

Testimony of
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Testimony Concerning SEC Personnel Matters by Mark Kreitman
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Before the U.S. Senate Committee on the Judiciary December 5, 2006
Chairman Specter, Ranking Member Leahy, and Members of the Committee:

Thank you for the opportunity to address what I understand to be your concerns about a personnel matter involving a former member of my staff, and to answer any remaining questions you may have after the extensive interviews my staff and I have provided to your staff and the staff of the Senate Finance Committee.

Please let me first say that my colleague, friend, and branch chief Robert Hanson, also on this panel, is among the most dedicated public servants I have had the privilege to know, a person of unimpeachable character, honor and fierce dedication to our agency's mission to protect investors. Paul Berger, my former supervisor and mentor, is known far beyond our circle of professional colleagues for his zealous fair-minded enforcement of the securities laws during his 14 years at the Commission. Any suggestion that I, or either of these individuals, was moved in any way by political influence in our investigation that is the subject of your committee's inquiry has no basis whatever in fact.

I have been an Assistant Director in the Division of Enforcement for about three years. I supervise a staff that has, during my tenure, included between 10 and 15 attorneys. Previously, I was an Assistant Chief Litigation Counsel -a trial lawyer --with the Division for about 16 years, and tried some notorious cases including the successful prosecution of First Jersey Securities and its principal Robert Brennan to a \$75 million verdict. I've brought cases against a department head at a major New York law firm, the president of a Beverly Hills bank, the son of a prominent local banker, and numerous Wall Street luminaries. My reputation at the Commission, in the industry, and at the bar is hardly that of a shrinking violet intimidated by power, money, or anything else.

I've won some awards, including the Irving M. Pollak Award named for our first Division Director, the Chairman's Award for Excellence, and most recently, an award from the United States Attorney for the Southern District of New York for my participation in the repatriation and recovery for investors of \$200 million of proceeds of fraud from the Isle of Man. I've been an Adjunct Professor in the Graduate Program at Georgetown Law School since 1999 and was named Charles Fahy Distinguished Adjunct Professor for the 2004-5 academic year. I'm a graduate of Yale College and Harvard Law School, where I was a Wasserstein Public Interest Fellow for the 2003-2004 academic year.

I have been a public servant for 26 of my 31 years of law practice, 19 of them at the Commission. I come from a family of lawyers and judges with a long commitment to legal ethics

and public service. I am 56 years old.

Mr. Aguirre was a student of mine at Georgetown -an excellent student who participated actively in class. I supervised his Masters paper; when he decided to submit it for publication, I edited the draft, and it was published in several journals. We became friends and socialized together with our wives. That has made this entire episode particularly painful for me, and for my wife.

When Mr. Aguirre graduated from the Georgetown program, he had not practiced law for a number of years after leaving his California practice at a small firm doing work unrelated to the federal securities laws. He had no enforcement investigative experience and was unfamiliar with a closely supervised working environment like the Commission, where investigative zeal must be tempered by respect for the rights and legitimate interests of citizens, and where collegiality and mutual respect is the hallmark of our working environment. As I understand it, Mr. Aguirre applied unsuccessfully for employment at the Commission 22 times before being hired here in Washington, where he was assigned to another Assistant Director group as a staff attorney with a standard one year probationary period. Mr. Aguirre complained repeatedly and bitterly to me that his supervisors in that group were inexperienced and incompetent. I understand, however, that his supervisors attributed Mr. Aguirre's problems to his inability to accept supervision or work effectively with his colleagues. When an opening occurred in my group, Mr. Aguirre requested transfer to my group, I acquiesced, and he was granted that unusual accommodation. However, I refused his request for special treatment to be allowed to report outside the chain of command directly to me. He brought the Pequot investigation with him.

Unfortunately, after several months, the difficulties Mr. Aguirre previously engendered recurred. He treated his colleagues with disrespect bordering on contempt, and refused to share with them details, strategy or tactics about the investigation in which he was involved. His investigation of Pequot was poorly thought out, disorganized, and sloppily documented. The files were in disarray. He was unable to fairly and impartially balance evidence against his preconceived conclusions or articulate his thinking in a linear fashion. He viewed all supervision, direction, even inquiry concerning his work as unwarranted intrusion.

Beginning in June 2005, he came to believe, primarily on the basis of speculation, that John Mack was the tipper in Pequot's trading prior to announcement of GEJs acquisition of Heller Financial, and repeatedly and heatedly insisted that we subpoena John Mack for testimony immediately, before he had developed evidence that Mr. Mack had access to material nonpublic information, or indeed, any potentially inculpatory evidence with which to confront Mr. Mack. When his supervisors pointed out that premature testimony would almost certainly be a fruitless exercise in that case because Mr. Mack could simply deny any illegal activity or, in fact, any connection to the suspicious trading, Mr. Aguirre concluded this was evidence of a widespread conspiracy to thwart him and protect an individual no more significant or powerful than people we subpoena or take testimony from every day -including, during this same time period, a former United States Senator and a former high-ranking White House Official.

