

Testimony Concerning SEC Personnel Matters

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Chairman Specter, Ranking Member Leahy, and Members of the Committee:

Thank you for inviting me to testify today and to respond to false allegations of abuse of authority that have been advanced by a former staff attorney of the United States Securities and Exchange Commission. I greatly appreciate the opportunity to set the record straight on the matter about which Gary Aguirre testified to this Committee last summer. I will start with an introduction that summarizes my testimony and then provide further details.

Summary

Let me state at the outset that, in my experience, the Division of Enforcement of the SEC has never considered an individual's political connections in deciding whether or not to take his or her testimony. No one has ever asked or suggested that I refrain from taking a person's testimony because of his or her political connections. Indeed, Enforcement investigations frequently involve well known and prominent individuals. In conducting and supervising investigations, I always follow the evidence wherever it leads -- even if the trail points to a prominent executive or a public figure. In the investigation concerning the hedge fund Pequot Capital Management, I have no reason to believe any outside source ever attempted to influence the decision on taking the testimony of John Mack, the current CEO of Morgan Stanley.

As you are aware, Mr. Aguirre was terminated before his one-year probationary period expired. Until he completed his probationary period, Mr. Aguirre could be terminated at any time, for any lawful reason. Mr. Aguirre was a highly energetic staff attorney, but his conduct was often inappropriate and his behavior unsuitable for continued employment in the Enforcement Division. He was unable or unwilling to work in a professional manner with other attorneys on the investigation and he failed to observe Enforcement Division policy on several occasions. In the spring of 2005, Mr. Aguirre twice left work abruptly during the workday after disagreements with other attorneys. He tendered his resignation from the Commission in July 2005. Some time thereafter he withdrew his resignation. Then Mr. Aguirre said he would leave after completing the investigation but would not memorialize the investigative findings. His erratic behavior and the negative impact it was having on the investigation and the other attorneys on the case compelled me to strongly urge others to terminate Mr. Aguirre before his one-year probationary period ended.

Mr. Aguirre's public assertion that the Pequot investigation was halted or somehow ceased after he was terminated is completely untrue. In fact, after he was terminated, the Division of Enforcement continued the investigation, devoting hundreds of staff hours to the matter. After Mr. Aguirre's termination, investigative staff took testimony from or interviewed more than a dozen individuals, made numerous formal and informal document requests, reviewed and analyzed thousands of documents, and participated in two proffer sessions with the Federal Bureau of Investigation and the office of the U.S. Attorney for the Southern District of New York. Ultimately, after a thorough investigation, we closed the matter after finding insufficient evidence to warrant bringing an enforcement action.

My Professional Background

I am currently employed as a Branch Chief in the Division of Enforcement at the SEC, where I have worked for approximately six and one half years. I currently supervise five staff attorneys on approximately ten active investigations.

Prior to working the Division of Enforcement, I worked as an attorney in the SEC's Office of Compliance, Inspections and Examinations for approximately two years. I have received several awards while working at the SEC, including a Division Director's Award and a Chairman's Award for Excellence. I have an extensive background in accounting and finance, having practiced as a CPA for many years before entering law school. I have spent my entire legal career in federal government service. It has been a great honor and privilege to do so.

During my tenure at the SEC, I have interviewed or taken the testimony of dozens of prominent individuals, including: (1) principals of brokerage firms, hedge fund advisers and publicly-traded companies; (2) executives of a major stock exchange; and (3) a former United States Senator. While working in the Division of Enforcement, I have participated in bringing several significant SEC enforcement cases including:

- Financial fraud cases against (1) AremisSoft Corp. and senior management (working with the Department of Justice to repatriate \$200 million to the U.S.); and (2) Huntington Bancshares Corp. and three of its senior officers;
- Broker-dealer fraud cases against ICapital Markets (formerly Datek Securities Corp.) and Heartland Securities, and actions against a number of principals of those firms (resulting in some of the highest penalties ever collected from individuals in an SEC proceeding);
- A fraud case against broker-dealer Robertson Stephens, Inc. and a former research analyst of the firm;

- An insider trading case against hedge fund adviser Deephaven Capital and a former portfolio manager of Deephaven; and

My Supervision of Mr. Aguirre

In late January 2005, Mr. Aguirre was transferred to my supervisory group after he requested a transfer out of the enforcement branch to which he was initially assigned. The investigation he had been working on for approximately five months, a matter involving hedge fund adviser Pequot Capital Management, then came under my supervision. Over the course of the next several months, I became more intimately involved in the investigation.

