Irving H. Picard v. Saul B. Katz et al Doc. 163

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor,	Adv. Pro. No. 08-01789 (BRL) SIPA LIQUIDATION (Substantively Consolidated)
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. SAUL B. KATZ, et al., Defendants.	Adv. Pro. No. 10-5287 (BRL) 11-CV-03605 (JSR) (HBP)

TRUSTEE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE No. 5 TO DEEM STATEMENTS BY CERTAIN STERLING STAMOS PARTNERS AND EMPLOYEES AS ADMISSIONS OF THE STERLING PARTNERS

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Irving H. Picard, as trustee ("Trustee") for the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") and the estate of Bernard L. Madoff ("Madoff"), under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.*, by and through his undersigned counsel, hereby submits this memorandum of law in support of his motion *in limine* to deem statements made by agents and/or employees of the Sterling Partners[1] in one of their businesses, Sterling Stamos Partners Capital Management, LP ("Sterling Stamos") as admissions by the Sterling Partners pursuant to Federal Rule of Evidence 801(d)(2)(D).

I. PRELIMINARY STATEMENT

The Trustee intends to introduce evidence obtained from the records of Sterling Stamos, an entity that is partially owned by the Sterling Partners and which is a partnership between the Sterling Partners and Peter Stamos. All Sterling Stamos records, documents and statements on which the Trustee intends to rely at trial were created and/or adopted by agents of the Sterling Partners in the scope of and during the existence of their agency, and therefore are non-hearsay party admissions of the Sterling Partners for purposes of Fed. R. Evid. 801(d)(2)(D). Indeed, having accepted and retained the benefits of their partnership in Sterling Stamos—including millions of dollars in incentive and management fees and $115 million for the sale of only half of their interest, the Sterling Partners of Sterling Stamos cannot now be heard to deny that statements made by and on behalf of that partnership are admissible against them.

[1] The Sterling Partners for purposes of this Motion are Saul B. Katz, Fred Wilpon, David M. Katz, Richard A. Wilpon, Michael Katz, L. Thomas Osterman, Arthur Friedman, Jeffrey S. Wilpon, Marvin B. Tepper and Gregory Katz.

II. ARGUMENT

Rule 801(d)(2)(D) provides that a statement is not hearsay when it is "made by the party's agent or employee on a matter within the scope of that relationship and while it existed[.]" Fed. R. Evid. 801(d)(2)(D) (2011). To establish a statement is admissible under the Rule, the party seeking to introduce the declaration must show "(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it 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). Admissibility under this rule is subject to "liberal treatment." *Id.*; *see also* Committee Notes on Rules 1972 Amendments (calling for "generous treatment of this avenue to admissibility").

A. STERLING STAMOS' PARTNERS AND EMPLOYEES ARE AGENTS OF THE STERLING PARTNERS

A statement of a party's business partner, made during the course of the partnership and in connection with its business, is admissible against the party. *U.S. v. Saks*, 964 F.2d 1514, 1524 (5th Cir. 1992); *see also U.S. v. Kelley*, 305 F. App'x 705, 707-08 (2d Cir. 2009) (tax returns of defendant's partnership were admissible as non-hearsay statement by party's agent in prosecution for securities fraud and wire frauds; the tax forms were signed by the managing partner within the scope of his responsibilities to the partnership); *Pfizer Inc. v. F&S Alloys & Minerals Corp.*, 856 F. Supp. 808, 811 n.1 (S.D.N.Y. 1994) (statements by personnel of a "de facto partner" constitute Rule 801(d)(2)(D) party-admissions); *United States v. Clark*, 613 F.2d 391, 403-04 (2d Cir. 1979) (statements of participants in joint venture admissible against joint-venturer defendant under Rule 801(d)(2)(D) and (E)). Here, all documents sought to be offered by the Trustee are statements by the Defendants' partner Peter Stamos and/or employees or agents he authorized to act on behalf of the partnership.

