UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING H. PICARD, Plaintiff, - against - SAUL B. KATZ, et al., Defendants.	:	11-CV-03605 (JSR) (HBP)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE TO EXCLUDE STERLING STAMOS DOCUMENTS

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Defendants respectfully submit this memorandum of law in support of their motion *in limine* to preclude the Trustee from referring to or offering inadmissible documents from Sterling Stamos Partners ("Sterling Stamos") at the trial of this case.

PRELIMINARY STATEMENT

Sterling Stamos is not a party to this action. Nor are the Sterling Partners and Sterling Stamos one and the same. Nevertheless, the Trustee has repeatedly referred to the Sterling Partners as partners of Sterling Stamos and indicated his intention to rely on (a) Sterling Stamos marketing brochures and related sales materials to prove that the Sterling Partners were experienced investment managers who *should have* discovered the fraud of Bernard L. Madoff ("Madoff") and his brokerage firm, Bernard L. Madoff Investment Securities LLC ("BLMIS") and (b) Sterling Stamos emails written after Madoff's arrest supposedly to show that Peter Stamos much earlier warned the Sterling Partners about Madoff's fraud.

Both categories of documents are hearsay, and neither is admissible against Defendants. The Sterling Partners were passive investors in, not active partners of, Sterling Stamos, and there is no basis for admitting into evidence the marketing materials and hedge fund due diligence questionnaires upon which the Trustee relies to demonstrate the Partners' supposed investment expertise. Similarly, there is no basis for admitting the post-December 11, 2008 emails upon which he bases his claim that warnings were given.

ARGUMENT

Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted" in the statement. Fed. R. Evid. 801(c). Hearsay is inadmissible unless it falls within an exception provided by the Federal Rules of Evidence. Fed. R. Evid. 802. The Trustee, as the proponent of such evidence, bears the burden of establishing its admissibility. *See Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 632 (2d Cir. 1994).

I. STERLING STAMOS MARKETING MATERIALS, POST-DECEMBER 11, 2008 EMAILS, AND THIRD-PARTY DUE DILIGENCE QUESTIONNAIRES ARE INADMISSIBLE HEARSAY AND SHOULD BE EXCLUDED BECAUSE THEY ARE NOT PARTY ADMISSIONS

Over the course of this litigation, the Trustee has claimed that Defendants were sophisticated securities investment management professionals, even though the evidence is utterly to the contrary, by relying on Sterling Stamos marketing materials and third-party due diligence questionnaires from 2004 and early 2005.[1] The documents on their face are out-of-court statements not under oath by a non-party in the action and are hearsay. The Trustee has advanced no theory that would support their admission.[2]

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[1] (*See, e.g.*, Trustee's Mem. of Law. in Supp. of Mot. to Strike the Expert Reports and Test. of John Maine (doc. no. 83) at 15-16; Trustee's Mem. of Law in Opp'n to Def. Mot. for Summ. J ("Tr. Opp. Mem.") (doc. no. 120) at 42-43; Trustee's Statement of Additional Material Facts That Are Undisputed or As To Which There Exists Genuine Issues To Be Tried ("Tr. Rule 56.1") (doc. no. 125) ¶¶ 174-177.) A representative list of these documents is attached hereto as Exhibit A. Pursuant to the Court's pre-trial schedule, Defendants served the instant motion on the Trustee before the parties' exhibit lists were final. Upon receipt of the Trustee's final exhibit list, Defendants will supplement Exhibit A to specifically identify the actual trial exhibits at issue.

[2] These materials refer to Saul Katz and David Katz, and at times Fred Wilpon, as Sterling Stamos "investment professionals," and suggest that the Katzes were involved in investment decisions at Sterling Stamos based on their "alternative investment experience." No Sterling Partner who was questioned about the Sterling Stamos
(…continued)

The Trustee has also offered certain emails postdating Madoff's arrest—and none sent by or to any Defendant—to support his claims that Peter Stamos warned some Defendants of Madoff's fraud, even though Mr. Stamos has repeatedly testified that he never made such warnings.[3] The Trustee has argued that these documents are party admissions under Fed. R. Evid. 801(d)(2)(D). (*See* Tr. Opp. Mem. at 22 n.24.) But neither Sterling Stamos nor the authors of the emails are parties, and there is no evidence that they were under the control of the Sterling Partners—indeed the Trustee concedes they were not. (*See* Tr. Opp. Mem. at 22 n.24; Tr. Rule 56.1 ¶ 173.) The agreements that govern Sterling Stamos also define both the passive investment status of the Sterling Partners and the total control of Peter Stamos, contradicting the Trustee's repeated charge that the Sterling Partners were "partners" in Sterling Stamos. (*See, e.g.*, Tr. of Feb. 23, 2012 Oral Arg. (doc. no. 139) at 10:23-11:18, 14:5-7; Tr. Rule 56.1 ¶ 1.) There is no basis for admitting these documents against any Defendant.

