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February 3, 2010

The Honorable Arlen Specter
Chairman
United States Senate Committee on the Judiciary
Subcommittee on Crime and Drugs
United States Senate
Washington, D.C. 20510-3802

Re: Hearing on S. 1551, the Liability for Aiding and
Abetting Securities Violations Act of 2009, September 17, 2009

Dear Chairman Specter:

This responds to the Committee's written questions to me.

1. You and lawyers at your firm have derived substantial revenues from representing defendants in securities fraud cases, haven't you? Your firm represented, among others, Conrad Black, the CEO of Hollinger International, didn't it? Mr. Hollinger received a jail sentence for engaging in fraudulent accounting manipulations, didn't he?

As discussed during my testimony, I served as Chief Counsel of the Senate Banking Committee during 1995 to 1996. As Chief Counsel, I participated in the drafting of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). The PSLRA was enacted with substantial bi-partisan support, and I worked closely with Senator Dodd's staff on this important legislation. I am now a partner of Sullivan & Cromwell LLP. As stated during my written testimony, I've spent much of my professional career litigating securities class action cases. My firm and I represent defendants in such actions. My firm represented Conrad Black, although I had no role in his representation. The Supreme Court recently heard oral argument in connection with Mr. Black's appeal of his criminal conviction.

2. You note in your prepared statement (at 9) that in the Sarbanes-Oxley Act, Congress “gave the SEC the power to require wrongdoers (including aiders and abettors) to make payments into a ‘Fair Fund’ to compensate injured investors.” But the SEC cannot recover any compensatory damages against aiders or abettors on behalf of injured investors, can it?

The SEC can take action against aiders and abettors of securities fraud and can require such wrongdoers to make payments into a “Fair Fund” to provide compensation to injured investors. *See* 15 U.S.C. § 7246(a). Under its Fair Funds authority, the SEC can take steps to ensure that the actual victims of fraud receive the lion’s share of compensation—*without* taking a significant part of any recovery for attorneys’ fees. Since 2002, the SEC has distributed \$6.6 billion to investors, including more than \$2 billion in 2009 alone.¹

3. You note in your prepared statement (at 9-10) that “since 2002 the SEC has recovered more than \$8 billion from securities law violators.” Didn’t private lawyers recover approximately \$8 billion from secondary actors on behalf of the defrauded investors in the Enron litigation alone? Didn’t the plaintiffs’ lawyers in that case receive less than 10% of the total settlement?

It is my understanding that the Enron litigation—the largest securities class action settlement in history—resulted in a recovery of approximately \$7.2 billion from various defendants, and plaintiffs’ lawyers obtained fees of over \$650 million from that recovery. The amount of these fees was obviously quite large, and plaintiffs’ counsel sometimes request fees of one third or more of the settlement amount in securities class actions.² Indeed, one recent study showed that the average hourly rate charged by plaintiffs’ attorneys in securities class actions was \$1370/hour.³ By increasing the role of institutional plaintiffs, such as public pension funds, the PSLRA has improved oversight of plaintiffs’ attorneys in securities class actions. This oversight role is threatened when plaintiffs’ lawyers make substantial campaign contributions to elected officials who

¹ SEC, 2009 Performance and Accountability Report, at 11.

² John C. Coffee, *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1546 (2006).

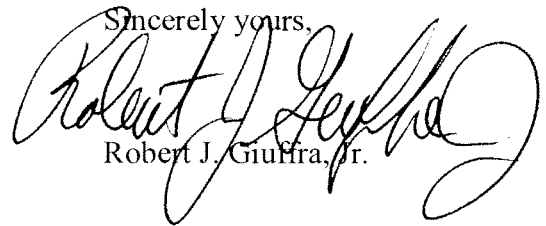
³ Institute for Legal Reform, *Securities Class Action Litigation: The Problem, Its Impact, and the Path to Reform*, at 20 (July 2008).

The Honorable Arlen Specter

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control public pension funds, including the appointment of lead counsel in securities class actions.⁴

Sincerely yours,

A handwritten signature in black ink, appearing to read "Robert J. Giuffra, Jr.", written in a cursive style.

Robert J. Giuffra, Jr.

⁴ Choi, Skinner, & Pritchard, *The Price of Pay to Play in Securities Class Actions*, U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 09-025, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527047; see also accompanying articles.