1. Background of Sterling Stamos

Sterling Stamos was formed as a partnership between Peter Stamos and the Sterling Partners, primarily Fred Wilpon and Saul Katz. (*See* excerpts from the Deposition of Peter Stamos dated Jan. 5, 2012, at 14:19-23 attached to the accompanying Declaration of Regina Griffin dated March 5, 2012 ("Griffin Decl.").) Fred Wilpon and Saul Katz chose Peter Stamos to be the Chief Executive Officer for Sterling Stamos (*Id.* at 196:19-23), which at first was to serve as a family office for the Katz, Wilpon and Stamos families. (*Id.* at 28:9-14.)

Sterling Stamos is an investment manager of private investment funds created in 2002. Fred Wilpon, Saul Katz and Peter Stamos structured an entity whereby the eight Sterling Partners collectively owned fifty percent of Sterling Stamos as well as fifty percent of the general partner of all of Sterling Stamos' domestic private investment funds (the "GP entity"), while Peter Stamos and the Stamos partners owned the other fifty percent of these entities. (*See* Griffin Decl. Exh. 45.) A board of directors was established with Saul Katz and his son representing the Sterling Partnership side and Peter Stamos and his father representing the Stamos partnership side. (*See* Griffin Decl. Exh. 12 at 37:5-15.)

Sterling Stamos' partnership agreement itself creates an agency relationship between its partners—including the Sterling Partners—and the partnership's partners and/or employees. Pursuant to the partnership agreement, Peter Stamos, the individual authorized to act on behalf of the General Partner of Sterling Stamos, is vested with broad authority to take any action he deems "necessary or advisable or incidental" to carry out the purposes of the partnership. (*See* Limited Partnership Agreement of Stamos Partners Capital Management, LP, dated June 15, 2002, at SE_T751849-1877; attached to the Griffin Declaration as Exh. 13; First Amended and Restated Limited Partnership Agreement of Stamos Partners Capital Management, LP, dated Dec. 31, 2003, at SSKW00019536-19544; attached to the Griffin Declaration as Exh. 14; Third

Amended and Restated Limited Partnership Agreement of Stamos Partners Capital Management, LP, dated July 1, 2007, at SSMT02406282-6353, attached to the Griffin Declaration as Exh. 15.) Among other things, the General Partner is and was entitled to appoint Partners to serve as officers of the Partnership with such titles and responsibilities as the General Partner in its sole discretion deems appropriate; and authorize any Partner, officer, employee or other agent to act for and on behalf of the Partnership as to the foregoing and all matters pertaining thereto. (Griffin Decl. Exh. 13, § 2.02(o)-(p), at SSKW00019543-4.)[2] Under the Agreement, any limited partner assigned by the General Partner to perform any duties relating to the partnership agrees to perform those duties "diligently, faithfully and loyally. (*Id.* § 2.04(c), at SSKW00019544.) Although the partnership has twice been restructured, as discussed below, the authority of the General Partner and its agents to act on behalf of the partnership has not fundamentally changed over the years.

a. Pre-2005: The Sterling Partners Participate in Both the Financial and Investment Side of the Partnership

Notwithstanding that Sterling Stamos was structured as a limited partnership with only the General Partner authorized to act on behalf of the business, Sterling Stamos made no significant business decision during the early years of its operation without Defendant Saul Katz's approval. (*See* Griffin Decl. Ex. 11, Rule 2004 Deposition of Peter Stamos, dated Aug. 19. 2010, at 63:2-4.) Saul Katz, whom Peter Stamos understood to be acting on behalf of all the

[2] In addition to the Sterling Partners, the Partners of Sterling Stamos identified in the 2002 agreement include Noreen Harrington, Spiro Stamos, Derek Daley, Ellen Horing, Kevin Okimoto, Ashok Chachra, Christopher Stamos, Basil Stamos. (See Griffin Decl., Ex.13, Sterling Stamos Agreement, Bates No. SE_T751849, at 1877.) The schedule of partners identified in the 2003 agreement include non-defendants Spiro Stamos, Ellen Horing, Kevin Okimoto, and Ashok Chachra. (See Griffin Decl., Ex.14, First Amended Sterling Stamos Agreement, Schedule A, Bates No. SSKW00019536 at SSKW00019576.)

