

Exhibit D

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VIA E-MAIL

Tammy Bieber
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Re: *Picard v. Katz et al.*, 11-CV-03605 (JSR)

Dear Tammy:

I write to memorialize our numerous meet-and-confers regarding Sterling Stamos' due diligence files on Ascot Fund, LP, Gabriel Capital, LP, and other funds managed by Ezra Merkin that invested all or some portion of their funds in Bernard L. Madoff Investment Securities (the "Merkin Funds"). The Trustee has repeatedly requested the Merkin Funds' due diligence files in this proceeding, first identified in the Trustee's October 11, 2011 subpoena to Sterling Stamos (the "Subpoena"), and reiterated throughout the meet-and-confer process through numerous teleconferences, in-person meetings, depositions, letters and e-mails. See, e.g., Subpoena Request No. 20.

The significance of the documents requested by the Trustee was demonstrated during the deposition of Sterling Stamos' former Chief Investment Officer Noreen Harrington on December 30, 2011. Ms. Harrington, who served as CIO of Sterling Stamos (then known as SP Capital) from October 2002 to August 2003, testified that after meeting with Merkin to conduct ongoing due diligence into his funds – in which Sterling Stamos first invested in July 2002 – she advised her Sterling Stamos partners Saul Katz, David Katz and Peter Stamos, that Ezra Merkin was feeding investments in his fund to Madoff, and that it was her view that Madoff's investment returns were either the product of illegal front-running or were a "fiction." (N. Harrington Tr. at 67-68, 72-73, 78, 111-18.)

Ms. Harrington testified that while acting as CIO, she and Ashok Chachra – her then-associate at Sterling Stamos – conducted due diligence analyses into the Merkin and Madoff funds that led her to the conclusion that Madoff was engaging in illegal activity. Ms. Harrington testified that she and/or Mr. Chachra prepared materials for a meeting with Sterling Equities partners Saul Katz and David Katz at which she provided her negative recommendation about investing in the Merkin Funds. (N. Harrington Tr. at

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VIA E-MAIL

Tammy Bieber
January 23, 2012
Page 2

86-88, 92-96.) Ms. Harrington further testified that her recollection of the events in question would be aided if she were able to review the documents she and Mr. Chachra had prepared in connection with the Merkin and Madoff funds. (N. Harrington Tr. 88:6-89:24; see also 1/2/2012 Ltr. from F. Bohorquez to T. Bieber.)

Mr. Chachra also testified that he performed due diligence analyses of the Merkin Funds and provided them to Ms. Harrington, including a review of "the monthly performance of the fund, the annualized volatility of the fund, the correlation of the fund to the broader equity markets, looked at the distribution of returns." (A. Chachra Rule 2004 Tr. at 32-33). In addition, Peter Stamos testified that as of 2002, Sterling Stamos, and specifically Mr. Chachra, performed many different types of diligence analyses on its investment managers such as Merkin's Ascot and Gabriel funds, including evaluations of the funds' historical performance, portfolio exposure, volatility analysis, leverage, diversification and correlation with various market and portfolio factors. (P. Stamos Rule 45 Tr. 148-150).

As of January 2, 2012, despite the Trustee's repeated requests, Sterling Stamos had not produced the due diligence materials to which Ms. Harrington and Mr. Chachra referred in their testimony. We then specifically requested the above-referenced documents and issued a subpoena and notice of a Sterling Stamos Fed. R. Civ. P. 30(b)(6) deposition to determine, among other things, the location, retention and/or destruction of Sterling Stamos' diligence files for Merkin's Ascot and Gabriel Funds, as well as Ms. Harrington's files. See 1/2/2012 Ltr. from F. Bohorquez to T. Bieber. You and your co-counsel, Alan Goudiss, agreed to provide a Rule 30(b)(6) witness who would be able to testify as to these topics and assured that any gaps or deficiencies in Sterling Stamos' production would be resolved prior to or at the Rule 30(b)(6) deposition. (See P. Stamos Rule 45 Tr. 312:4-315:15).

Sterling Stamos designated Chief Financial Officer Kevin Barcelona as its Rule 30(b)(6) witness, but Mr. Barcelona was unable to testify concerning the whereabouts of Ms. Harrington's files. In fact, on January 12, 2012, Mr. Barcelona testified that he had no knowledge of what happened to her files and did nothing in advance of the deposition to educate himself on the topics specifically identified in the notice of deposition. (Sterling Stamos Rule 30(b)(6) Tr. 152:7-153:21).

