

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)
) File No. OIG-509
OIG-509)

ORIGINAL

WITNESS: Number 23
PAGES: 1 through 89
PLACE: 33 Arch Street
 Boston, Massachusetts
DATE: Thursday, April 2, 2009

The above-entitled matter came on for hearing, pursuant to notice, at 3:12 p.m.

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(202) 467-9200

1 APPEARANCES:

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3 On behalf of the Securities and Exchange Commission:

4 JAMES D. FIELDER, ESQ., ASST. INSPECTOR GENERAL

5 DAVID B. WITHERSPOON, ESQ.

6 Securities and Exchange Commission

7 Office of Inspector General

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9 Washington, D.C. 20549

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12 On behalf of the Witness:

13 DAVID PAUL BERGERS, PRO SE

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P R O C E E D I N G S

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2 MR. WITHERSPOON: We are on the record at 3:12
3 p.m. on Thursday, April 2nd, 2009 at the United States
4 Securities and Exchange Commission.

5 Right now the court reporter will swear you in.

6 DAVID PAUL BERGERS

7 was called as a witness and, having been duly sworn, was
8 examined and testified as follows:

9 EXAMINATION

10 BY MR. WITHERSPOON:

11 Q Thank you, Mr. Bergers.

12 A Sure.

13 Q Good afternoon.

14 A Good afternoon.

15 Q My name is David Witherspoon, and to my right is my
16 colleague, David Fielder. I'm an attorney in the Office of
17 the Inspector General of the United States Securities and
18 Exchange Commission, and Mr. Fielder is Assistant Inspector
19 General in that office.

20 This is an investigation by the Office of Inspector
21 General, Case Number OIG-509. The investigation is regarding
22 Madoff Securities and Bernard L. Madoff.

23 I'm going to ask you certain questions, Mr.
24 Bergers, and you're going to provide answers to us under
25 oath. The court reporter will record and later transcribe

1 to potentially stay, but there were possibilities in
2 Minneapolis. Bottom line, there was no real opportunity to
3 stay on as part of the legal counsel in Boston.

4 At that time there was a position open which would
5 have been the next position at the SEC, an assistant district
6 administrator position. So I applied for that and received
7 an offer to come back to the SEC as assistant district
8 administrator for the enforcement program. And so I left
9 Tucker Anthony and came back to the SEC.

10 So I've been back at the SEC since November 2001.
11 I've had three different jobs in that time period. First was
12 as assistant district administrator. In July of 2003, I was
13 appointed -- promoted to associate district administrator
14 with responsibility for the enforcement program. There was
15 another posting for the same position a year later, after
16 Walter Ricciardi joined the office. When I first got the
17 position, it was not an SO position, the associate. It
18 became an SO position, and it was reposted, and I applied, as
19 did others, and I received an offer of the position sometime
20 in the middle of '04.

21 Q Okay.

22 A I became head of the office in April 2006, and
23 that's still my position today.

24 Q Okay. Thank you very much for that. Got most of
25 that down.

1 I was wondering, when you came to the SEC
2 initially, that was September of 1998?

3 A That's correct.

4 Q Is that correct?

5 A That's right.

6 Q And who was your branch chief at that time; do you
7 recall?

8 A

Personal Privacy

9

Personal Privacy

10 Q All right.

11 A

Personal Privacy

12 Q Thank you.

13 And who was above Personal Privacy? If you recall.

14 A I think Jim Adelman was the head of enforcement,
15 and maybe even had some supervisory authority over exam as
16 well. It always -- I can't remember exactly what Grant
17 Ward's role vis-a-vis Jim Adelman's was. I feel like Grant
18 was -- that Grant reported to Jim. I think that's the case.

19 Q All right.

20 A I'm sorry if I don't get all the -- it's been -- I
21 forget a lot about --

22 Q I understand.

23 A But, anyway, Grant and Jim had senior positions in
24 the office at that time.

25 BY MR. FIELDER:

1 Q Do you recall -- and I don't think you would
2 have -- but did Jim leave the SEC, come back at some point,
3 and then leave again?

4 A Oh, yeah. Because Jim is the reason I came to the
5 SEC.

6 Q Okay.

7 A He went to Choate Hall & Stewart.

8 Q Okay.

9 A I'm just going to guess, but probably in '96.

10 Q Okay.

11 A So I joined Choate Hall & Stewart, or rejoined them
12 in '95, and then Jim came in '96 to Choate, and that's when I
13 started doing securities work with him.

14 Q Okay.

15 A He went back to the SEC before I joined for the
16 first time. So either '97 or '98 time period.

17 Q Okay.

18 A I think '97 is when he went back. So he might have
19 been at Choate for between two and three years.

20 Q Okay.

21 A So he started out in Washington in the '80s, he
22 came up to Boston, was there, I don't know, '93 to '95 or
23 '96, came to Choate for a couple of years, then went back to
24 the SEC.

