

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

In the Matter of: )

)

OIG-509 )

OIG-502 )

OU -938 )

WITNESS: #13

PAGES: 1-133

PLACE: PAUL, WEISS, RIFKIND, WHARTON &  
GARRISON, LLP

1285 Avenue Of The Americas

New York, NY 10019

DATE: February 26, 2009

The above-entitled matter come on for  
investigation at 10:48 a.m.

**COPY**

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

2

On behalf of the Securities and Exchange Commission

3

H. DAVID KOTZ, Inspector General

4

Office of Inspector General

United States Securities and Exchange Commission

5

100 F Street NE

Washington, DC 20549

6

7 On behalf of Witness # 13:

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Witness #13, Pro Se

Paul, Weiss, Rifkind, Wharton & Garrison LLP

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1285 Avenue Of The Americas

New York, NY 10019

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P R O C E E D I N G S

Whereupon,

WITNESS #13,

after having been first duly sworn by the Notary Public, was examined and testified as follows:

MR. KOTZ: We are on the record at 10:48 a.m., on February 26, 2009, at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP, located on 1285 Six Avenue, New York New York.

Could you please state and spell your full name for the record.

THE WITNESS: (Witness #13 complies.)

EXAMINATION BY

MR. KOTZ:

Q. My name is David Kotz, I am the Inspector General of the United States Securities and Exchange Commission. This an investigation by the Office of Inspector General, Case Number 509, but we actually will be asking you questions about Case Number 502 as well.

I am going to ask you certain questions. You are going to provide answers under oath. The court reporter will record and later transcribe everything that is said. Please provide verbal

1 independent. You cannot have an independent audit  
2 performed by a relative."

3 From looking at these two documents,  
4 does this indicate to you that you, in fact, took  
5 this complaint seriously, thought there was some  
6 urgency and that you referred to "significant  
7 concerns"?

8 A. Yes. Why I would have said "be sure,"  
9 is that when I got to the SEC, I felt that too  
10 often officers were trying to handle investigations  
11 that really didn't belong in their region, because  
12 they received the tip.

13 For example, the Denver office had a  
14 case where they were going to trial in New  
15 Hampshire, and every time it was in front of the  
16 Commission it was, "Why is the Denver office  
17 handling this?" So I felt that we had to work  
18 better about making sure that the right team of  
19 people were assigned to matters.

20 I think there was always a concern that  
21 if you just sent something to another office, the  
22 assumption was, "Well, Boston didn't want this, and  
23 they're sending it to us, it must be the garbage  
24 they are trying to get off their list of things to  
25 follow up on." I didn't want New York to think

1 this was something that we just didn't think needed  
2 attention. I wanted to make sure it was a high  
3 level, not just the standard referral process, but  
4 a high-level referral, so that it would be taken  
5 more seriously, and not that they wouldn't consider  
6 it something like we were merely sending a case we  
7 were not interested in and we were trying to find a  
8 home for it .

9 Q. The main reason you sent the case to New  
10 York was because Madoff Securities was in New York;  
11 correct?

12 A. Correct. The geographical nexus. It  
13 would have been inappropriate for Boston, I felt,  
14 to open an investigation for an entity sitting in  
15 New York City.

16 Q. Is it fair to say that you thought that  
17 this matter was significant enough that you wanted  
18 to make sure that you followed up so that New York  
19 would take appropriate action?

20 A. Correct.

21 Q. And looking, based on your recollection  
22 and looking at the document with MARK 0051 -- it  
23 says "The World's Largest Hedge Fund is a Fraud,"  
24 why do you think you felt this matter was  
25 significant enough that you not only referred it,

1 but that you wanted to follow up to ensure that it  
2 got some priority?

3 A. My confidence in the people who were  
4 bringing it to my attention.

5 Q. Who were those people?

6 A. John Dugan, Mike Garrity, and Andy  
7 Caverly, C A V E R L Y.

8 Q. Who are those people?

9 A. John's E-Mail said, "We met this  
10 morning, so I took the "we" to mean John Dugan,  
11 Mike Garrity, and Andy Caverly. The memo was to me  
12 and David.