Sterling Partners (Griffin Decl. Exh. 12 at 16:18-23), was intimately involved in the financial and business aspects of the business, including payroll, budget profitability and capital expenditures. (Griffin Decl. Exh. 11 at 62:17-23; Rule 2004 Deposition of Saul Katz, dated Aug. 4, 2010, at 143:14-144:21, attached to the Griffin Declaration as Exh. 6.) The Board of Directors consisted of Saul Katz and his son David, and Peter Stamos and his father Spiro Stamos. (Griffin Decl. Exh. 12 at 37:5-15.) Peter Stamos understood that all decision-making authority around final investment decisions, hiring and firing and acceptance and non-acceptance of investors had been delegated to him by the Board, including Saul and David Katz. (*Id.* at 46:12-47:7.)

A Sterling Stamos 2004 prospectus stated that "Saul and David Katz are general partners of Sterling Stamos and actively involved in investment decisions as well as management of Sterling Stamos." (*See* Griffin Declaration Exh. 40.) Similarly, a hedge fund questionnaire response identified Saul and David Katz as two of the four "primary portfolio decision makers" at Sterling Stamos. (*See* Griffin Decl. Exh. 16 at SSMSAA0184408-10.) As Peter Stamos testified, as of 2004-05:

> [T]he Katz and the Wilpon and Sterling Equities partners represented a substantial portion of all of the assets that we managed. So to call them our largest limited partner would be an understatement . . . . If you included in that all of the referrals that they made to us of limited partners who also chose to invest with us, the Sterling Equities related investments, their investments with us, was a significant, I believe, majority of the assets we had.

(Griffin Decl. Exh. 12 at 297:25-298:10.) Sterling Partners' capital represented "very conservatively" between 50-100% of the firm's capital for the first year and a half. (*See* deposition of Kevin Barcelona, dated Dec. 15, 2011, at 99:15-19, attached to the Griffin Declaration as Exh. 1.)

b. July 2005: The Sterling Partners are Separated from the Investment Side of the Partnership in Response to Defendant Saul Katz's concerns

In July 2005, Sterling Stamos registered as an investment advisor with the Securities and Exchange Commission. Saul Katz had expressed concerns that such registration would require the Sterling Partners to disclose their relationship with BLMIS, which would endanger the Sterling Partners' relationship with Madoff. (Griffin Decl. Exh. 11 at 49:19-50:1; 50:12-16, 126:3-127:21.) In order to alleviate Saul Katz' concerns, Sterling Stamos engaged in a physical and legal restructuring to separate the Sterling Partners from the investment side of the business. (*Id.* at 56:14-57:20.) The purpose of the Sterling Stamos restructuring was to separate "the financial management of the business and the investment side of the business" (*Id.* at 63:21-24), so that the Sterling Partners could continue to participate in Sterling Stamos without having to disclose their investment in BLMIS to regulators. (*Id.* at 55:5-56:21.)

Saul Katz remained a member of the Board of Directors (Griffin Decl. Exh. 11 at 64:25-65:8), where he continued to represent the Sterling Partners' interests and remained responsible for determining bonus incentive payments and the like. (See Deposition of Saul Katz, dated Jan. 13, 2012, at 125:20-126-22, attached to the Griffin Declaration as Exh. 7.)

c. 2007: Merrill Lynch Buys Half of Each Partner's Share of the Partnership

The Sterling Partners and the Stamos Partners each sold half of their respective interests in Sterling Stamos and the GP entity to Merrill Lynch in 2007.[3] Saul Katz participated in

[3] At one point both Merrill Lynch and Citibank expressed interest in buying into Sterling Stamos. Sterling Partners board meetings note that Saul Katz was to tell Peter Stamos that "if we don't sell we'll be running [Sterling Stamos] on a bottom line basis." *See* Griffin Decl., Ex. 17 at SE_T668814.

negotiations on behalf of the "Sterling Equities side" of the partnership, conferring with Peter Stamos (Griffin Decl. Exh. 12 at 237:9-238:25), and negotiating directly with Merrill Lynch on certain matters. (*See* Deposition of Kevin Dunleavy, dated Dec. 21, 2011, at 69:20-70:22; excerpts from the Dunleavy deposition are attached to the Griffin Declaration as Exh. 4.) Merrill Lynch paid a total of $230 million for a fifty percent stake, half of which was paid out to the Sterling Partners and half of which was paid out to the Stamos partners, proportionate to their respective ownership stakes in the firm. (Griffin Decl. Exh. 12 at 239:19-23 and Exh. 2.) Saul Katz continued to participate actively on the Sterling Stamos Board. (*See* Griffin Decl. Exhs. 19 and 20.)