(continued…)

marketing materials had any familiarity with them, and no Sterling Stamos employee who was questioned about the documents recalled ever showing them to or reviewing them with any Sterling Partner. (*See* Deposition Transcript of David Katz, Dec. 28, 2011, 111:14-112:19, 326:4-327:10 (Seshens Decl., Ex A); Deposition Transcript of Saul Katz ("S. Katz. Tr."), Jan. 13, 2012, 66:15-24, 85:2-6 (Seshens Decl., Ex. B); Deposition Transcript of Fred Wilpon, Jan. 10, 2012, 39:1-4 (Seshens Decl., Ex. C); Deposition Transcript of Kevin Barcelona ("K. Barcelona Tr."), Dec. 15, 2011, 156:3-13, 159:14-160:12, 184:1-4 (Seshens Decl., Ex. D).) References to the "Seshens Decl." are to the Declaration of Dana M. Seshens, dated March 5, 2012 and filed in support of Defendants' motions *in limine*.

[3] (*See, e.g.*, Am. Compl. ¶¶ 871-875; Tr. Opp. Mem. at 22-23; Press Release of Irving H. Picard 3 (May 19, 2011) (Seshens Decl., Ex. E).) A representative list of these emails is attached hereto as Exhibit B. Pursuant to the Court's pre-trial schedule, Defendants served the instant motion on the Trustee before the parties' exhibit lists were final. Upon receipt of the Trustee's final exhibit list, Defendants will supplement Exhibit B to specifically identify the actual trial exhibits at issue.

First, under Rule 801(d)(2)(D), a statement offered against a party is not hearsay if it is made "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." A party seeking to introduce statements under Rule 801(d)(2)(D) must establish (1) the existence of an agency relationship, (2) that the statement in question was made during the course of that relationship, and (3) that the statement relates to a matter within the scope of the agency. *Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534, 537 (2d Cir. 1992). The formation of an agency relationship requires "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the *understanding of the parties that the principal is to be in control of the undertaking*." *Nat'l Commc'n Ass'n, Inc. v. Am. Tel. & Tel. Co.*, No. 92 Civ. 1735, 1998 U.S. Dist. LEXIS 3198, at *130 (S.D.N.Y. Mar. 16, 1998) (emphasis added) (quoting *Cabrera v. Jakabovitz*, 24 F.3d 372, 386 (2d Cir. 1994)). "The *critical element* is *control* of the agent by the principal." *Id.* (emphasis added).

No evidence of control exists here. There is no dispute that Sterling Stamos was formed in 2002 by the Sterling Partners and Peter Stamos and his family. Two entities were established, a management company for the investment funds, Stamos Partners Capital Management LP, and a general partner, Stamos Partners Associates GP, LLC. The Sterling Partners were only *limited partners* in the management entity, while the *sole general partner* was Stamos Partners Capital Management GP, LLC, an entity controlled by Peter Stamos in which no Sterling Partner has ever held an interest. (Limited Partnership Agreement of Stamos Partners Capital Management, LP ("LP Agmt.") § 1.05 and Schedule A (Seshens Decl., Ex. F); First Amended and Restated Limited Liability

Company Agreement of Stamos Partners Capital Management GP, LLC. (Seshens Decl., Ex. G).) Peter Stamos was the sole managing member of the general partner, of which the Sterling Partners were non-managing members. (Limited Liability Company Agreement of Sterling Partners Associates, LLC ("LLC Agmt.") § 1.05 (Seshens Decl., Ex. H).)

