

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

-----X

In the Matter of:

OIG-509

-----X

WITNESS: NUMBER 62

PAGES: 1 - 55

PLACE: Richards Kibbe & Orbe LLP
One World Financial Center
New York, New York

DATE: June 10, 2009

The above-entitled matter came on
for hearing at 1:55 p.m.

COPY

1 A P P E A R A N C E S :

2

3 On behalf of the Securities and Exchange
4 Commission

5

6 H. DAVID KOTZ, ESQ.

7 NOELLE FRANGIPANE, ESQ.

8 United States

9 Securities and Exchange Commission

10 100 F Street NE

11 Washington, DC 20549

12

13 On behalf of the Witness

14

15 STEPHEN DeTORE, ESQ.

16 22 East 36th Street, Apartment 5

17 New York, New York 10016

18

19

20

21

22

23

24

25

1 P R O C E E D I N G S

2 MR. KOTZ: We are on the record at
3 1:55 p.m. on June 10, 2009 at the Law Offices
4 of Lee Richards. I'm going to swear you in, if
5 that's okay.

6 former New York Enforcement Staff Attorney #2
[Redacted]

7 having first been duly sworn by a Notary
8 Public of the State of New York, was
9 examined and testified as follows:

10 EXAMINATION BY

11 MR. KOTZ:

12 Q. Could you state and spell your full
13 name for the record.

14 former New York Enforcement Staff Attorney #2
[Redacted]

15
16 Q. [Redacted], my name is David
17 Kotz, I'm the Inspector General of the United
18 States Securities and Exchange Commission. I
19 have my colleague here with me of the Office of
20 Inspector General Noelle Frangipane, and you
21 have your attorney here as well.

22 MR. DeTORE: Stephen,
23 S-T-E-P-H-E-N, DeTore, D-E capital T-O-R-E.

24 Q. This is an investigation by the
25 Office of Inspector General, case number

1 Securities?

2 A. No.

3 Q. As you began to work on the matter
4 involving Avellino and Bienes that had a
5 relationship to Bernard Madoff, did you learn
6 anything about Bernard Madoff at that time?

7 A. I little bit.

8 Q. What did you learn?

9 A. What I learned about it was that he
10 was had a market making firm and that Bernard
11 Madoff was well known in the securities
12 industry and had been -- just was well known in
13 the securities industry.

14 Q. You learned that in the course of
15 the investigation?

16 MR. DeTORE: I think you're
17 actually going down slightly -- this is really
18 more to benefit you, I think you're going down
19 the wrong path. Maybe you want to ask if she
20 was involved in the investigation of the matter
21 first.

22 MR. KOTZ: Okay.

23 Q. Were you involved in the
24 investigation?

25 A. No. I was brought in at the

1 conclusion of the investigation to put together
2 the litigation papers for the Preliminary
3 Injunction, and then I was involved in the
4 litigation.

5 Q. Did you learn this information
6 about Bernard Madoff in the course of the
7 litigation?

8 A. Yet, but not -- it was not formally
9 through the course of discovery.

10 Q. Do you remember at what time period
11 you were brought into the case?

12 A. It was in the couple weeks before
13 the Preliminary Injunction was filed.

14 Q. Let me show you a few documents and
15 let me know whether you recognize them or not.
16 The first document is marked as Exhibit 2.

17 This is a June 24, 1992 memorandum from former New York
Enforcement Staff
Attorney
18 [REDACTED] to the file, subject in the matter of

19 Not Related to Madoff, Examination Material

20 (Whereupon, the aforementioned
21 memorandum was marked Exhibit 2 in evidence
22 as of this date by the Reporter.)

23 Q. I show you this memorandum to try
24 to get a sense what you understood to have
25 precipitated the investigation and then the

1 litigation, what was the precipitating factor
2 that led to the litigation you began working
3 on?

4 A. Well, I wasn't at the SEC at this
5 time, certainly of this memo. My recollection
6 is that there were some -- my recollection at
7 the time is there were some individuals who had
8 approached the SEC about investments that they
9 had made, either that they had heard about it
10 or that they had made through Avellino and
11 Bienes or through another accounting firm, and
12 they were sort of questioning the returns, I
13 think the lack of information that was being
14 provided and things like that and had brought
15 this. I don't remember this specifically or
16 remember even speaking to these individuals,
17 but that was the general gist.

