [Emphasis added]

This Specification wrongfully implies that any federal manager who does not implement his subordinates' unfiltered suggestions – no matter how vague or unrealistic – is somehow committing misconduct.

Notably, the list identified no specific proposed responsibilities for anyone except Dr. Horowitz. Nonetheless, on Monday, July 28, 2014, Dr. Horowitz held a regular manager's staff meeting in which initiatives for the upcoming fiscal year were discussed. Dr. Horowitz told the group –

“We are going to make the annual Action Plan, Hiring Plan, and Budget a main focus of discussions for the next few weeks, so can start FY 15 with the right plans in place.” (Exhibit XII, also Agency Exhibit 23, page 35)

Mr. Lau replied the following day raising the status of the “appropriations action plan” i.e. the 19-point list. That afternoon Hillary Cohen, the agency's congressional affairs lead, wrote back to the group “in my opinion this [the plan] is in no way appropriate to give to an appropriations staff ... the committee was specifically interested in how we are going to address open investigations.”

Nonetheless, under Dr. Horowitz's direction, the CSB did implement the most feasible items on the list over the next six months:

- (a) Certain cases were dropped by vote of the Board in Jan. 2015, following a staff analysis of the prospects for completion;
- (b) Board member orientation materials were developed, and Dr. Horowitz led a staff effort to hold detailed briefings for new Board members;
- (c) An executive coach was retained to assist the Chairperson and Managing Director;
- (d) A management consultant firm was put under contract; and
- (e) The Workplace Improvement Committee was reinstated with new members.

Thus, contrary to this Specification, staff suggestions were not ignored, abandoned or left undiscussed. Instead, Dr. Horowitz processed these suggestions in a manner he felt best served the agency mission.

**(g) Hiring Strategy:** This allegation is based upon multiple inaccuracies.

First, the agency's budget was never increased to any significant degree during Dr. Horowitz's tenure as Managing Director. The FY 2015 budget was \$11.0 million, which was lower than it was in 2010 (\$11.15 million), 2012 (\$11.13 million), and 2013 (\$11.20 million), and was flat with the year before, 2014. See [http://www.csb.gov/assets/1/7/FY\\_2016\\_Budget\\_Justification\\_-\\_FINAL\\_.pdf](http://www.csb.gov/assets/1/7/FY_2016_Budget_Justification_-_FINAL_.pdf). In addition these figures do not take account of the effects of inflation, grade creep, or unavailable increases in space leasing costs. It is simply a myth that there was a major increase that could finance a wave of staff hiring.

In addition the agency had very costly projects that it had committed to, such as Deepwater Horizon, which had large contracting bills (\$1.3 million total for Deepwater, as of May 2015).

Despite that, the CSB hired many investigators during the five years of Dr. Horowitz's tenure. During FY 2015, the current investigative staffing was at or near an historic high. This was done in part by trimming administrative positions through attrition. The following current investigators were hired during Dr. Horowitz's tenure as Managing Director: Corona, Lashkari, Cutchen, Oyewole, Shroff, Lyon, Denton, Qureshi, Hougland, and Whitwell, along with two current recommendations staff (Anenberg and Tinney), representing 12 people in total. In addition three legal or support positions were filled (Loeb, Bouziane, and Lawhorne).

These hires did not happen by happenstance or osmosis: Dr. Horowitz directed and oversaw various hiring plans and strategies to implement most of these recruitment activities. On Sept. 12 and 17, 2014, he reported in emails to the agency on the results of the hiring initiatives from the summer, including the recruiting of three new investigators and the development of an investigative career ladder.

Most recently in March 2015, he worked with pertinent staff to develop a comprehensive, up-to-date hiring plan, and, on May 1, 2015, he transmitted the complete, fully-justified multi-office hiring plan to the Board, along with detailed tables showing the budgetary impacts of the proposed hires (See email of May 1, 2015, 6:45 PM, Horowitz to Board and leadership team as Exhibit XXIII).

Overall staffing of the agency is near its historic high levels and is consistent with what the agency can afford under its actual budget. There is simply no basis that hiring activities were deficient under Dr. Horowitz.

In addition, Dr. Horowitz was primarily responsible for implementing improved procurement and budgeting practices that allowed much more expert contract support for investigative teams, which allowed the teams to perform more work even when budget constraints and uncertainties prevented a large wave of staff hiring.

Significantly and by contrast, no hiring has occurred after Dr. Horowitz was placed on administrative leave on June 16, 2015, and no investigative positions have even been advertised.