The governing documents for each entity vested all *control* over investment and operational decisions exclusively with Peter Stamos, manifesting control by Peter Stamos, and lack of control by any Defendant.[4] (LP Agmt. §§ 2.01, 2.02; LLC Agmt. §§ 2.01, 2.02.) Consequently, the Trustee cannot establish that Sterling Stamos, or any employee, "spoke" as an agent of the Sterling Partners through Sterling Stamos marketing materials or in post-December 11, 2008 individual emails.[5]

II. STERLING STAMOS MARKETING MATERIALS, POST-DECEMBER 11, 2008 EMAILS, AND THIRD-PARTY DUE DILIGENCE QUESTIONNAIRES ARE NOT BUSINESS RECORDS

The Trustee also may argue that the Sterling Stamos marketing materials, post-December 11, 2008 emails, and third-party due diligence questionnaires are admissible as business records under Fed. R. Evid. 803(6). Again, he is wrong.

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[4] Although the names and the organization of these entities have changed over time, the passive nature of the Sterling Partners' ownership interest and Peter Stamos' complete control of the business and its investments have not. Notably, by the time the post-December 11, 2008 emails were written, the Sterling Partners' passive ownership interest in Sterling Stamos had decreased to only 25%, following Merrill Lynch's acquisition of 50% of Sterling Stamos in 2007.

[5] The Trustee has not offered any evidence regarding the creation of a DeMarche Associates, Inc. due diligence questionnaire, which appears to be an incomplete draft, replete with unanswered questions and requests for additional information. (*See* Deposition Transcript of Kevin Okimoto ("K. Okimoto Tr."), Jan. 6, 2012, 152:9-21 (Seshens Decl., Ex. I).)

Under Rule 803(6), a record of "acts, events, conditions, opinions, or diagnoses" is not excluded as hearsay if:

> (A) "the record was made at or near the time by—or from information transmitted by—someone with knowledge";
> (B) "the record was kept in the course of a regularly conducted activity of a business";
> (C) "making the record was a regular practice of that activity";
> (D) "all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification"; and
> (E) "neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6).

To qualify, a document must satisfy each of these requirements. *See United States v. Strother*, 49 F.3d 869, 874 (2d Cir. 1995). Thus, only some records created by a business, or by an employee of the business, may qualify as a "business record" for purposes of Rule 803(6). *See, e.g.*, *Lion Oil Trading & Transp., Inc. v. Statoil Mktg. & Trading (US) Inc.*, No. 08 Civ. 11315, 2011 U.S. Dist. LEXIS 24516, at *18-19 (S.D.N.Y. Feb. 28, 2011) ("The mere fact that [a document] was created in the course of employment does not render it a business record."); *Morisseau v. DLA Piper*, 532 F. Supp. 2d 595, 621 n.163 (S.D.N.Y. 2008) ("An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule.").

A. Sterling Stamos Marketing Materials and Third-Party Due Diligence Questionnaires Do Not Satisfy Rule 803(6)

As to the marketing materials, the Trustee has no evidentiary basis to satisfy the requirements of Rule 803(6). Moreover, marketing materials and due diligence questionnaires are not "records" of "acts, events, conditions, opinions, or diagnoses" made at or near the time that the acts or events occurred. These materials do not *record*

routine events and cannot fit within the confines of the business records exception. *See*, *e.g.*, *In re Nassau Cnty. Strip Search Cases*, 742 F. Supp. 2d 304, 319 (E.D.N.Y. 2010) ("Although the scope of [Rule 803(6)] is broad, it is not unlimited; for example, it does not embrace operating or procedural manuals, which are not records of any act, transaction, occurrence, or event as required by the Rule." (citing 12A Federal Procedure: Lawyer's Edition § 33:445)).

First, the Trustee has not obtained a Rule 902(11) business records certification. None of the seven current or former Sterling Stamos employees he deposed gave competent or sufficient foundational testimony; none testified that these marketing materials or the diligence questionnaires were records created or maintained in the ordinary course of business or described the process by which specific documents were created. This evidentiary deficiency alone requires their exclusion. *See, e.g.*, *Hargett v. Nat'l Westminster Bank, USA*, 78 F.3d 836, 841-42 (2d Cir. 1996) (affirming the exclusion of evidence where the witness "did not recall the circumstances under which the document was created"); *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 828 F. Supp. 1114, 1119-20 (S.D.N.Y. 1993) (excluding evidence where the witness did not describe the method for creating the documents).