18 Q. Was there a concern that kind of
19 the returns that were being suggested by
20 Avellino and Bienes to their investors were too
21 good to be true or suspicious?

22 A. I think it was a combination of, as
23 I recall, the returns that were being promised
24 to investors combined with a lack of
25 transparency about how the monies were

1 invested, the strategies and things like that.
2 So, it was a combination of the two things
3 together.

4 Q. Was there any concern in your
5 recollection that perhaps it was a fraud in
6 some kind of Ponzi scheme such that they
7 weren't trading at all?

8 A. Certainly there was a concern that
9 Avellino and Bienes was operating a Ponzi
10 scheme.

11 Q. Let's me show you another document.
12 I'm going to mark this document as Exhibit 3.

13 (Whereupon, the aforementioned
14 memorandum was marked Exhibit 3 in evidence
15 as of this date by the Reporter.)

16 Q. This is a memorandum dated
17 November 16, 1992 to Demetrios Vasilakis and
18 Personal Privacy, subject Bernard L. Madoff,
19 885 Third Avenue. It looks like this happened
20 shortly after court papers were filed seeking a
21 Preliminary Injunction. You were with the
22 Commission and working on the matter at this
23 time; is that right?

24 A. I was.

25 Q. Do you remember what the purpose of

1 this examination was, do you remember anything
2 about the exam?

3 A. I don't remember anything about the
4 examination.

5 Q. Do you remember anything generally
6 about the need to have an examination as part
7 of the litigation efforts?

8 A. I don't.

9 MR. DeTORE: Have you seen this
10 document before?

11 THE WITNESS: I certainly don't
12 remember ever seeing it.

13 Q. Let me show you another couple
14 documents. I'll show you these two at the same
15 time. I'll mark the next document as Exhibit
16 4, which is a Complaint for a Preliminary and
17 Permanent Injunctive and other Applicable
18 Relief, Securities and Exchange Commission
19 against Avellino and Bienes, Frank J. Avellino
20 and Michael S. Bienes. Then I'm going to give
21 you as well, an Order of Preliminary Injunction
22 and Other Equitable Relief on Consent as
23 Exhibit 5, also in the matter of Securities and
24 Exchange Commission against Avellino and
25 Bienes, Frank J. Avellino and Michael S.

1 Bienes.

2 (Whereupon, the aforementioned
3 Complaint was marked Exhibit 4 in evidence
4 as of this date by the Reporter.)

5 (Whereupon, the aforementioned Order
6 of Preliminary Injunction was marked as
7 Exhibit 5 in evidence as of this date by
8 the Reporter.)

9 Q. Do you recognize these documents,
10 Exhibits 4 and 5?

11 A. I do.

12 Q. In what capacity did you work on
13 preparing them?

14 A. I definitely drafted Exhibit 4 and
15 certainly I worked on Exhibit 5. I don't
16 remember if I was the person who drafted it,
17 but most likely I did.

18 Q. This is shortly after you joined
19 the Commission?

20 A. Yes.

21 Q. How shortly, do you remember?

22 A. I joined the Commission on
23 Personal Privacy and I spent a week in
24 training in Washington and I spent a week
25 handling depositions in a different matter in

1 another litigation unrelated to this, prior to
2 this particular case. I had been there maybe
3 eight weeks, tops.

4 Q. What was your role exactly in
5 connection with the litigation?

6 A. I was a staff attorney, but my
7 duties were I drafted complaints, I drafted
8 papers for people.

9 Q. Had you prior to this ever worked
10 on either an investigation or a litigation
11 involving allegations of a Ponzi scheme?

12 A. No.

13 Q. What was the purpose of the
14 complaint, what were you trying to set forth,
15 what was the issue here?

16 A. Well, the issue was, we were
17 drafting a complaint that would support a
18 request for Preliminary and Permanent
19 Injunction, so the complaint has to demonstrate
20 -- the investigation had not, as I understood
21 it, found that these individuals had engaged in
22 fraud. Because as I recall, I don't believe
23 they're charged with any fraud charges here, I
24 think they're only charged with unregistered
25 securities claim and running an unregistered

1 investment company. So the purpose of the
2 complaint was to demonstrate they were selling
3 securities, that they were unregistered, you
4 know, that they were, you know, they had failed
5 to register and meet the register investment
6 company statute.