13 Q. Right.

14 A. David Bergers, who was the head of the  
15 office. I trust their judgment, and from the tone  
16 of the memo, I got the sense that they thought this  
17 was an issue that needed to be investigated; so I  
18 wanted to make sure this did not fall through the  
19 cracks and that it got attention?

20 Q. Who was Michael Garrity?

21 A. Mike Garrity is someone who I have a  
22 great deal of confidence in, in the Boston office.  
23 I believe I gave him a promotion. He is a former  
24 reporter and is very passionate about his work. He  
25 takes his work very seriously.

1                   When we were going to be given  
2 responsibility to do examinations of hedge funds, I  
3 put Mike in charge of getting the staff ready and  
4 knowledgeable about how hedge funds work. He did a  
5 lot of work to understand how they worked, on his  
6 own time. He is very enthusiastic and Dugan made a  
7 bunch of presentations to our staff. I think they  
8 may have become a model for training around the  
9 Commission, to get folks ready for hedge-fund  
10 examinations.

11           Q.       Would you Mike Garrity to be very  
12 credible when it came to suggesting that a matter  
13 be looked into?

14           A.       Yes.

15           Q.       Take a look quickly at the document, the  
16 presentation document. It says "The World's  
17 Largest Hedge Fund is a fraud."

18           A.       Yes.

19           Q.       From time to time, I am sure, during  
20 your time at the SEC, you have seen tips,  
21 information brought in from the outside about  
22 potential cases?

23           A.       I used to get literally dozens a day,  
24 personally, to me. I had a standard -- because I  
25 didn't want any to fall in between the cracks, even

1 if they looked stupid, so I had a standard practice  
2 of forwarding them to the Complaints Tips groups,  
3 which was run by Office of Internet Enforcement  
Official.

4 So, I didn't want this one treated as  
5 just another routine tip, one of the dozens I got  
6 everyday, which I didn't know if it was worth  
7 looking into, but I wanted to make sure somebody  
8 considered that. This was one where I wanted to  
9 make a point of asking someone at the senior level  
10 to not treat it like just another tip and risk that  
11 it might fall between the cracks.

12 Q. Okay. Would you say that over the time  
13 that you were at SEC, you had seen thousands of  
14 tips?

15 A. Yes.

16 Q. How would you compare, in terms of the  
17 thousands of tips that you have seen, how would you  
18 compare this document, which says "The World's  
19 Largest Hedge Funds is a Fraud," MARK 0051 to MARK  
20 0070, in terms of the details and the information  
21 provided?

22 A. About one a month. It was pretty  
23 considerable. Some people, like hedge funds, short  
24 sellers, will hire law firms, very prominent law  
25 firms, to give you a two-inch packet of material



1 about some company engaging in financial fraud,  
2 because they have a financial interest in an  
3 investigation being opened because the stock will  
4 drop; but they may be right, so you have to follow  
5 up on it.

6 Q. So you were saying, how many did you say  
7 you used to get a day?

8 A. I would say a dozen, two dozen,  
9 personally.

10 Q. You used to get two dozen a day, you  
11 would say about once a month a document of this  
12 magnitude would come in?

13 A. To me, personally.

14 Q. So, looking through this document, does  
15 it provide some level of detail that would lead you  
16 to conclude that is a matter that needed to be  
17 looked at carefully.

18 A. I don't remember looking at this  
19 document. I think my persona was just based on my  
20 comfort with the quality of people that were  
21 recommending that this be followed up on. I was  
22 relying on Garrity and Dugan.

23 Q. But looking at the document right now,  
24 if you could look at it right now briefly, just go  
25 through it and tell me, just based on looking at

1 it, given your experience in seeing tips, how would  
2 you characterize the type and level of information,  
3 and the level of detail in this complaint?

