

Exhibit E

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January 25, 2012

VIA E-MAIL

Fernando A. Bohorquez, Jr., Esq.
Baker & Hostetler, LLP
45 Rockefeller Plaza,
New York, New York 10111

Re: Picard v. Katz, et al. 11 Civ 3605 (JSR)

Dear Fernando:

I write on behalf of Sterling Stamos Capital Management, L.P. ("Sterling Stamos") in response to your letter dated January 23, 2012. As a preliminary matter, we note that the Trustee's implication that Sterling Stamos has been withholding, or continues to withhold documents relating to any due diligence performed from 2002 through 2004 on the Ascot Partners, L.P. ("Ascot"), Gabriel Capital L.P. ("Gabriel"), and Ariel Fund Limited ("Ariel") managed by Ezra Merkin's Gabriel Capital Corporation (the "Merkin Fund documents"), is a gross mischaracterization of the record and Sterling Stamos' good faith efforts to comply with the Rule 45 subpoena. Indeed, your letter flatly ignores that Sterling Stamos, a third-party to this action, has produced over 2.38 million pages of documents to date, which include hundreds, if not thousands, of pages relating to the Merkin Fund documents.

Your continued insistence on the existence of documents that, if created at all, were created over nine years ago at the infancy of the firm when diligence procedures were informal and largely hard copy,¹ no document retention policy existed, no archival system was in place, and the

¹ As Ms. Harrington explained when asked whether documents would have resided on her computer or in hard copy files: "The answer to that question would have been SP Capital was still in its infancy and we did have a lot of paper. But we were creating files for hedge fund managers." Harrington Tr. at 89. *See also id.* at 90 ("So, again, I'm not sure I can differentiate exactly how much of that would have been computerized at that point..."); *id.* at 104 ("Again, the organization was in its infancy and we were working out exactly how we were going to keep these files..."); *id.* at 107 ("[electronic meeting notes were] sort of a work in progress at the time, and I'm more of a paper person, so most likely I would have - I probably would have handwritten. The idea was that this was supposed to be all automated at some point.").

computer server used by Sterling Stamos was not its own, ignores the realities of a small but growing business. That your doggedness is grounded solely² in the wholly speculative testimony of Noreen Harrington as to what she believed “would” have been created for an introductory meeting with a fund manager in whose funds Sterling Stamos had already invested (Harrington Tr. at 89),³ approaches the bounds of responsible advocacy. Insinuating that there must be some nefarious reason for the absence of those documents years later is well beyond those bounds. Quite simply, there is no institutional memory as to what would have been in the files about which Ms. Harrington testified including, whether such files existed, where those files would have been located at the time, and what might have happened to them in the years since her departure.

In response to the Trustee’s Rule 45 subpoena, we have met and conferred with the Trustee in good faith on numerous occasions for several months now. Whenever you have sought to follow-up as to the existence of certain documents, no matter how tangential to this litigation, we have gone back and ascertained whether the requested documents exist and whether they have been

² To the extent you are relying on Mr. Chachra’s testimony, his recollection went generally to the type of analyses he would have conducted on the Merkin funds at the time. Like Ms. Harrington, he had no recollection of specific documents that might have existed or been prepared for the meeting with Merkin to which Ms. Harrington testified. Chachra Tr. at 33:11-17. Nor did he testify as to the existence of any specific documents or their continued existence.

³ Ms. Harrington’s testimony outlines her usual practices for speaking with managers but provides no specific recollection as to what documents, if any, she had prepared for her meeting with Merkin or for the subsequent internal meeting. See Harrington Tr. at 88 (“ I don’t, I don’t think we walked into any investment meeting on a hedge fund in my entire time there that didn’t have paperwork attached to it.”); *id.* at 90 (“[I]n the investment meeting we would have had, there would have been handouts normally or paper in those meetings); *id.* at 104 (“[a liquidity analysis] would be, you know, my normal process, so I would have – I believe I would have done it”); *id.* at 107-08 (“We would have had the pitch books [for Gabriel and Ascot], and they would have –most of the time you have pitch books that are electronic, and we would have had hard copies as well.”). The speculative nature of Ms. Harrington’s testimony is best illustrated by the following exchange:

- Q. Did you take any notes at that meeting, Ms. Harrington?
A. You know, I most likely did.
Q. And do you recall taking notes at that meeting?
A. I don’t. I don’t recall specifically.
Q. And do you know whether Mr. Chachra took notes at that meeting?
A. He generally took notes.
Q. And do you remember him doing so at that particular meeting?
A. It was his – generally speaking, Ashok took notes. I really – I mean, do I remember a notebook that he had? You know, I really don’t remember. It’s eight years ago. But it would be out of character if Ashok didn’t take some notes from a meeting.