7 Q. Do you know what investigation
8 determined that they were to charge them with
9 the unregistered securities rather than fraud?

10 A. I don't know how it was. By the
11 time I was brought into this it was at the
12 stage of, we need to someone who can draft
13 court papers for us and we're asking you,
14 experienced litigator, to please draft court
15 papers for us for a Preliminary Injunction.

16 Q. Do you know why you were seeking a
17 Preliminary Injunction?

18 A. You know, I think it was really no
19 different from any other kind of case where
20 from a strategic standpoint one of the remedies
21 the SEC has is to get injunctive relief, and I
22 think that they wanted to quickly put a halt to
23 these investors, to the Avellino and Bienes
24 continuing to recruit more investors into their
25 unregistered investment company.

1 Q. If you look at Exhibit 5 on Page 4
2 it is stated it is further ordered the judge
3 decreed that, and then handwritten in Lee S.
4 Richards of the Law Firm of Richards Spears
5 equivalent or be appointed trustee for the
6 purpose of et cetera, et cetera. Do you recall
7 what was the reason to have a trustee
8 appointed?

9 A. My understanding we were having a
10 trustee appointed to insure that all of the
11 funds were properly liquidated and returned to
12 the customers.

13 Q. Did you understand that to be the
14 focus of the litigation efforts, to stop
15 Avellino and Bienes from continuing to make
16 these investments or offer their customers
17 these investment opportunities, and make sure
18 that the funds were returned?

19 A. Correct, because they were not --
20 they were offering unregistered securities and
21 they were an unregistered investment company.
22 Yes, the point was to insure that they did not
23 continue to do that activity in an unregistered
24 fashion.

25 Q. Do you remember any discussion at

1 all as to whether you would charge Avellino and
2 Bienes with any kind of fraud?

3 A. Certainly there was discussion
4 about the case, that it was unusual that they
5 would just be bringing a case solely on claims
6 of not being registered and that there was not
7 a corollary fraud component, but at the time I
8 was brought in people, you know, the people
9 that I was reporting to were of the view that
10 they had not found any fraud.

11 Q. Who were those people that you were
12 reporting to?

13 A. Well, I shouldn't say the people I
14 was reporting to. The people that were sort of
15 supervising this case was [REDACTED] former New York Enforcement Staff
Attorney, [REDACTED] former Enforcement
Assistant Regional Director
16 [REDACTED], [REDACTED] Personal Privacy [REDACTED] was the associate
17 director and Richard Walker was the head of the
18 office.

19 Q. Were you aware that there was an
20 effort to have an audit done of Avellino and
21 Bienes' financial statements under the tutelage
22 of a trustee?

23 A. I was aware that PWC was retained.
24 My recollection is PWC was retained to sort of
25 audit that the money that had gone into

1 We can perform an audit or render an opinion
2 during that period."

3 Do you have any recollection of PWC
4 being unable to render an opinion, does this
5 refresh your recollection? I guess it was
6 Pricewaterhouse at the time, maybe.

7 A. It was Pricewaterhouse at the time.
8 Yes, it does refresh my recollection that they
9 were unable to render an opinion as to certain
10 parts of what they were looking at.

11 Q. Do you remember any concern
12 expressed, that there were kind of open
13 question or unanswered questions as a result of
14 Pricewaterhouse's inability to render opinions?

15 A. In terms of I think the return of
16 funds to investors?

17 Q. In terms of any of the purposes of
18 the litigation?

19 A. I just don't really recall.

20 Q. Do you recall any sense that
21 Avellino and Bienes were not forthcoming? I
22 mean according to this financial statements
23 hadn't been prepared at all by Avellino and
24 Bienes, do you remember anything about that
25 being kind of odd or curious?

1 A. Yes, I think that, you know, I
2 certainly think that people did think it was
3 odd or curious that they had a lack of records,
4 particularly for an accounting firm.

5 Q. Do you remember at any point any
6 discussion of investigating further or taking
7 further action as a result of what
8 Pricewaterhouse found in the audit?

9 A. Well, the action against Avellino
10 and Bienes, the focus of the action was to --
11 right, because in terms of what the Commission
12 has jurisdiction over doing, had to do with the
13 sale of securities. And so, the focus of our
14 litigation was to prevent them from continuing
15 to sell unregistered securities or operating an
16 unregistered investment company, and to have a
17 comfort level that monies were returned to the
18 investors who invested it with Avellino and
19 Bienes. And beyond that, unless they were
20 engaging in some sort of violations of
21 Securities Laws, it starts to be not something
22 that the SEC really had jurisdiction over.