5. Finally, this Specification is framed in such a disingenuous fashion that it should be dismissed out-of-hand. It is a specification of "conduct unbecoming" yet it is based on issues that solely concern performance, not conduct.

It asserts a "pattern of management decisions" in a series of bullet points without elaboration or context. Further, it alleges "neglect of duties" but does not specify a mandatory obligation which could reasonably be described as a duty.

Even if the cited management decisions are now being questioned by the current Board, it is improper to retrospectively transform perceived mistakes or misjudgments into misconduct and grounds for disciplinary action.

## **Additional Closing Responses**

### **I. Reply Buttressed by Documents While Proposal Rooted in Unsupported, Self-Serving Hearsay**

As amply demonstrated by the exhibits supporting this reply, an examination of the record (emails, contemporaneous memos and reports) demonstrates that the allegations cited by the proposal are without foundation. In assessing the materials supporting this reply, no fair decision-maker could find any of the proposal's specifications supported by a preponderance of the evidence.

Indeed, many of the key exonerating documents are included in the agency's own List of Exhibits. Yet none of this information from the agency's own record is rebutted, explained or even acknowledged in the proposal's specifications.

By contrast, the agency relies upon a House Republican staff report, written as a political document which omitted all contradictory evidence and was released to the news media without any opportunity for the CSB or any individual employees.

The agency also proffers statements from staff containing sweeping generalizations, unsupported by any documents and, in some cases, addressing subjects in which the staff member had no firsthand knowledge. Nor are the motives or credibility of the staff providing statements even cursorily examined. Instead, statements are taken at face value with no evident attempt to verify them or even corroborate statements upon which the proposal relies.

Finally, most all of the assembled exhibits supporting this reply were limited to those that were readily available to Dr. Horowitz. Should the CSB be forced to disgorge materials it is withholding either from this record, in response to FOIA lawsuits and other inquiries, the balance of evidence will shift even more decidedly against this proposal.

### **II. Most All These Matters Have Already Been Reviewed by Federal Agencies with Primary Jurisdiction**

The subject matter of nine of the ten specifications have already been the subject of formal complaints or reviews from sister federal agencies.

For example, all of the proposal's alleged acts of retaliation, appearances or retaliation, attempts at retaliation or conspiracy to perpetrate retaliation have been lodged with the U.S. Office of Special Counsel (OSC), the agency charged with reviewing such matters. Significantly, OSC has yet to determine that any of these complaints has merit.

Dr. Horowitz was deposed at great length by OSC on May 3, 2012, and again on Jan 7, 2014, about a series of allegations of reprisal, including those in this proposal. The OSC did not find merit in these allegations either, yet they are being revived yet again in this proposal.

Similarly, OPM approved Dr. Horowitz's temporary SES appointment in 2012 and reviewed it again in 2013 in response to the same recycled allegations contained in this proposal – and again found no basis for finding a violation of any rule or guideline.

If the agencies with expertise in, and jurisdiction over, these matters do not see merit in these accusations, why does the proposing official? This is especially questionable in that the proposing official was not at CSB when these events occurred, has no firsthand knowledge of them and interviewed no witnesses, including Dr. Horowitz, whom she barely has met and with whom she has never worked.

### **III. The Proposal Greatly Oversimplifies Morale Issues within CSB**

The proposal regurgitates a charge that Dr. Horowitz, along with the former Chairperson, created a “toxic work environment” at CSB. Ascribing the principal cause of poor morale at CSB to Dr. Horowitz is neither fair nor appropriate.

As you are no doubt discovering, morale within an organization is a complex and changeable commodity. In the recent past at CSB, some years showed morale improvements. In most cases the results were consistently higher than in the June 2010 morale survey which was conducted under Chairman Bresland and before Dr. Horowitz became managing director. See <https://www.unlocktalent.gov/files/Employee-Engagement-and-Global-Satisfaction-Trends.pdf>

In 2013, for example, the CSB was recognized as one of the best very small agencies to work for by the independent Partnership for Public Service, the primary outside organization that looks at federal morale issues. This was reflected in a high survey participation rate and a large increase in employee satisfaction from 2011 to 2012, during a period when Dr. Horowitz was Managing Director. See <http://www.govexec.com/excellence/promising-practices/2013/03/12-best-small-agencies-work-government/61920/>

Because of concerns about the 2013 survey data, Dr. Horowitz established the first Workplace Improvement Committee (WIC) and appointed its members to independently analyze the survey results and develop recommendations, which they did, including obtaining the first management consultant (Carden Group). Dr. Horowitz supported the activities and recommendations of this committee. In addition the committee's analysis showed areas of both strength and weakness in the survey results, it was certainly not all negative.