4 A. It's much more detailed than your  
5 average tip. It would clearly call for a follow  
6 up.

7 Q. Is it clear to you from the E-mails and  
8 this document, "The World's Largest Hedge Fund is a  
9 Fraud," that what was being alleged here was that  
10 Bernie Madoff was running a Ponzi scheme? Is that  
11 your understanding of what --

12 A. Just what I read here today and I read  
13 when I looked at this on line, that it was part of  
14 the allegation that it may be a Ponzi scheme.

15 Q. You see in John Dugan's E-Mail to you,  
16 Tuesday, October 25, 2005, 4:26 p.m., that he says,  
17 "In fact, the informant believes that Madoff cannot  
18 possible be achieving the returns that the hedge  
19 funds claim he is getting. The informant believes  
20 that Madoff may be running one giant Ponzi scheme,  
21 and there are signs that it may be close to  
22 crashing down on him." (Sic)

23 So is it clear that John and you, David  
24 Bergers and Mike Garrity had the understanding at  
25 the time that what was being brought forward was

1 this E-Mail to you look like Mike Garrity is trying  
2 to ensure that Harry Markopolos, the informant, was  
3 able to meet with and talk to the folks in New York  
4 who were doing this investigation?

5 A. Now, I don't remember receiving this,  
6 but it looks like Harry sent an E-Mail to Mike, and  
7 Mike is saying, Hey, "Harry is now connected to  
8 NERO."

9 Q. So Mike Garrity is saying to you and  
10 others, "Harry is now connected to NERO"?

11 A. Right. It means they followed up.

12 Q. So it seems as though there was concern  
13 or definite interest on the part of Mike, and on  
14 the part of you and others to ensure that Harry  
15 Markopolos was connected to NERO.

16 A. I think Mike may be responding to my  
17 E-Mail where I had said, somewhere in here, "Let's  
18 try to make sure that NERO recognizes the potential  
19 urgency of the situation." I began to copy Mike,  
20 and Mike is following up, saying: They are  
21 connected; Harry is talking directly to NERO.

22 Q. So, did you get the impression that Mike  
23 Garrity must have viewed Harry Markopolos as a  
24 credible source, if he wanted to ensure that NERO  
25 was talking to him?

1 A. Yes.

2 Q. Does it seem as though this was a  
3 concern to the whole leadership of the Boston  
4 Office, given that David Bergers is involved, you  
5 are involved, John Dugan, to advise you that the  
6 connection has been made from Harry to the New York  
7 office?

8 A. Yes. It's unusual for the staff in  
9 Boston to come to me and say, "This is significant.  
10 We should not do it because it's not our region,  
11 but we think another office should follow up on  
12 it," and I think they are bringing it to my  
13 attention to make sure it wouldn't just get left at  
14 a low level and treated like just one of the many,  
15 maybe 10,000 tips that came in that day.

16 Q. So, these documents that I have showed  
17 you, does that indicate that there was almost an  
18 extra effort on the part of the Boston Office, to  
19 ensure that the New York Office was investigating  
20 it, that it was assigned to people, and that the  
21 informant connected with them?

22 A. I think when I arrived in Boston I asked  
23 for three things: Integrity in everything we do;  
24 passion for the mission -- I called it fierceness  
25 on behalf of investors; and, 3, team work. I think

1 this illustrated what I was trying to -- I was  
2 asking them to do. I'd say it was our shared value  
3 and what I was trying to encourage.

4 I think this illustrates what they were  
5 trying to do, team work, and not just saying, "What  
6 does this have to do with the Boston Office, we are  
7 not getting any credit for this, so why do we  
8 care?" We're trying to provide to New York helpful  
9 information on an investigation that should be  
10 followed up, and passion for the mission. They met  
11 with somebody that they think had something  
12 interesting to say that should be followed up on,  
13 so they are following up.