23 Q. You don't remember any discussion
24 to kind of enlarge the matters that you were
25 looking at in the litigation or conducting

1 available."

2 Do you recall whether you received
3 satisfactory discovery responses in general,
4 and I guess, you know, in this particular
5 matter?

6 A. The only thing that I recall is
7 just that this was a fairly contentious
8 litigation, that, you know, defense counsel was
9 very aggressive. Whether I ultimately got the
10 information I needed, I mean I'm pretty dogged,
11 so. I just don't recall. I remember though it
12 was a fairly contentious litigation.

13 Q. Lots of objections to discovery
14 requests?

15 A. Yes. I mean as evidence from here
16 that, you know, like, you know, two sentences
17 and, you know, it's just very typical of
18 litigation, as I'm confident that you know, so.
19 I think it's indicative of the tone in this
20 litigation which was, you know, contentious.

21 Q. Do you recall at all whether there
22 were efforts made by you to seek information
23 related to Bernie Madoff, that there was
24 contentiousness associated with that, as
25 opposed to just related to Avellino and Bienes?

1 A. I don't remember anything specific
2 about any contentiousness with specifics to any
3 particular -- with respect to Bernie Madoff or
4 anything in specific. It was just overall a
5 very contentious litigation. I shouldn't say
6 very contentious, it was a contentious
7 litigation.

8 Q. Did you understand at the time that
9 Avellino and Bienes were stating that all the
10 investment decisions were done by Bernard
11 Madoff?

12 A. Yes.

13 Q. Do you recall what if any efforts
14 were made to look at books and records of
15 Bernard Madoff given that Avellino and Bienes
16 were saying that the investments were made by
17 Bernard Madoff?

18 A. Do I recall what?

19 Q. Do you recall any efforts to seek
20 documents or information about Bernard Madoff's
21 operations as opposed to Avellino and Bienes'
22 operations?

23 MR. DeTORE: Can I just make the
24 one qualification, you have shown her a
25 document that suggested that such efforts were

1 made in the form of an examination, do you mean
2 exclusive of that examination?

3 MR. KOTZ: She testified she wasn't
4 involved in that.

5 MR. DeTORE: No, no. I'm just
6 saying that you had shown us a document that
7 reflects that there was one, that's why I was
8 making the comment.

9 A. As I sit here and look back on my
10 recollection, my focus on this particular
11 litigation was on the Avellino and Bienes
12 returning, you know, having a comfort level
13 that we had located all the investors, how much
14 they should be returned, that the money was
15 returned to them. And just given the length of
16 my interrogatories that I sent and document
17 requests and other things, obviously I was
18 pretty busy, that that was a pretty full job
19 for -- because I was really the only staff
20 attorney working on this.

21 Q. So you don't remember as much of a
22 focus on Bernard Madoff's operations as on the
23 issue of insuring that the investors to
24 Avellino and Bienes were repaid?

25 A. Well, my particular focus --

1 Bernard Madoff was not a Defendant or relief,
2 defendant in this litigation, so my particular
3 responsibility was the four corners of, you
4 know, Avellino and Bienes, getting a Permanent
5 Injunction, getting monies returned to
6 investors.

7 Q. So, the issues you worked on didn't
8 really relate so much to Bernard Madoff's
9 operations?

10 A. No, that was not -- I was looking
11 at this and it reminded me -- and I had other
12 matters I was working on. I was pretty full,
13 busy, running that specific assignment.

14 Q. Were there any other staff
15 attorneys who were working on different
16 assignments relating to this litigation that
17 you're aware of?

18 A. Well, certainly former New York Enforcement Staff
Attorney was
19 around. I frankly don't remember what he was
20 doing. I don't, you know, I don't know what
21 other people were doing, per se.

22 Q. You weren't aware of any of the
23 staff attorneys on the Avellino and Bienes
24 investigation?

25 A. There had been a guy named Personal Privacy

Personal Privacy

1 [REDACTED] who had been on the Avellino and
2 Bienes litigation when we were drafting the
3 complaint, but I don't remember if he continued
4 or not.