2. Sterling Stamos Employees are Agents of the Sterling Partners

Each of the partners of Sterling Stamos, including the Sterling Partners, authorized Peter Stamos, and any employee or agent Peter Stamos chose, to act on their behalf for any and all matters connected with the partnership. Each partner provided Peter Stamos or his designee power of attorney to execute any document of "any kind necessary or desirable to accomplish the business, purpose and objectives of the Partnership." (Griffin Decl. Exh. 14, § 9.02(b) at SSKW00019565.) To the extent any partner was assigned to perform any duties in connection with the partnership, each assumed a fiduciary duty to the partnership. These are textbook examples of a principal/agency relationship, in which each Sterling Stamos partner authorized the General Partner and any other partner or employee who act on his or her behalf in furtherance of the partnership. *See* Restatement (Third) of Agency §1.01 (2006); *Saks*, 964 F.2d at 1524 ("[T]he declarations of one partner made during the existence of the partnership and in relation to its affairs are admissible against the other partners even if the declarant is not a party to the action.").

Authorizing another to act on one's behalf is the essence of an agency relationship. "A principal's failure to exercise the right of control does not eliminate it." Restatement (Third) of Agency §1.01, cmt. C (2006). An anecdote described by Peter Stamos makes this point clearly. Peter Stamos testified that at one point early on, Fred Wilpon confronted him in the hallway and asked why Peter Stamos had fired "their friend." Peter Stamos explained his reasoning, to which Fred Wilpon replied, "That's exactly why it is I chose you." (Griffin Decl. Exh. 12 at 35:5-6; Rule 2004 Deposition of Ashok Chachra, dated Oct. 8, 2010, attached as Exh. 3 to the Griffin Decl. at 94:4-96:14.)

The breadth of the authority delegated by the partners to Peter Stamos is relevant only, as discussed below, to show that virtually any act undertaken by him or anyone he employed or engaged on behalf of Sterling Stamos was within the scope of his agency.

B. STATEMENTS BY STERLING STAMOS PARTNERS AND EMPLOYEES ARE ADMISSIBLE AGAINST THE STERLING PARTNERS

1. Agency Principles Are Not Displaced by the Limited Liability Structure of the Partnership Entity

The Sterling Defendants' prior arguments about "control" suggest that they will argue that ordinary agency principles do not apply because Sterling Stamos was a limited partnership. But whether and to what extent the partners' liability for acts of the partnership or its agents may be limited is not relevant to the question of whether the agency relationship exists.[4] A principal on whose behalf an agent acted remains a principal even if his liability for those acts is capped at

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[4] Indeed, the common law of agency has been codified in Delaware state law. *See* Delaware Revised Uniform Partnership Act § 15-301 (each partner is an agent of the partnership whose acts in the ordinary course of partnership business bind the business); *see also Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999) ("Unquestionably, the general partner of a limited partnership owes direct fiduciary duties to the partnership and to its limited partners.")

the amount of his capital investment. Thus, for example, the common law principle that notice to one general partner constitutes notice to all partners applies to limited partners as well as general partners. *Kaplan v. United States*, 133 F.3d 469, 475 (7th Cir. 1998); *see also Employers Insur. of Wausau v. Banco de Seguros Del Estado*, 199 F.3d 937, 944 (7th Cir. 1999) (explaining that *Kaplan* was based on principle that partnership is a "web of interlocking agency relationships, in which each principal is imputed actual knowledge from the knowledge of any of his agents" and applying principle to facts before it); *Higgins v. Shenango Potter Co.*, 256 F.2d 504, 510 (3d Cir. 1958) (rule that notice to any partner is imputed to all partners whether or not partnership is a limited or general partnership; "limitations on liability have no relevancy to a limited partner's being held to answer for profits realized on his contribution to the capital of the partnership").