14 Q. I am showing you another document. This  
15 is an E-Mail from David Bergers to Meaghan Cheung,  
16 M E A G H A N, C H E U N G, dated 12/1/2005, 4:52  
17 p.m., two pages.

18 MR. KOTZ: We are going to mark this  
19 as Exhibit 7.

20 (Exhibit Number 7 was marked for  
21 identification.)

22 Q. You see Meaghan Cheung is communicating  
23 with John Dugan specifically about the informant,  
24 Mr. Markopolos. There is a reference in there that  
25 he has worked closely with the Boston Office in the

1 past and that many people there, including you and  
2 Peter Bresnan, would vouch for his reliability.

3 Do you know anything about that?

4 A. It's a mystery to me. It suggests I had  
5 a phone call with him, but I don't remember any  
6 phone call with him directly.

7 Q. Do you know whether Harry Markopolos  
8 had, in fact, had worked closely with the Boston  
9 Office in the past?

10 A. Not to my knowledge.

11 Q. Does it seem though from this E-Mail  
12 that Meaghan Cheung had some concerns about the  
13 credibility of the informant?

14 A. Well, there are different ways to read  
15 it. It could be Meaghan is just trying to make  
16 sure she's got all the information that the Boston  
17 Office has, all the information that she needs from  
18 them to evaluate his credibility, which is  
19 appropriate. I think John is just saying, "Hey, I  
20 am a busy guy, and you're the one investigating it.  
21 We met with them, but you do the investigation,  
22 what else can I tell you?" I mean, read between  
23 the lines.

24 Q. Do you sense from these E-mails  
25 generally some skepticism on the part of either the

1 exam or investigative team about this Madoff matter  
2 that Markopolos brought to their attention and you  
3 referred?

4 A. It's hard to tell with these kind of  
5 E-mails.

6 Q. When did you first hear of Bernie  
7 Madoff?

8 A. When I first heard the name recently, I  
9 didn't recall having ever heard of it before. I  
10 didn't realize that he may have contacted the  
11 Boston Office, I read it in the newspaper.

12 Q. Were you aware of his existence when he  
13 was the head of NASDAQ?

14 A. No. Someone actually asked me in  
15 December, "Hey, have you ever heard of Bernie  
16 Madoff?" They were surprised that I had never  
17 heard of him, like everyone knew of Bernie Madoff,  
18 but I was like, "I don't think I've ever heard of  
19 him."

20 Q. You were saying before that there was  
21 sometimes some push back from commissioners about  
22 bringing a case?

23 A. It was to obtain a formal order.

24 Q. To obtain a formal order, okay.

25 A. It was just one commissioner.

1 Q. One commissioner?

2 A. Yes.

3 Q. Okay. Was there ever a sense that if  
4 you had a potential case against somebody who had  
5 some prominence, that that might be something that  
6 some members of the Commission would be even more  
7 concerned about, bringing a formal order without  
8 evidence, or was it just kind of a general, kind of  
9 a little bit of a push back against formal orders?

10 A. It was just kind of a push back against  
11 what might be fishing expeditions, meaning that  
12 there really is no indication of wrong doing, yet  
13 there's a cost to a respondent to produce all of  
14 these documents and provide all of this testimony,  
15 and did you really feel you had enough to justify a  
16 formal investigation?

17 Like I say, every one was approved.  
18 Even that commissioner voted in a favor of them.  
19 He would just be asking questions, "What do you  
20 know so far? Do you really need a formal order?"  
21 But some could have taken from that tone that there  
22 was a reluctance to go for a formal order, if you  
23 are getting full cooperation.

24 Q. In your view, based on --

25 A. But I tried to fight that by adopting, I



1 think, the new policy that makes it clear that you  
2 ought to.

3 Q. Based upon the documents that Harry  
4 Markopolos provided to the Boston Office, "The  
5 World's Greatest Hedge Fund is a Fraud," do you  
6 think there is sufficient detail in that document  
7 to justify getting a formal order to conduct the  
8 investigation?