Harrington at 187-88. As you are aware, we have produced Mr. Chachra’s notes from the meetings with Merkin during that time period.

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produced.⁴ When necessary, we have made additional productions. Your repeated requests for the Merkin Fund documents are no exception.

Iron Mountain Files

Contrary to your intimations, we have fully explained the issue with the Iron Mountain boxes to you and your colleagues on several occasions. Your selective recitation of those events, however, necessitates that I once again set forth the circumstances surrounding those files.

On Wednesday, January 4, 2012, we learned during Chris Stamos' deposition in California of a possible off-site storage at "Blue Mountain." Consistent with Sterling Stamos' good faith efforts to comply with the Rule 45 subpoena, we followed-up and inquired into whether Sterling Stamos had a "Blue Mountain" storage facility and, if so, whether those files had been searched for responsive documents. We learned of the existence of storage at an "Iron" Mountain facility as well as in the basement of 450 Park Avenue, Sterling Stamos' office, and understood that most of the contents of those facilities had been scanned onto the computer system. Nevertheless, the NY office manager reviewed the basement storage and pulled several boxes for us to review upon our return from the depositions in California. On Monday, January 9, I reviewed those boxes and did not find any Merkin Fund documents. The NY Office manager and I went to the basement and again looked through the storage area, unsuccessfully.

On January 10, we received and reviewed the boxes from Iron Mountain. Again, we did not locate any Merkin Fund documents. We noted, however, that the Iron Mountain directory listed two boxes of fund manager files that the index suggested should contain files for Ariel, Gabriel and Ascot. Those boxes had been checked out on December 22, 2008 (the "Iron Mountain Merkin files"). We immediately undertook to locate those boxes and were able to locate the box that was listed as containing Gabriel/Ariel files, which had been one of the boxes pulled from the basement for review. On closer examination, the only files in that box were for funds that were alphabetical neighbors to Gabriel. The search of Sterling Stamos' office continued.

During a break in the 30(b)(6) testimony on Thursday, January 12, I reached out to the client to ensure that the California office was being searched. I was told that having conducted a third search of the basement that morning, they had located a box⁵ containing the Ascot, Gabriel, and

⁴ Indeed, on January 2, 2012, the Trustee sought Noreen Harrington's personnel file for the first time. Notwithstanding that we believe such documents to be completely irrelevant to the present action, we conducted a thorough search of Sterling Stamos' files and produced the requested documents on January 12, 2012. Moreover, as early as November 10, 2011, the Trustee knew that Sterling Equities had back-up tapes from the time that Sterling Stamos' files resided on Sterling Equities' computer systems. Nevertheless, the Trustee waited until two days before the discovery cutoff to ask that Ms. Harrington's e-mail be uploaded and reviewed for production. In response to the Trustee's last minute request, Sterling Stamos reviewed Ms. Harrington's electronic files and produced an additional 2,000 documents by January 17, 2012. The record is abundantly clear that in compliance with Sterling Stamos' obligations pursuant to the Rule 45 subpoena, we have supplemented our production on multiple occasions upon locating the requested documents, which has come at a great expense to our client.

⁵ As we previously informed you, our review of the files and documents at Sterling Stamos' office revealed that the Merkin Funds files that were retrieved from Iron Mountain in December 2008 had been consolidated in one box.

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Ariel files together with several notebooks containing Mr. Chachra's handwritten notes of his meetings with investment managers.

We immediately provided you unfettered access to those files and notebooks. Ms. Griffin and Ms. Bell came to Sterling Stamos' offices the morning of January 13 and reviewed the files, including photographing documents without permission. They also were given the opportunity to read the notebooks in their entirety with the exception of a handful of pages marked privileged.

Again, a review of the documents confirmed that the majority, if not all, the materials contained in what you have coined the "Discovered Box," had previously been produced by Sterling Stamos, including, *inter alia*, all of Mr. Chachra's handwritten notes from meetings with Mr. Merkin in 2002 and 2003. Therefore, your characterization of these documents as newly found documents, perhaps in an attempt to imply that the Trustee has experienced undue prejudice, is plainly unfounded.