25 Q And when he came back to the SEC in the '97 or '98

1 time frame, was he here then until he left --

2 A Yes.

3 Q -- the last time, which I think was around December
4 2000? Does that sound about right?

5 A Well, he was definitely here until he left.

6 Q He didn't leave in between, so.

7 A He didn't leave in between, and you would have a
8 better grasp than I would on when he left.

9 Q My information is it's December 2000.

10 A The only reason that I paused when you said that
11 was having read all the exhibits to Harry Markopolos's
12 testimony and there being some description of Jim coming in
13 and saying, "I'm leaving, so Grant is going to do this
14 meeting." But, then again, you have that. And I don't have
15 any personnel information to know for sure. I'm sure we have
16 it, by the way, and would be happy to check it for you later
17 on if that would be helpful.

18 MR. FIELDER: Okay.

19 BY MR. WITHERSPOON:

20 Q So I guess we can move forward a little bit here,
21 and I guess since the subject of Mr. Markopolos has already
22 come up, why don't we start there.

23 When did you first, I guess, come in contact with
24 Mr. Markopolos; do you remember?

25 A No, I can't tell you for sure. I believe it was

1 some time in the period that I was an associate. The only
2 reason I'm hesitating is because I don't know whether it was
3 around the same time of the meeting about Madoff or whether
4 it was slightly before or slightly after, because I had come
5 in contact with him on other cases or other potential issues
6 that he had raised. So that time period, I just don't know
7 for sure when it was.

8 Q Okay.

9 BY MR. FIELDER:

10 Q Had there been some other cases or issues that he
11 raised prior to the --

12 A That's what I don't know.

13 Q Okay.

14 A At least from my perspective, I can't remember
15 whether they were before or after. I have a recollection,
16 and I hope you have these documents, that from looking at
17 the -- our CTR logs that there were issues that he brought to
18 our attention before the 2005 meeting.

19 Q I think that's right.

20 A And so the only question in my mind, I don't know
21 whether I personally met with him beforehand for those or
22 not. Absolutely could have, no question. Because I think
23 that I met with Harry definitely more than once.

24 MR. WITHERSPOON: Okay.

25 THE WITNESS: I'm sorry, I'm not trying to get

1 ahead of you.

2 MR. WITHERSPOON: Go ahead, please.

3 THE WITNESS: Definitely more than once. I don't
4 think I met with him on the Madoff occasion, although I know
5 I'm a party to the e-mails. So I think it was more than
6 once, and, unfortunately, I don't know which matter it was
7 on.

8 I do know that there were issues that we were
9 trying to resolve on what we could say to him about the
10 possibility of bounty, because he wanted to try to get that
11 squared away before we went forward on issues. So I remember
12 that Personal Privacy and I were both trying to figure that --
13 oh, you know what, that's a good time indicator, because
14 Personal Privacy was here from November of '03 to April of '04.
15 So that at least during that time period, we would have -- I
16 would have met with him at least once, at least during that
17 time period.

18 BY MR. FIELDER:

19 Q What were the other matters that you remember, the
20 non-Madoff matters, independent of timing, having dealings
21 with Harry Markopolos on?

22 A Yeah. I don't have a good recollection of all of
23 them, but we -- we were trying to look through all of these
24 things more recently. So he raised issues on market timing
25 on several different fund companies.

1 Q Okay.

2 A There was at least some allegation relating to
3 Fleet, I believe the Fleet Columbia funds, I believe that's
4 it, and we were already investigating that.

5 Q Okay.

6 A So what I can't tell you is whether he gave us
7 something additional or just, you know, helped confirm what
8 we were already doing.

9 Q On Fleet?

10 A On Fleet Columbia. But he clearly gave us
11 something on Fleet Columbia.

12 Q And what did he give on Fleet Columbia? Again, did
13 this sort of wind up panning out or corroborating what you
14 guys found?

15 A I don't think it was contrary to it.

16 Q Okay.

17 A There were a number of fund companies that he gave
18 us that he believed that because of certain changes in the
19 prospectus or because of the addition of redemption fees to
20 prospectus language that that indicated there must have been
21 a problem beforehand, but that was based on his observation
22 of changes. And so I'm not sure there was a lot to
23 corroborate. I think anything that he indicated there had
24 been a change in, I don't think that there was any reason to
25 believe there wasn't a change, but it wasn't something

1 internal.

2 But there are other cases that he had more
3 information internally on, not necessarily from being at a
4 particular company, but from being -- having someone that he
5 knew there. I believe State Street, and I'm trying to
6 remember the issue there, whether it was timing or not. It
7 may have been timing. In that case, I can't -- I wish I
8 could tell you more accurately. I can't tell you whether we
9 already had a case open or whether we started an exam as a
10 result -- exam and then potentially investigation as a result
11 of his tip. We didn't end up bringing a case on market
12 timing, but we did -- that case that we had did end up -- we
13 did bring a case, and it was based on their failure to impose
14 redemption fees on some of the short-term traders.