9 A. Just based on that, I think you would  
10 want to do what we call "opening a matter under  
11 investigation," and do some follow up, checking out  
12 what Harry had to say, obtain some information from  
13 Madoff and see if what information you got from  
14 Madoff answered the allegations. That would be the  
15 key for me.

16 If they didn't answer the allegations,  
17 then you would want to get a formal order. If they  
18 answered the allegation and you didn't think there  
19 was anything there, then there would be no reason  
20 to bother him with the subpoena.

21 Q. You mentioned before that there are  
22 some cases where the Boston Office got a case  
23 and --

24 A. A tip.

25 Q. A tip, I'm sorry. The Boston Office

1 got a tip and if it was referred to the New York  
2 Office, there might be some sense among the New  
3 York Office that this was just kind of Boston not  
4 wanting to deal with this tip, and they had kind of  
5 given it over to the New York Office?

6 A. The issue is that at that time,  
7 especially as time went on, the staff was pressed  
8 for finding people to follow up on every  
9 investigation that needed to be followed up. So it  
10 was in some order of a triage mode.

11 For example, the Corporate Finance  
12 Division would make a lot of referrals for  
13 Enforcement, and Personal Privacy, who was the Chief  
14 Accountant of Enforcement would have a stack in her  
15 office three feet high, referrals from Corporate  
16 Finance that she felt ought to be followed up. She  
17 would have to call around, because the home office  
18 used to go through them and pick out which ones  
19 they wanted, and then try to send off to the  
20 regions others, and there was a perception, "Well,  
21 the home office did not want it, so it probably  
22 isn't all that interesting or worthy of work, and  
23 we are going to waste our time with it." It just  
24 has to be followed up and Corporate Finance asked  
25 someone to follow up with it.

Personal Privacy

1 [REDACTED] would actually enlist my  
2 assistance in trying to get the region to follow up  
3 on it. We would call around and we would have  
4 trouble finding anyone who would say that they had  
5 the resources to take it. So I didn't want them to  
6 think that this was just another matter that the  
7 home office didn't want or that Boston didn't want  
8 it, and we were trying to find a home for an  
9 orphan. We felt it was something that needed  
10 follow up.

11 Q. But overall, generally, not specifically  
12 related to this complaint, but overall, did the New  
13 York Office kind of look skeptically on information  
14 that the Boston Office provided, kind of feeling  
15 like, "We have our own cases. Those are going to  
16 be higher priority than the cases Boston sends us"?

17 A. I had an relationship with Mark. I  
18 think if he got a referral from me, he would not  
19 view it as one that I was dumping into his office  
20 at all. I don't think that was a fact.

21 Q. But there were people in that office  
22 who, in the ordinary course, would not put on such  
23 a high priority level a tip that came from Boston,  
24 as compared to the cases they were working on?

25 A. There might be some additional

1 skepticism that if this was such a great matter,  
2 why isn't Boston trying to keep it, fighting for  
3 it, trying to find some jurisdictional nexus as an  
4 excuse to keep it.

5 Q. Could there have been a jurisdictional  
6 nexus to keep it?

7 A. We could always stretch it. We could  
8 say, "Well, the tipper is in Boston, so he needs to  
9 be available to talk, that's why we kept it." I  
10 felt that was gamesmanship. That's not what I  
11 wanted, I want to make it clear. I was not sending  
12 this to New York because I felt it was something  
13 Boston did not want, I felt that I was trying to be  
14 a good citizen. I wanted to send it to the office  
15 that was the most appropriate office to investigate  
16 this. They had already begun an exam, and he was  
17 in New York. It did not make sense for our people  
18 to be using taxpayer money to be taking trains back  
19 and forth to New York to investigate something in  
20 New York.

21 Q. The overwhelming majority of the  
22 investigation would have had to be done in New  
23 York; correct?

24 A. Right.

25 That's why I felt, and that is also in