Over time it became clear that Mr. Aguirre could not work collaboratively with other attorneys on the Pequot investigation. Though Mr. Aguirre was initially the only attorney working on the investigation, by May 2005, three additional attorneys were assigned to the matter. For no apparent reason, Mr. Aguirre was disrespectful and abusive to them. He attacked them in emails and badgered them on minor issues. Several times he accused his colleagues of thwarting his progress. Mr. Aguirre became angry and abrasive whenever an investigative decision was made that he did not agree with, yet on at least one occasion the same idea he rejected dismissively when made by another attorney became an idea Mr. Aguirre later presented as his own. In early July 2005, he told me that he could no longer even talk to Mark Kreitman, our group's Assistant Director.

Mr. Aguirre was a hard worker, but as time went on, I became increasingly concerned about his reliability. On two occasions, Mr. Aguirre angrily left the building during the workday after disagreements with other attorneys. Both times he said he was leaving to think about what he was going to do, which I understood to mean that he was planning to leave the Commission. Mr. Aguirre formally tendered his resignation in July 2005, but some time thereafter he withdrew that resignation. Then he said he was willing to work to complete the investigation but would not document his findings, which was essential to completing the investigation. It became apparent that Mr. Aguirre was a significant risk to leave at a moment's notice, regardless of the impact such action would have on the investigation.

Mr. Aguirre was not mindful of Commission policies and procedures. He misrepresented Commission policy to opposing counsel. Several subpoenas he issued had to be recalled because they were improperly issued in violation of federal law and Commission policy concerning electronic communication subpoenas. After Mr. Aguirre was terminated, his files were found to be so disorganized that it was difficult to determine which subpoenas he had actually issued.

It was extremely difficult to communicate with Mr. Aguirre, either verbally or in writing, and miscommunications were common. Information that Mr. Aguirre presented as fact often turned out to be mere speculation based on fragments of information that did not reflect reality. He bombarded me and others with hostile emails that were lengthy, difficult to follow, and often repetitive.

In June 2005, I prepared written evaluations and merit pay recommendations for all of the staff I supervised, including Mr. Aguirre. It is important to note that his evaluation was based on his work for the final three months of that period, from the date Mr. Aguirre joined my group, through April 30, 2005. In my written evaluation of Mr. Aguirre, I highlighted his high energy level and the long hours he put in on the investigation. In making my recommendation to the SEC compensation committee, I indicated that Mr. Aguirre had made "contributions of high quality." I did so because I wanted to reward Mr. Aguirre for his hard work.

We never gave Mr. Aguirre his written evaluation because he was out of the office when we began distributing the evaluations in late August 2005. Had we given Mr. Aguirre his evaluation, we would have also told him about the serious concerns we had with his behavior. Those concerns were included in a supplemental evaluation Mr. Kreitman and I wrote on August 1, 2005. We drafted a supplemental evaluation after Paul Berger, the Associate Director on the investigation, suggested we consider preparing one after asking me whether Mr. Aguirre's evaluation accurately reflected his workplace behavior. I told him it did not and we then drafted a supplemental evaluation that identified a number of serious deficiencies in Mr. Aguirre's workplace behavior.

Testimony of Mr. Mack

In or around May 2005, the Pequot investigation began focusing on Pequot's trading in two securities in July 2001. On July 30, 2001, it was publicly announced that General Electric ("GE") had acquired Heller Financial ("Heller"), causing a sharp rise in the stock price of Heller and a small decline in the stock price of GE. Pequot began accumulating Heller stock on Monday July 2, 2001 and started selling short GE stock on July 25, 2001. By closing out these positions after the merger announcement, Pequot realized a profit of nearly \$17 million on Heller and approximately \$1.9 million on GE.

During the summer of 2005, Mr. Aguirre became obsessed with whether Mr. Mack provided Arthur Samberg, the head of Pequot, with inside information about the merger between Heller and GE ahead of the public announcement. Credit Suisse First Boston ("CSFB"), an investment banking firm and an adviser to Heller in the transaction, hired Mr. Mack as its CEO on July 12, 2001, ten days after Pequot began to buy Heller stock. Mr. Aguirre speculated that Mr. Mack may have received information concerning the merger from CSFB before he joined the firm. Alternatively, he speculated that Mr. Mack may have received the information from Morgan Stanley, which advised GE on the transaction.