After the Carden Group completed its initial short engagement, Dr. Horowitz supported a longer term management consultant, which was one of Carden's recommendations, and established a permanent Workplace Improvement Committee with annual terms and appointed its members, and supported its work. Eventually the contract team selected Vantage for the management consultant – demonstrating that few of Dr. Horowitz's good deeds went unpunished.

## **RESPONSE TO AGENCY DOUGLAS FACTORS EVALUATION**

The “Douglas Factor Evaluation Checklist” signed and initialed by Board Member Kulinowski contains clear errors in judgment. Moreover, the checklist is designed to reach what obviously is the preordained result that removal is the only reasonable penalty for these specifications.

Notably, Member Kulinowski barely knows Dr. Horowitz and did not interview him before concluding things such as that he, in her judgment, lacks any “potential for rehabilitation.” Dr. Horowitz and Member Kulinowski have never worked together at the CSB or any other organization, even for a single day.

Further, Member Kulinowski based many of her judgments on sweeping summaries of events and impacts which happened well before she came to the CSB and of which she has no direct knowledge. Finally, Member Kulinowski based her judgments on statements which have no basis in, or in some cases are flatly contradicted by, contemporaneous documents, including the Agency’s own record.

### **Douglas Factor 1 – Nature and Seriousness of Offense**

This analysis omits any analysis of the precise nature of any “offense” or what made it egregious. Instead, Member Kulinowski refers to a “general atmosphere” which is not the standard of judgment for this factor.

In addition, she makes reference to a personal gain from misconduct “by deflecting responsibility and accountability” without a word of explanation as to what this means. If, as Member Kulinowski notes in Douglas Factor 9, Dr. Horowitz was named in various internal and external reports, then how did he avoid “responsibility and accountability”? Instead, this phrase is recited as if it is rote rhetoric offered as a substitute for seriously and rationally analyzing this factor.

Finally, Member Kulinowski references an increase in pay as a factor relating to the nature and seriousness of an offense but Dr. Horowitz is not even charged with any offense for accepting a pay increase for a promotion lawfully offered him by the then Chairperson, and was amply justified by the increase in his responsibilities.

### **Douglas Factor 4 –Employee’s Past Work Record**

Member Kulinowski’s brief recitation of this factor is riddled with factual errors. Contrary to her premise statements:

- Dr. Horowitz has no power to “approve” agency action plans;
- It is not even a listed, let alone a “primary” official duty for Dr. Horowitz as Managing Director to comment on draft investigation reports;
- Regardless of how budgeting was formatted, there is nothing in the record to indicate that CSB budget plans and reports prepared during Dr. Horowitz’s tenure violated any federal or agency regulation, rule or even guideline. Nor is any such specific violation cited;

- There is no support in the record (nor is there any relevant specification) that Dr. Horowitz somehow exposed CSB “to serious risk of financial wrongdoing.” Despite leveling this charge, this potential for wrongdoing is not even identified, let alone explained, by Ms. Kulinowski, nor did she identify a single dollar that was misspent; and
- The supposedly “critical Agency oversight function” that CSB was supposedly unable to perform is also never identified – nor is it at all evident what specifically Dr. Horowitz did to disable this mysterious “oversight” capacity.

These misstatements are aggravated by flawed reasoning proffered by Member Kulinowski to reach an apparently predetermined judgement:

- If Member Kulinowski concedes that Dr. Horowitz worked well with staff prior to being promoted to Managing Director, how is that evidence he could not work productively again in an alternative or non-supervisory role? If in her judgment his problems stemmed from being an ineffective manager, wouldn’t that in fact argue for his being returned to a non-management position?
- Member Kulinowski contradicts herself by first claiming that Dr. Horowitz openly admitted that he could not effectively manage CSB and then turns around in Douglas Factor 1 to claim that he deflected any admission of accountability and responsibility.
- If Dr. Horowitz indeed once “reversed course” on an internal matter (although no specification relates to this incident and the alleged reversal is not even identified), how is this evidence that he “is unable to continue working productively with CSB staff” in any future capacity?

In short, Member Kulinowski’s analysis of this factor makes little sense.