During a break in the Rule 30(b)(6) deposition, we explained our position that Sterling Stamos had failed to comply with its obligations pursuant to Rule 30(b)(6) because Mr. Barcelona had no knowledge about many topics identified in the notice, and admittedly had not educated himself on those topics in accordance with the requirements of a Rule 30(b)(6) witness. (Sterling Stamos Rule 30(b)(6) Tr. 189:23-191:16). We then questioned you about what you and your co-counsel, Alan Goudiss, knew about Sterling Stamos' due diligence files and noted that it appeared that Sterling Stamos had essentially produced no diligence materials at all for the Merkin Funds which pre-dated 2005. *Id.* It was only then that you informed us that you had learned that two boxes of hard copy materials relating to Merkin's Ascot and Gabriel Funds had essentially gone missing three years ago on December 22, 2008 – just a little more than one week after the revelation of Madoff's fraud, and at a time when Sterling Stamos was contemplating

VIA E-MAIL

Tammy Bieber
January 23, 2012
Page 3

litigation arising out of the Merkin Funds which had invested in Madoff. *Id.* You stated that Sterling Stamos had been unable to locate these boxes in the three years since (the "Missing Boxes"). *Id.*

Just minutes after you informed us that Ascot and Gabriel documents had gone missing for nearly three years, you then informed us that Sterling Stamos believed it may have located materials from the Missing Boxes in Sterling Stamos' New York office basement. Without having reviewed these materials yourself, you then suggested that the two Missing Boxes of Merkin Fund materials may have been consolidated into the one box you identified (the "Discovered Box"). (Sterling Stamos Rule 30(b)(6) Tr. 192:25-194:14).

The next day, January 13, 2012, Regina Griffin and Stacey Bell of our offices inspected the Discovered Box. The Discovered Box contained two file folders for Ascot and Gabriel entitled "Diligence," but they did not contain the due diligence analyses referenced by Ms. Harrington or Mr. Chachra in their testimony. Indeed, the Discovered Box did not contain any Sterling Stamos due diligence materials for the Ascot and Gabriel funds which pre-dated late 2004.

You represented to us that in the days following the Rule 30(b)(6) deposition, you spoke to many Sterling Stamos former and current employees – Peter Stamos, Spiro Stamos, Ashok Chachra, and Kevin Okimoto, former consultant Tim Dick, and counsel for Sterling partner David Katz – but you indicated that none of them knew anything about the retention of Ms. Harrington's files, nor about the due diligence analyses she referenced in her testimony. See 1/18/2012 E-mail from T. Bieber to K. Jenson.

During Mr. Barcelona's 30(b)(6) deposition, he testified to a September 2008 office-wide scanning project in which all hard copy documents in Sterling Stamos' New York office were scanned to the firm's electronic database. (Sterling Stamos Rule 30(b)(6) Tr. 30:17-31:11). Based on this representation, we requested a copy of the September 2008 scanned documents contained in the Missing Boxes (the "September 2008 Scan"). You represented that you searched for a September 2008 Scan and did not locate it. During your search, however, you located and produced on January 13, 2012, a December 2008 scanned copy of the Discovered Box.¹

On January 18, 2012 you advised that you had located an electronic directory containing the Sterling Stamos Investment Team's hard copy working files scanned starting as of 2005, which you believed contained Merkin Funds' due diligence documents. The parties held a meet-and-confer conference on Jan. 19, 2012 during which you agreed to produce the recently located additional scanned copies of Merkin Fund documents. Our review of those files has uncovered no documents from prior to

¹ 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' off-site storage.

VIA E-MAIL

Tammy Bieber
January 23, 2012
Page 4

late 2004 resembling the due diligence analyses referred to by Ms. Harrington or Mr. Chachra in their testimony.²

With your production to us on January 19, 2012 of those scanned materials, you represented that you have now produced all hard copy and electronic copies of documents pertaining to Merkin Funds which invested in Madoff. However, despite the testimony of two former Sterling Stamos' employees concerning the existence of 2002-2003 Merkin Fund due diligence materials, we cannot find among the documents produced any such due diligence materials from prior to late 2004. This is also despite the fact that Mr. Barcelona testified that Sterling Stamos has "records literally going back to day one on all of our funds, even though our policy says we don't have to retain them for that long." (Sterling Stamos Rule 30(b)(6) Tr. 142:24-143:9).³

Please confirm that you have already checked for all of the foregoing documents demanded by the Trustee with the law firms that have represented Sterling Stamos directly or indirectly since 2003, including Shearman Sterling and Davis Polk & Wardwell, as well as any other agents of Sterling Stamos.

Finally, if you believe that I have misstated any of the foregoing, please advise. Thank you.

Sincerely,



Fernando A. Bohorquez

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cc: Dana Seshens, Esq.

² In fact, in the thousands of documents produced by Sterling Stamos, only a single one-page document resembles the due diligence described by Ms. Harrington and Mr. Chachra. See SSKW00007066 "Ascot Partners, L.P."

³ Mr. Barcelona also testified that in "very early January" 2009, following Bernie Madoff's arrest, then-Sterling Stamos General Counsel Jared Kanover issued a written litigation hold to all employees of Sterling Stamos that explicitly instructed all employees to preserve all records relating to the Merkin Funds. (Sterling Stamos Rule 30(b)(6) Tr. 145:17-146:2).