15 Q Okay.

16 A So even though it wasn't a market timing case, it
17 was in a sense. What I can't tell you for sure sitting here
18 today is whether it was his information that he gave us that
19 led us to do that or whether we had multiple pieces. It
20 could have been a little bit of both.

21 Q Right.

22 A Again, this is information that you let me know
23 what you want me to do to try to ascertain to a greater
24 extent.

25 I will tell you the only reason I'm not being as

1 accurate as I can today is I just don't have documents in
2 front of me, and I do believe that, for example, our CTR
3 database would be helpful. It's been a real great database
4 just to go back through and look for some of these issues.

5 Q I think it will be helpful for the record to
6 discuss market timing cases a little bit. It would be
7 helpful if I'm right about what I think I know about market
8 timing cases.

9 Am I correct that one of the main issues or crux
10 that sort of was common to all market timing cases is not
11 just the fact of whether or not market timing as a factual
12 matter was occurring, but what the disclosures were and the
13 prospectus restrictions, and whether or not that activity was
14 going to be a violation of the securities laws.

15 A That's accurate. But let me add to that, if I can.

16 Q Sure.

17 A And we did a lot of market timing cases here. But
18 there were actually two issues. One was the disclosures, and
19 how strong the language of the disclosures was. In other
20 words, "We don't permit it," that would be a strong language
21 disclosure.

22 Q Right.

23 A "We think it's harmful, and we may stop it," that
24 would be a more difficult disclosure to make a violation out
25 of. It doesn't mean that it's impossible, just that it's

1 more difficult.

2 Q Right.

3 A What we looked for in cases where we didn't have
4 strong language was arrangements, quid pro quos. You know,
5 was the fund company or the distributor giving a privilege to
6 someone to time in exchange for assets or in exchange for
7 these things. So essentially it was a plus factor. You know,
8 if you don't have the real strong language, you're looking
9 for a plus factor to make the case. And I think if you look
10 at the cases that we brought -- not we, Boston, but the
11 SEC -- that you usually had one or the other. You had strong
12 evidence of an arrangement or a quid pro quo or you had
13 strong language in the prospectus.

14 Q Okay. Fair enough.

15 Where I was going with this, it sounds like there
16 were a large number of entities -- I shouldn't say large --
17 but a lot of what Harry referred or tipped involved market
18 timing, and some of that, like let's take State Street, is it
19 correct that the -- that Harry was right on the factual
20 predicate that market timing was occurring, but that it
21 turned out, because of the disclosures, et cetera, that it
22 was more an issue of they weren't charging the market timers
23 the appropriate redemption fees, as opposed to the activity
24 was illegal?

25 A Yes, to the -- relying on my recollection that

1 State Street, I don't think that we came to the conclusion
2 that market timing was not occurring.

3 Q Right.

4 A But that the issue may have been did the company
5 know it was happening, and that's something I didn't even
6 mention, but it's kind of subsumed in is there an
7 arrangement. If there's no arrangement --

8 Q Right.

9 A -- if there's no quid pro quo, then maybe the
10 company wasn't aware of it. Or even if aware, either was
11 trying to stop it or essentially wasn't telling people, "We
12 are stopping it."

13 Q Right.

14 A So I think that it would be fair to say that --
15 again, I'd love to go back to the State Street write-up and
16 see what we said in it.

17 Q Right.

18 A But I don't think that we concluded that there was
19 an absence of timing there, but we concluded that that didn't
20 translate it into a case.

21 Q Okay. Because I'm --

22 A Oh, excuse me. A case on the market timing side as
23 opposed to the redemption fees.

24 Q Right. I'm trying to get a sense of -- and since
25 it sounds like the market timing cases were a large sort of

1 universe and there are unique issues to them. So I'm just
2 trying to get a sense of, with your experience with Harry on
3 the referrals that he made, was it that generally speaking he
4 had his facts right. Now, it may be that for the issues you
5 discussed like when you get in there and you look at the
6 disclosures and you look at the quid pro quo, it may or may
7 not amount to, quote/unquote, a market timing case. But was
8 it your feeling that Harry was pretty reliable when he made
9 representations about facts?

10 A I think that -- I think he was credible. And I'm
11 not trying to draw a distinction and say he wasn't reliable.

12 Q No, no.

13 A I think when we talked to him, we felt like he was
14 connected to the industry, that he may be making guesses
15 about certain things, but that it was -- it was worthwhile to
16 take a look at or try to think it through.

17 Q Okay.

18 A Now, when he made observations such as the fact
19 that there must have been timing in a particular fund because
20 of the addition of redemption fees, that didn't mean that for
21 every fund he said that about, we would go and talk to those
22 funds, because, you know what, if we had talked to every fund
23 that added redemption fees at that time, we wouldn't have
24 been able to do it all.

25 Q Right.