#### **Douglas Factor 5 – Supervisory Confidence**

Member Kulinowski has never directly supervised Dr. Horowitz. Nor is it clear what authority or protocol entitles her to serve as proposing official in this matter.

#### **Douglas Factor 6 – Consistency of Penalty**

Member Kulinowski’s analysis of this factor is disingenuous, at best. For example, the Agency Exhibits supplied by Member Kulinowski document that the former Chairperson believed that Mr. Lau was guilty of serious misconduct in his mismanagement of the Vantage contract, yet Mr. Lau received non-punitive treatment, suffering no loss of pay or grade.

Undoubtedly Member Kulinowski is aware of the Lau/Vantage case, as it figures into specifications she leveled. At the time, Mr. Lau was Deputy Managing Director. His misconduct disrupted the contract’s object of work and resulted in a draft report leaked to a House committee even before it was reviewed by the full Board. The contract was thereafter seen as potentially tainted, and tens of thousands of dollars previously obligated to it went unutilized; no acting chair or chairperson after Dr. Moure-Eraso saw fit to revive the Vantage contract during the remainder of FY 2015.

It is difficult to reconcile the vastly disparate treatment between the leniency accorded to Mr. Lau and the harsh penalty proposed for Dr. Horowitz.

### **Douglas Factor 8 – Notoriety**

Here Member Kulinowski cites “Congressional hearings, OIG reports, and news reports” in contending that the conduct listed in the specifications were notorious. Her two-sentence analysis of this factor omits several pertinent factors which should have been taken into consideration:

1. Virtually none of the specifications in this proposal figured in Congressional hearings or OIG reports. While atmospherics related to some of the specifications are cited in a Republican House committee report (such as fear of retaliation or low morale), almost none of the specific acts with which Dr. Horowitz is now charged figured in these public discussions.
2. These reports and hearings revolved around a wide range of other issues related to matters, such as use of private emails or the legality of Board procedures, which are not included in the proposal’s specifications. Thus, the supposed notoriety also arose out of actions other than Dr. Horowitz’s. Moreover, it is clear that the primary focus of these reports was on a Presidentially-appointed Chair, rather than staff.
3. Few if any of the supposedly notorious actions by Dr. Horowitz have been reversed by the current CSB leadership in the several months since Dr. Horowitz has functioned as Managing Director. This official inattention denotes just how little public attention was (or is still) accorded to the specific actions outlined in this proposal.

Finally, it should be stated that the hearings and OIG reports were part of an orchestrated attempt to defang an agency that had finally begun to address controversial but vitally important issues of industrial chemical safety. These efforts to embarrass and impede the CSB show that Dr. Horowitz was trying to make a difference in the public interest – for which he is now facing removal from public service.

### **Douglas Factor 9 – Notice of Warning about Conduct**

The analysis behind this factor is a maddening exhibition of doublethink: since Member Kulinowski’s proposal is cast as Conduct Unbecoming a Federal Employee rather than violation of a specific code of conduct, there is no way that Dr. Horowitz could have been on notice or “knew or should have known that his actions constituted misconduct.”

Instead, Member Kulinowski’s stated assumption is that because there was criticism of CSB leadership, including but not limited to Dr. Horowitz, “This should have served as notice of warning about conduct.” Given the wide-ranging, complex and often political nature of this flak, it could in no way serve as a coherent, let alone, specific, notice about the broad range of disparate actions touched upon in these specifications.

If anything, this negative attention increased pressure on the entire agency, including Dr. Horowitz to improve CSB operations. In reaction, he took actions to improve CSB operations by, for example –

- Strengthening CSB financial operations, oversight and reporting;
- Improving the quality of independent review of investigation reports while greatly reducing the seemingly insurmountable backlog that existed on the first day of his appointment as Managing Director; and
- Spending significant time and resources (including receiving personal “coaching”) to address morale issues.

Yet those very efforts to improve agency functioning are what gave rise to the specifications of supposed misconduct he is now facing.

Even more frustrating, some specifications fault him for being proactive while others take him to task for being passive or unresponsive. Given the conflicting, if not contradictory, directions and advice he was constantly given, how in the world could Dr. Horowitz have been on notice that whatever course he took would later be construed as misconduct?

In short, it appears that Member Kulinowski substitutes an after-the-fact measure of political reaction for the quite different notion of clearly recognizable prior notice of misconduct. Thus, in this instance, it appears that a civil servant is being pilloried solely to satisfy demands from elected officials and certain influential stakeholders.