Second, by their very nature, marketing materials do not meet the standards for trustworthiness required by Rule 803(6). Business records are an exception to the hearsay rule because it is presumed that they are trustworthy based on the process by which they are created. *Strother*, 49 F.3d at 874 ("[T]he 'principal precondition' to admissibility is the sufficient trustworthiness of the record." (quoting *Saks Int'l, Inc. v. M/V Export Champion*, 817 F.2d 1011, 1013 (2d Cir. 1987).) "[T]he business record

exception is founded on the notion that such documents bear a sufficient degree of reliability 'because they are created either through systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." *Giannone v. Deutsche Bank Sec., Inc.*, No. 03 Civ. 9665, 2005 U.S. Dist. LEXIS 36948, at *9-10 (S.D.N.Y. Dec. 30, 2005) (quoting *In re Worldcom Inc. Sec. Litig.*, No. 02 Civ. 3288, 2005 U.S. Dist. LEXIS 2215, at *24 (S.D.N.Y. 2005)).

For example, bank statements, medical records, police reports, and business invoices are admissible as business records under Rule 803(6) because they are created as a matter of routine, or under circumstances that give rise to a guarantee of trustworthiness. *See, e.g., Bridgeway Corp. v. Citibank*, 91 Fed. App'x 727, 729 (2d Cir. 2004) (bank statements admissible as business records where it was bank branch's regular practice to make such records); *Menorah Home & Hosp. for the Aged & Infirm v. Fireman's Fund Ins. Co.*, No. 04 Civ. 3172, 2011 U.S. Dist. LEXIS 145423, at *7-10 (E.D.N.Y. Dec. 16, 2011) (invoices for construction services admissible as business records where invoices were regularly sent to vendors and created near the time costs were incurred); *Goldstein v. Laurent*, No. 09 Civ. 2437, 2011 U.S. Dist. LEXIS 89121, at *10-11 (S.D.N.Y. Aug. 2, 2011) (police report admissible as a business record under Rule 803(6)); *Shea v. Royal Enters., Inc.*, No. 09 Civ. 8709, 2011 U.S. Dist. LEXIS 63763, at *33-36 (S.D.N.Y. June 16, 2011) (medical records admissible as business records).

Marketing materials are very different. Marketing materials are not "records" of "acts, events, conditions, opinions, or diagnoses" made at or near the time the acts or events occurred, and they are far from routine. They are intended to sell, promote, and

present information in the most positive light possible, exactly as described in the testimony elicited by the Trustee.

- Sterling Stamos witnesses questioned about statements set forth in marketing materials referring to Fred Wilpon, Saul Katz, or David Katz as Sterling Stamos "investment professionals" or as part of the Sterling Stamos "investment team," testified that they did not reflect the operation of the investment side of Sterling Stamos' investment business at the time. (*See, e.g.*, K. Barcelona Tr. 196:22-198:15 (Seshens Decl. Ex. D); Bankruptcy Rule 2004 Deposition Transcript of Ashok Chachra, Oct. 8, 2010, 119:19-122:15, 123:21-124:14, 130:3-134:22 (Seshens Decl., Ex. J); K. Okimoto Tr. 139:20-141:11, 142:12-19, 152:2-16, 152:22-153:8 (Seshens Decl., Ex. I); *see also, e.g.*, S. Katz Tr. 80:22-83:5 (Seshens Decl., Ex. B).) At most, these statements were intended to convey a very general involvement by those individuals, by recommending potential investment managers or vetting their reputations in the broader business community. (*See, e.g.*, Deposition Transcript of Peter Stamos ("P. Stamos Tr."), Jan. 5, 2012, 229:24-231:6, 231:21-233:14, 234:13-235:9 (Seshens Decl., Ex. K).

- Peter Stamos described as "marketing puffery" statements in a Sterling Stamos "firm overview" dated July 2005 that Sterling Equities "has developed a deep expertise in hedge funds" and provided unique "due diligence capabilities," while recognizing that Sterling Equities did have *real estate* due diligence experience. (Bankruptcy Rule 2004 Deposition Transcript of Peter Stamos, Aug. 19, 2010, 167:22-169:10 (Seshens Decl., Ex. L).)