Despite a lack of concrete evidence, Mr. Aguirre insisted that Mr. Mack had tipped Mr. Samberg about the merger. He was extremely anxious to take Mr. Mack's testimony, so much so that I grew increasingly concerned that his desire to take Mr. Mack's testimony stemmed from Mr. Mack's high profile status, not an objective assessment of the facts. In emails, Mr. Aguirre claimed that Mr. Mack was the only person who met the profile of the tipper, a highly suspect and illogical conclusion. My concern was heightened because Mr. Aguirre wanted to take Mr. Mack's testimony immediately, before gathering

documents from CSFB that could shed light on whether Mack had received information about the merger before he joined CSFB. Moreover, Mr. Aguirre misrepresented several facts that he claimed linked Mack to the trading.

Along with these issues, I became concerned that Mr. Aguirre was potentially abusing his government authority when, after he took Mr. Samberg's testimony in June of 2005, it was reported to me that Mr. Aguirre behaved unprofessionally and was extremely disorganized during the testimony. As I learned that more and more of the information that Mr. Aguirre provided me was inaccurate or unsubstantiated and as I saw him display poor judgment in his dealings with other members of the team and with defense counsel, I began doubting that Mr. Aguirre was capable of objectively and professionally conducting this investigation. All of these events convinced me that it was important for me to understand exactly what evidence there was that Mr. Mack was the tipper before compelling his testimony.

Although I had no idea who would represent Mr. Mack if we called him to testify, I knew he would retain experienced SEC counsel who would likely, as is not uncommon, directly contact my superiors about the testimony. Accordingly, consistent with my general practice, I made Mr. Kreitman aware that we were considering taking Mr. Mack's testimony. I explained this practice to Mr. Aguirre, perhaps inartfully choosing the words "juice" and "political clout" to describe the fact that any influential counsel Mr. Mack chose could easily pick up the phone and call my supervisors about the case and I wanted them to be fully aware of the facts before answering any calls. I certainly did not intend to shy away from questioning Mr. Mack because of his power and influence -- quite the contrary.

Investigation after Mr. Aguirre's Termination

Starting in September 2005, the staff began focusing on identifying other potential tippers who may have provided Mr. Samberg information about the GE/Heller transaction and pursuing other aspects of the investigation. With respect to the GE/Heller transaction, the staff reviewed information to identify whom Mr. Samberg met with at the time of Pequot's trading. The staff also obtained from Pequot a list of people hired in 2001 and identified several people on that list who had connections with GE, Heller, or broker dealers involved in the merger. The staff reviewed thousands of emails obtained from Pequot to identify other potential tippers. The staff then compiled information about each person identified, including searching for relevant documents in the database of emails provided by Pequot.

When this research was complete, the staff evaluated whether to take the testimony of any of these potential tippers. The staff determined that, while it had identified people with significant connections to Pequot or Mr. Samberg or both, there was no evidence that any of them knew about the merger in advance of its public announcement. Conversely, those who knew about the deal did not have sufficient connection to Pequot and/or contact with Samberg or Pequot during the relevant time period. Thus, the staff had identified a large number of potential tippers, but no likely tippers. At this same

time, around December 2005, the focus of the investigation shifted to other Pequot trades and trading practices, where it remained until June 2006.

From December 2005 through June 2006, the investigative staff took testimony from or interviewed multiple individuals, issued subpoenas and made informal document requests, reviewed and analyzed thousands of documents, and participated in two proffer sessions with the Federal Bureau of Investigation and the office of the U.S. Attorney for the Southern District of New York. At the end of March 2006, the staff obtained four-month tolling agreements from Pequot and Mr. Samberg, which applied to all matters under investigation.

Beginning in June 2006, the staff considered whether to take any additional investigatory steps regarding the GE/Heller trading. One consideration was the harm Mr. Aguirre had caused, by taking this confidential, non-public investigation public for his own purposes, and the need to maintain public and investor confidence in the work of the Division of Enforcement. Ultimately, the staff took the testimony of several more witnesses. Each was questioned at length and each produced subpoenaed documents. On August 1, 2006, the staff took the testimony of Mr. Mack.

Recently, the decision was reached to close the investigation without taking any action. This decision was based on the evidence and, to my knowledge, nothing else.

Conclusion

In closing, I hope I have shed some light on the Pequot investigation and on Mr. Aguirre's unfounded allegations. While at the SEC, every investigation I have ever worked on has been conducted with fairness, diligence, and integrity. We did so in the Pequot investigation.

Thank you. I would be glad to answer any questions you may have.