We asked Mr. Aguirre to summarize his reasons for taking Mr. Mack's testimony at that point in time in a memorandum, but I found his reasons unpersuasive. In his arrogance, he refused to accept the possibility that there could be a good faith difference of professional opinion as to the appropriate timing of and proper evidentiary foundation for the invocation of compulsory process, between a first year probationer and his immediate supervisors who had, among them, more than 40 years of Commission experience. Instead, he vociferously and baselessly challenged their good faith and integrity. Frighteningly, it appeared that Mr. Aguirre was pursuing a personal agenda bordering on vendetta, instead of a calmly reasoned fair-minded

pursuit of the evidence. He focused single-mindedly on John Mack, to the exclusion of other persons who, he acknowledged in his June 28 testimony before this committee, were equally likely potential tippers.

Toward the end of his tenure, Mr. Aguirre's behavior became increasingly unprofessional, irresponsible and erratic. He threw what can only be reasonably described as tantrums, storming up and down the halls in a furious crouch, and abruptly left the office without leave on a number of occasions. He resigned at least twice and, though he reconsidered and withdrew his resignations, refused to provide any assurance that he would complete his assigned work -- necessitating that, despite severely limited resources, we double staff his investigation. Finally, Mr. Aguirre announced that he refused to write up the results of his investigation in the required lengthy and detailed Action Memo to the Commission seeking authority, if the evidence warrants, to bring a proceeding against wrongdoers. Mr. Aguirre's self-indulgent refusal to perform that difficult but essential task which, as he was the primary investigator on the case, would be difficult and inefficient for another attorney to undertake, was, for me, the last straw. Mr. Aguirre was terminated, as the notice given him stated, for "demonstrated inability to work effectively with other staff members and your unwillingness to operate within the Securities and Exchange Commission process." The decision to recommend that Mr. Aguirre be terminated during his probationary period was, despite the problems he had caused, a very difficult one for me.

I've heard -and read -a good deal about the two step increase we recommended for Mr. Aguirre which became effective shortly before his termination. That recommendation covered the rating period that ended April 30, some four months prior. Perhaps in retrospect it was too generous. He was a new member of my group. He worked an enormous number of hours with furious energy. I was anxious to encourage and help him to adjust after a troubled beginning. And, as I advised your staff, rating him unacceptable in any of the critical performance elements would almost certainly ensure his termination at a time I still hoped he could work out. Mr. Aguirre's subsequent behavior however so far exceeded the bounds of acceptable professional conduct that it was incumbent on me and his other super-visors to supplement his overly generous evaluation. A copy of our supplemental evaluation, prepared on August 1, 2005, which accurately described concerns we had about Mr. Aguirre's conduct, is attached.

Because Mr. Aguirre was vacationing in California during the last few weeks of his tenure, he did not receive this supplemental evaluation contemporaneously.

I believe the most serious concern raised in this inquiry has been the possibility of political influence distorting the Commission's investigation of fraud in the securities markets. I have seen no evidence whatever of such a thing. I can say categorically that no such thing influenced the conduct of Mr. Aguirre's investigation, supervision, or termination. Nor did it influence the decision not to take testimony from John Mack while Mr. Aguirre worked at the Commission. The Pequot investigation was pursued with vigor and professionalism after Mr. Aguirre departed the Commission, despite his leaving the files in a state of disarray. Ultimately, after all reasonable leads were exhausted and the relevant individuals were questioned and documents examined, the investigation was recently closed with no action taken.

I'd be pleased to answer any questions you may have.

Attachment Evaluation of Gatv Aquirre: Gary works very hard, puts in long hours, and is dedicated to his work. But he is resistant to supervision and insufficiently cognizant of institutional protocol and possible programmatic impact of his investigative methods. For example, though he feels competent to manage the Pequot investigation on his own, certain

subpoenas he prepared required revision, inter alia, to avoid violating privacy statutes and he has, by failing to consult with his branch chief, inaccurately stated Commission policy in communication with defense counsel. His manner has, on more than a few occasions, drawn complaints from opposing counsel which, though not in itself an indication of inappropriate conduct, raises a question because of their frequency and consistency. Other staff attorneys find it difficult to work with him; his desire to maintain complete control of his single investigation seems to preclude full and open sharing of his legal analyses. He has difficulty explaining the significance of evidence his investigation uncovered in linear fashion and expresses resentment at what he inaccurately perceives as attempts by his supervisors to thwart his success.

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