- Peter Stamos and Chris Stamos both testified that they purposefully played up their association with Sterling Equities and its Partners, particularly early on in Sterling Stamos' existence, so as to take advantage of the "halo effect" provided by the Sterling Partners' business reputation across the New York community. (*See, e.g.*, Chris Stamos Deposition Transcript, Jan. 4, 2012, 46:15-47:23, 50:25-52:4 (Seshens Decl., Ex. M); P. Stamos Tr. 300:10-301:19 (Seshens Decl., Ex. K).)

B. Sterling Stamos Post-December 11, 2008 Emails Do Not Satisfy Rule 803(6)

Nor do the post-December 11, 2008 emails constitute business records under Rule 803(6). These emails reflect communications following Madoff's arrest by and between Sterling Stamos personnel and other third parties, but not with any Sterling Partner. The Trustee relies on these communications as evidence that Sterling Stamos personnel "warned" the Sterling Partners about Madoff years before his fraud was disclosed. All of

the Trustee's post-December 11, 2008 emails were personal responses to a shocking event—the disclosure of Madoff's fraud—and were far from records "kept in the course of a regularly conducted activity," as Rule 803(6)(B) requires. The emails assert, for example:

- "[Madoff] wouldn't make it through our risk and ops controls – lack of transparency, no third party administrator, etc. Unfortunately, our partners – Saul and Fred – against our recommendations invested as individuals and through their real estate firm." (Tr. Opp. Mem. at 22 (quoting Bohorquez Decl., Ex. 149).)[6]

- "Please let me know if you would like to discuss this further as we are trying to inform all of our investors that our due diligence process rejected Madoff but, unfortunately, the Katz and Wilpon families maintained their investment independent of our advice." (*Id.* at 22-23 (quoting Bohorquez Decl., Ex. 150).)

- "We had recommended to [the Wilpon and Katz families] to redeem [from Madoff] for years but they kept their investment independent of our recommendation." (*Id.* (quoting Bohorquez Decl., Ex. 151).)

These are classic hearsay, statements made out of court and not under oath by non-parties. None is admissible for the truth of the matter asserted.

First, the post-December 11, 2008 emails refer vaguely to conversations that purportedly took place *years* in the past. Accordingly, they all fail Rule 803(6)(A)'s requirement that the "record" in question be made "at or near the time" of the act, event, condition, opinion, or diagnosis recorded therein. "The timeliness with which a report is prepared with relation to the events recorded therein is important 'to assure a fairly accurate recollection of the matter . . . [and] because any trustworthy habit of making regular business records will ordinarily involve the making of the record

[6] Citations to the "Bohorquez Decl." refer to the Declaration of Fernando A. Bohorquez, Jr. in Opposition to the Defendants' Motion for Summary Judgment, dated February 9, 2012 (doc. no. 126).

contemporaneously.'" *Strother*, 49 F.3d at 876 (emphasis added) (quoting *Seattle-First Nat'l Bank v. Randall*, 532 F.2d 1291, 1296 (9th Cir. 1976)).

Courts generally have concluded that a delay of more than a couple of months between when an event occurred and when the record of that event was made is too long. *See, e.g.*, *Strother*, 49 F.3d at 876 (delay of six months too long for record to be considered made "at or near the time" of the event); *United States v. Lemire*, 720 F.2d 1327, 1350 (D.C. Cir. 1983) (delay of one year and ten months too long to satisfy the timeliness requirement); *United States v. Kim*, 595 F.2d 755, 760 (D.C. Cir. 1979) (delay of more than two years too long to satisfy the timeliness requirement); *Carrie Contractors, Inc. v. Blount Constr. Grp. of Blount, Inc.*, 968 F. Supp. 662, 666 (M.D. Ala. 1997) (delay of approximately seventeen months too long to satisfy the timeliness requirement).

Second, many of the post-December 11, 2008 emails do not satisfy Rule 803(6) because they were plainly not sent for business purposes, as confirmed by the discovery taken by the Trustee.[7] *See, e.g.*, *United States v. Kaiser*, 609 F.3d 556, 574 (2d Cir. 2010) ("The purpose of [Rule 803(6)] is to ensure that documents were not created for 'personal purpose[s] . . . or in anticipation of any litigation' so that the creator of the document 'had no motive to falsify the record in question.'" (quoting *United States v. Freidin*, 849 F.2d 716, 719 (2d Cir. 1988)); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 571 (D. Md. 2007) (Mag. Judge) ("It is essential for the [business records] exception to apply that [a

[7] For example, Basil Stamos testified that the emails he sent to his philanthropic partners following Madoff's arrest were to inform them that Sterling Stamos was not affected by the Madoff fraud at a time when Basil Stamos was not a Sterling Stamos employee and Sterling Stamos had no philanthropic arm of its business. (Basil Stamos Deposition Transcript, Jan. 3, 2012, 59:12-18, 70:2-71:5 (Seshens Decl., Ex. N).)

document] was made in furtherance of the business' needs, and not for the personal purposes of the person who made it.").