### **Douglas Factor 10 – Potential for Rehabilitation**

Member Kulinowski offers no cogent basis for her firmly stated conclusion that Dr. Horowitz lacks “any potential for rehabilitation.” As noted above, she barely knows Dr. Horowitz and declined to interview him herself. Instead, she makes her judgments based upon a pre-selected record assembled by as yet unidentified parties.

First, she claims that the only expression of regret came during his investigative interview with the RGS firm. Given the nature of that interview, any expression of regret would have been totally uncalled for since the stated purpose of the interview was fact-finding.

Second, Member Kulinowski earlier cited what she termed Dr. Horowitz’s open acknowledgement of management problems at the CSB. This belies her statement in this factor (“I could not see where he even being a small part of the numerous systemic problems”).

Third, many of the “numerous systemic problems at the CSB” have little to do with Dr. Horowitz and many clearly predate his tenure. The proposal ignores the fact that no prior CSB Chief Operating Officer succeeded in serving more than two-and-a-half years, and the job was left vacant for nearly six years that were marked by organizational conflicts and chaos, that were highlighted in external audit reports.

Yet Dr. Horowitz is being singled out as the only person slated to take the fall. Nor does there appear to be any interest in figuring out others within CSB who contribute to these systemic problems.

Fourth, the fact that Dr. Horowitz sought out and received “leadership coaching” shows that he was aware that his performance could be improved and he would dedicate time to do so. This alone indicates potential for improvement which Member Kulinowski disregards without explanation.

Fifth, and perhaps most incredibly, there is this statement from Member Kulinowski:

“Several employees made numerous efforts to assist Dr. Horowitz in turning around at the agency.”

As indicated by the Agency Exhibits, this assistance consisted of –

- A campaign of constant leaks to Capitol Hill, resulting in voluminous document requests and multiple hearings;
- A steady stream of complaints to OIG and OSC (notably, none of the complaints of retaliation was ever verified by OSC but they are, nonetheless, being resurrected in this proposal); and
- A concerted but covert effort to manipulate a contractor’s report about morale to serve an agenda to “reform leadership.”

As they say, with friends like these who needs enemies? Of course, Member Kulinowski makes no apparent effort to discern the motives or motivations for employees’ whose accounts she takes at face value. Here is what one staff accuser who figures prominently in the specifications told the RGS “investigator”:

1721 A: From any time from 2011 on I had a concern. ‘Cause Daniel’d never struck

1722 me as somebody that was an ethical person. Or - and I just - I thought if he at

1723 any time could have looked in to my mail.

1724

1725 Q: Was there a specific incident or something that happened that made you think

1726 he would look at your mail?

1727

1728 A: There’s not a specific thing that I can tie it to. I just - like I said, I just - he was

1729 very - did not strike me as a moral or ethical person.

Is it any wonder that Dr. Horowitz may have been leery of what some co-workers were actually trying to accomplish?

### **Douglas Factor 11 – Mitigating Circumstances**

This is a case of Member Kulinowski being unreasonable by omission. For example, she does not think that more than a dozen years of service in positions of steadily increasing responsibility is worthy of her consideration. Nor are the national and international awards recognizing Dr. Horowitz's work and programs (see Reply to Specification 10) mentioned.

Nor does she think that the highly complex and divisive period during which Dr. Horowitz served as Managing Director (with Board Members openly feuding with each other during multiple congressional hearings, public meetings and investigations) is a mitigating factor. A reasonable proposing official would have to consider whether alleged misconduct took place under circumstances that were extremely challenging, if not downright chaotic, and under highly, highly stressful conditions.

Finally, a fair review of the record clearly indicates that various CSB staff were and likely remains resistant to management direction of any kind. This characteristic was highlighted in Government Accountability Office and OIG reports that called for the reinstatement of the COO/managing director position.

The Agency Exhibits illustrate an unfortunate snake-pit like atmosphere inside CSB, in which backbiting was common and individuals routinely took complaints to the Hill or OIG rather than seek to resolve or address them internally. As noted in the Reply to Specifications 5-6, Bea Robinson warned Dr. Horowitz in 2011 that the job was so daunting he would be "crazy" to take it.

In short, Dr. Horowitz as Managing Director had a job akin to herding cats. That he might have been unable to always manage this cat herd without eliciting hisses and incurring scratches should be taken into account.

### **Douglas Factor 12 – Effectiveness of a Lesser Sanction**

The framing of Douglas Factor 12 is unfortunately emblematic of the entire removal proposal. The underlying premise of the proposal is that Dr. Horowitz must be removed no matter what the facts are because certain elected officials had already dictated that outcome.