The Checked-Out Files

We then set about understanding the reasons the Iron Mountain Merkin files were pulled in December 2008. As we explained to you in my e-mail of January 18, the Gabriel, Ariel, and Ascot files were requested on December 19, 2008 by the communications team in the Menlo Park office so that they could determine what they could tell investors about the firm's potential exposure to Madoff. As a result of Menlo Park's request, a New York investment professional asked that the files be pulled. Once received by the NY office they were sent to California, where they were again scanned and stored on the P:/Portfolio Team Filing System\Library\1-Scanned Files drive. It is not at all surprising that your letter is silent on this point, given that it provides a logical explanation to why those documents were pulled at the time as opposed to the nefarious purpose you seem to seek. Indeed, we provided you with the e-mail chain in which the Iron Mountain Merkin files are requested, located, and shipped.⁶

Notwithstanding the explanation provided, the Trustee still sought the files as scanned in December 2008/January 2009. That same day, we made those documents available for your inspection at our office on a flash drive or alternatively, offered to endorse and upload them to your FTP site once the documents had been processed. See Bieber 1.18.12 email to F. Bohorquez *et al.* On January 19, 2012, after we did not hear back from you as to whether you intended to inspect the documents at our office or wanted the documents endorsed and uploaded, we proceeded to endorse and produce those documents to you. See Bieber 1.19.12 email to F. Bohorquez *et al.*

In addition to those documents, Ms. Jenson wanted the scans of the Iron Mountain Merkin files that pre-dated December 11, 2008. Specifically, because Mr. Kevin Barcelona, who was designated as Sterling Stamos' 30(b)(6) witness, testified that in 2008 Sterling Stamos had implemented an office-wide scan of hard copy documents in its New York office, Ms. Jenson

⁶ As we discussed, some of the details are explained in an otherwise privileged communication. You were offered that document subject to your agreement that it would not constitute a waiver of the privilege; Ms. Griffin, however, refused that agreement.

demanded those scans of the Iron Mountain Merkin files. In searching for documents scanned pre-December 11, 2008, we learned that the early investment management files were scanned into an "Existing Manager" directory when Sterling Stamos moved offices in late-2005/early 2006. That Existing Manager directory, which was subdivided by fund name and then by types of documents, was the working directory for each fund and therefore contained documents created after the original scans. We produced the contents of that directory as well.

As we explained to you, there is no single file that contains a scan of the Iron Mountain Merkin files. Rather, scanned files were done document-by-document and each document was then filed in an appropriate directory. Thus, for example, a subscription agreement would be filed under a Legal Documents folder in a particular manager's directory under the Existing Manager directory. We have not identified a 2008 scan of the Iron Mountain Merkin file, but it seems likely such a scan would have been redundant of the scanning that took place in the wake of the office move.

You now tell us that "while we appreciate your production of the December 2008 Scan, you have represented that this file was created after the Missing Boxes were removed from Sterling Stamos's off-site storage."⁷ Trustee's 1.23.12 letter n.1. Putting aside that you knew the timing of the scan when you insisted on having those documents, there is absolutely no basis on this record to suggest the Sterling Stamos has intentionally withheld a single document or that that scan varies in any way from the original files.

Moreover, despite your characterization that Sterling Stamos only just recently produced documents relating to the Merkin Fund documents, most, if not all, of the documents referenced in your letter that were inspected by your colleagues on January 13, 2012 or were subsequently produced by Sterling Stamos in the past two weeks, are not new documents; these documents are simply a reproduction of documents already produced by Sterling Stamos since 2010 albeit in a different format. Therefore, your suggestion that we have failed to timely produce responsive documents or have just recently produced documents related to the Merkin Funds is both inappropriate and unfounded. That those files do not contain the documents you believe might have existed in 2003 does not lay the groundwork for baseless insinuations and accusations.

Conclusion

To the extent that you have not been able to locate the Merkin Fund documents, we reiterate that we have conducted a good faith search and have produced everything that we are aware of in Sterling Stamos' possession, custody and control relating to the Merkin Funds. As you are undoubtedly aware by now, the firm was in its infancy stages during the short period of time Ms. Harrington was employed by Sterling Stamos between October 2002 and August 2003, and shared its office space and its computer servers with Sterling Equities. We also note for the record that despite having been notified by the Defendants by at least November 10, 2011 that Sterling Equities maintained back-up tapes containing Sterling Stamos' ESI prior to 2005, the Trustee failed to explore during the discovery timeframe whether those back-up tapes contained any other diligence

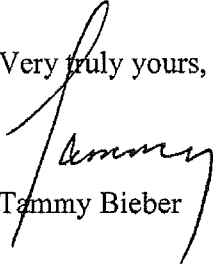
⁷ I have also represented that we are not aware of any Merkin Fund documents having been intentionally destroyed. That representation you have apparently chosen to ignore.

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explore during the discovery timeframe whether those back-up tapes contained any other diligence materials relating to the Merkin Funds, other than having us review Ms. Harrington's e-mails at the eleventh hour.

Accordingly, with this letter, we once again confirm, and reiterate that, subject to Sterling Stamos' objections to the requests in the Rule 45 subpoena and pursuant to the numerous meet-and-conferences between the parties to-date, Sterling Stamos, and its agents, have produced all responsive non-privileged documents relating to the Merkin Fund documents or, otherwise responsive to the requests.

Very truly yours,



Tammy Bieber

cc: Dana Seshens, Esq,