Third, the emails were personal responses to a shocking event—the disclosure of Madoff's fraud—and are far from records "kept in the course of a regularly conducted activity," as required by Rule 803(6)(B). *See Strother*, 49 F.3d at 876 (documents "drafted in response to unusual or 'isolated' events" are not admissible as business records); *see also Lion Oil*, 2011 U.S. Dist. LEXIS 24516, at *19 ("changes in standard contractual terms in response to supply disruptions caused by extreme weather events"—*i.e.*, two hurricanes—were "unique responses to unusual or isolated events" and thus were not records kept in the course of regularly conducted business activity).

Finally, the post-December 11, 2008 Sterling Stamos emails were not part of a regularly conducted business activity.[8] To establish the "regular practice" element of Rule 803(6)(C), the proponent must show that the document was "kept pursuant to a routine procedure," "regularly prepared," or "filled out in the regular course of business." *United States v. Freidin*, 849 F.2d 716, 722 (2d Cir. 1988) (citing *Wallace Motor Sales v. Am. Motor Sales*, 780 F.2d 1049, 1061 (1st Cir. 1985); *United States v. Sanders*, 749 F.2d 195, 197-98 (5th Cir. 1984)). "Memoranda that are casual, isolated, or unique do not qualify as business records[.]" 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 803.08[2] (2d ed. 2011); *cf.* Fed. R. Evid. 803(6) advisory committee's note ("Absence of routineness raises lack of motivation to be accurate.")

[8] For example, the post-December 11, 2008 emails from Basil Stamos and Tim Dick completely fail to satisfy the "regular practice" prong of Rule 803(6). *See* Bohorquez Decl. Exs. 125, 138-48.

Thus, courts in this Circuit have generally excluded documents not made as part of a business' "regular practice." *See, e.g.*, *In re Parmalat Sec. Litig.*, 659 F. Supp. 2d 504, 526 (S.D.N.Y. 2009) (excluding report where witness testified that it was "not a document that was commonly issued" by its preparer); *Yankee Bank for Fin. & Savings, FSB v. Task Assocs., Inc.*, 139 B.R. 71, 79-80 (N.D.N.Y. 1992) (excluding letter where there was no showing that it was the regular practice of the subject business to draft such a letter); *cf. Freidin*, 849 F.2d at 719-723 (excluding memorandum drafted by secretary whose job responsibilities did not typically involve preparing such memoranda).

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court preclude the Trustee's counsel from referring to or offering at trial the documents identified in Exhibits A and B attached hereto, or any other similar documents, because they are inadmissible hearsay to which no evidentiary exception applies.

Dated: New York, New York
March 5, 2012

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EXHIBIT A

Representative List of Sterling Stamos Marketing Materials and Third Party Due Diligence Questionnaires Subject to Defendants' Motion in Limine

Document
Feb. 9, 2012 Bohorquez Decl., Ex. 213; Trustee 187
Feb. 9, 2012 Bohorquez Decl., Ex. 117; Trustee 308
Trustee 110, SSMT01876757
Trustee 111, SSMT00025935
Trustee 257, SSMT01855447
Trustee 267, SSMT00184407
Trustee 266, SSMT02257869
SSMT00002134
SSMT00024050
SSMT00184406; SSMT00229008
SSMT01238316
SSMT01291191

EXHIBIT B

Representative List of E-mails Sent By or To Sterling Stamos Subject to Defendants' Motion in Limine

Document
Feb. 9, 2012 Bohorquez Decl., Ex. 120, SSMT01010357
Feb. 9, 2012 Bohorquez Decl., Ex. 122, Trustee 227
Feb. 9, 2012 Bohorquez Decl., Ex. 125, Trustee 312
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