5 Q. And you don't remember any staff
6 attorney or other individual who was
7 particularly focused on getting information
8 relating to Bernie Madoff's operations?

9 A. I just don't remember. I just know
10 it wasn't me.

11 Q. Do you recall whether there was any
12 discussion or consideration of where the money
13 came from that was used to repay the investors
14 to Avellino and Bienes?

15 A. I remember that -- my recollection
16 of the money that was used to repay the
17 investor was that the money was in some form of
18 investments that had to be liquidated at
19 Madoff's firm and that Madoff handled the
20 liquidation of the investments in a fairly
21 short period of time, and that that was the
22 flow of monies that was then returned to
23 people, to the underlying investors.

24 Q. Do you know if there was any effort
25 by the SEC to look at what those investments

1 were?

2 A. I don't know.

3 Q. Was there any discussion or
4 consideration of the fact that if Avellino and
5 Bienes were suspected of running a Ponzi scheme
6 and the decisions were made by Madoff, the
7 investing decisions that is, that Madoff could
8 have misappropriated other customers' funds in
9 order to pay the capital needed to pay back the
10 investors of Avellino and Bienes?

11 A. I don't recall any discussions that
12 Madoff was running a Ponzi scheme. My
13 recollection at the time was that when Madoff
14 was approached about liquidating the
15 investments and returning the funds, that he
16 was able to do so. I don't remember the exact
17 number, but I think it was close to \$500
18 million. That he was able indeed to liquidate
19 the investments and get the cash available
20 within a very short period of time, like a day
21 or two days. I mean it was a fairly compressed
22 period, which would suggest that the money was
23 where we would expect it to be.

24 Q. But do you know if there were any
25 efforts made by the SEC to confirm that the

1 money was where you expected it?

2 A. I don't know what the SEC did on
3 that. It was not part of what I was working
4 on.

5 Q. Do you recall any discussion or
6 consideration of the fact that the returns that
7 Avellino and Bienes were guaranteeing really to
8 investors were so high and so consistent?

9 A. Yes, I mean I think -- I don't
10 remember if the returns were guaranteed per se,
11 because my recollection was that the guarantees
12 had some fluctuation to them. I could be
13 wrong. My recollection might be dated at this
14 point. But certainly I think that that was
15 part of what started the investigation, was
16 that the returns to investors were high. And
17 it was the combination of high returns and lack
18 of transparency that's often found when people
19 are not doing what they say they are doing.

20 Q. Are you aware of any analysis
21 conducted or any efforts to find out from
22 Madoff how he was achieving these returns,
23 looking into the strategy that was being used?

24 A. If anything happened it wasn't
25 something that I was involved in.

1 We can look back, but that's how
2 Avellino and Bienes describe Bernie Madoff's
3 strategy. Do you recall at any point
4 discussions or consideration of the fact that
5 Avellino and Bienes were essentially saying
6 that for a 30-year period using Bernie Madoff's
7 strategy they had never had a loss?

8 A. Do I recall them saying that they
9 never had a loss?

10 Q. Yes.

11 A. Do we know who was answering the
12 question?

13 Q. It was interesting because this
14 interview was kind of both by Avellino and
15 Bienes. They were kind of there together. I
16 believe it was Avellino.

17 If you look on Page 41 it discusses
18 the strategy. Actually 40 and 41 discuss the
19 actual strategy.

20 Do you recall either Avellino and
21 Bienes saying that they have never had a loss
22 from 1962 until 1992 at that time?

23 MR. DeTORE: She wasn't there at
24 that time.

25 Q. But you read this in connection

1 Judgement was marked as Exhibit 10 in
2 evidence as of this date by the Reporter.)

3 Q. Do you recognize this document,
4 Exhibit 10?

5 A. Yes.

6 Q. What was your involvement with
7 this?

8 A. I believe I drafted it.

9 Q. Did this conclude the litigation
10 against Avellino and Bienes?

11 A. Yes.

12 Q. What was your understanding of the
13 conclusion of it?

14 A. The conclusion was that both
15 defendants in the firm were permanently
16 enjoined from the sale of unregistered
17 securities and acting as an unregistered
18 investment company and they had to pay fines.
19 I don't know whether this addresses it, but I
20 don't recall that they had any disgorements,
21 but they did have to pay civil penalties.

22 Q. Did you also understand that
23 pursuant to the trustee the money was returned
24 to the investors?

25 A. Yes.