Consistent with the rest of this unrelentingly one-side proposal, the sweeping conclusions in the analysis of this factor are based on false premises, overlooked material facts and unexplained assertions.

1. Dr. Horowitz has never insisted on holding a leadership role in the organization. In fact, the record indicates that at various times he expressed interest in returning to a role in public affairs and education, where there is no dispute he performed extremely ably for the organization. He twice approached Board Members with requests that he step down from the Managing Director position, first in April 2012 and again on March 27, 2015.

On March 27, following Dr. Moure-Eraso's resignation, Dr. Horowitz informed Board Member Rick Engler that he was interested in stepping aside as Managing Director and returning to his prior role at the CSB in video production and outreach. He stated he wished to avoid further conflict within the agency and only sought a "rational discussion" of his future role. However, Board Members took no action on that request and then abruptly placed Dr. Horowitz – who nominally remained as Managing Director – on administrative leave on June 16.

2. There is no persuasive evidence that the organization experienced a "lack of basic management, poor performance, and crushing loss of morale among the employees." Consider that during Dr. Horowitz's tenure as Managing Director –
  - Productivity as measured by accident deployments, reports completed, and recommendations both issued and closed were all substantially higher than they are currently. If Dr. Horowitz was an unsuccessful manager, why did the agency become less productive when he was put on administrative leave?
  - According to OPM's own metrics, CSB employee morale was higher in 2011, 2012, 2013, and 2014 than it was in June 2010, before Dr. Horowitz was appointed as managing director. It only fell again to those low levels in June 2015 after Dr. Moure-Eraso's resignation, Mark Griffon's appointment as acting chair, and the curtailment of Dr. Horowitz's responsibilities.
  - There is no evidence that investigator attrition was at a higher level from 2010-2015 than its historical average at the CSB. Historically, the average turnover of investigators at the CSB was 13%. During the last two years when Dr. Horowitz was Managing Director, investigator turnover was under 10% per year. In addition the agency currently employs 20 investigators, compared to just 13 in 2008, and no investigators have been hired since Dr. Horowitz was placed on administrative leave.
  - The majority of current investigators encumber senior positions (GS-14's and GS-15's) and received high performance ratings; there is no evidence of a net loss of senior-level investigative skills during Dr. Horowitz's tenure.
  - Member Kulinowski asserts that Dr. Horowitz is also responsible for "attrition of counsel, and a Board Member." While it is not clear to what she is referencing or about whom, it clearly denotes the type of unreasoned bias that seems to ooze from every paragraph of her proposal.

It is frustrating that Member Kulinowski repeatedly makes unsupported assertions as if they are known facts but without any serious or dispassionate examination of the actual record.

3. The majority of senior managers at the CSB did not appear to testify against him during RGS's administrative investigation. Specifically the following high-ranking CSB staff members – representing the majority of the agency's leadership team and the majority of

its investigative team leads – did not appear to provide any significant criticism of Dr. Horowitz or indicate they had any major conflicts with him:

- Anna Brown, Director of Administration and EEO Director;
  - Hillary Cohen, Communications Manager;
  - Allen Smith, Deputy Director of Administration;
  - Johnnie Banks, Investigations Director, Washington, DC;
  - Cheryl MacKenzie, Investigations Team Lead;
  - Dan Tillema, Investigations Team Lead; and
  - Susan Anenberg, Deputy Managing Director for Recommendations
4. Dr. Horowitz is one of the agency’s longest serving employees and has worked successfully in a number of both supervisory and non-supervisory roles, even during periods when the agency had high levels of conflict and turmoil.
  5. Dr. Horowitz’s prior position from 2005 to 2010, of Director of Congressional, Public, and Board Affairs has remained vacant since September 2010, and the CSB currently has no public affairs staff based in Washington, DC. This is an example of a role that Dr. Horowitz could fulfill productively within the CSB.
  6. The proposing official asserts that the CSB is too “small” to accommodate Dr. Horowitz in any other role but managing director, and therefore he must be removed. The agency currently has six employees, all at high grades (GS-13 and above) who work from home offices all around the country. If the agency believed that the mere presence of Dr. Horowitz would be a detriment to morale, it clearly has the option that he could work from home.

Accordingly there is simply no basis for suggesting that Dr. Horowitz is somehow incorrigible and could not work within the organization, or that his return would damage morale.

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