Indeed, a limited partnership can be held criminally liable for specific intent crimes of its general partner, with the attending legal consequences to the limited partner. *See United States v. Heffne*r, 916 F. Supp. 1010, 1012, n.5 (S.D. Cal. 1996) (rejecting limited partnership's argument that it could not be held liable for the acts of the president of the general partner and noting that determination of limited partner of limited partnership's "innocent owner" defense to forfeiture proceeding was not ripe until after conviction). As the court in that case noted, "a business entity cannot create a second, or a third business entity and argue that vicarious liability cannot be imputed through the various layers of entities." *Id*. at 1012.

2. Having Knowingly Retained the Fruits of Sterling Stamos' Business, the Sterling Partners are Estopped from Denying an Agency Relationship with Sterling Stamos' Partners and Employees

The Sterling Partners cannot disavow the existence of an agency relationship with the Sterling Stamos partners and employees when they have accepted and retained the benefits of the partnership—which include management fees, incentive fees, and $115 million from Merrill

Lynch for half of their partnership interest. "[K]nowing acceptance of the benefit of a transaction ratifies the act of entering into the transaction. This is so even though the person also manifests dissent to becoming bound by the act's legal consequences." Restatement (Third) of Agency §4.01 cmt. D (2006); *See Marine Midland Bank v. John E. Russo Produce Co., Inc.*, 50 N.Y.2d 31, 44, 427 N.Y.S.2d 961,968 (1980) ("A principal that accepts the benefits of its agent's misdeeds is estopped to deny knowledge of the facts of which the agent was aware.") (citing *Rocky River Dev. Co. v. German Am. Brewing Co.*, 193 A.D. 197, 201, 184 N.Y.S. 155, 158 (4th Dep't 1920) (discussing the rule that a principal is precluded from denying knowledge possessed by their agents, where a fraudulent transaction has worked out to the material benefit of the principal because "such a principal, even though ignorant and innocent, cannot receive the benefits of such a fraudulent transaction without adopting, as an incident thereto, the means used by the agent to produce the result").

3. The Sterling Defendants Are Not Mere "Limited Partners" of Sterling Stamos

Whether or not the Sterling Partners' liability for the conduct of Sterling Stamos is limited under Delaware partnership law, they were and are full partners in the partnership—both Sterling Stamos and the GP entity—for purposes of an agency analysis. No formal documentation is necessary to create an agency relationship; it can be established by the conduct of the actors. *See, e.g., U.S. v. Pilarnos*, 864 F.2d 253, 257 (2d Cir. 1988) (evidence that defendant and declarant agreed that declarant would act as agent in criminal negotiations satisfied Rule)*; United States v. Sudeen*, 434 F.3d 384, 390-91 (5th Cir. 2005) (evidence that investors had believed that individual was defendant's "associate" or "business partner" sufficient to satisfy Rule).

In addition to all the conduct described above, the Sterling Partners are members and part owners of the General Partner of all of Sterling Stamos' domestic funds. They were fifty percent owners, and even now remain twenty five percent owners, of Sterling Stamos itself. At all times, both before and after the sale to Merrill Lynch, the interests of the "Sterling side" of the partnership have been represented on the Board of Directors, which is responsible for the business operations of Sterling Stamos and which Peter Stamos views as the source of his authority, by Saul Katz. (Griffin Decl. Exh. 12 at 37:10-12, 46:12-23, 281:1-7.) Such a de facto partnership establishes that each of the partners is an agent of the other for purposes of admissibility of statements made in connection with the partnership. *Pfizer*, 856 F.Supp. at 811 n.1 (S.D.N.Y. 1994) (statements of personnel of a "de facto partner" suffice for the purposes of Rule 801(d)(2)(D) party-admissions); *see also Gordon v. Ross*, No. 87 CIV. 7105 (VLB), 1994 WL 603020 at *1 (S.D.N.Y. Nov. 2, 1994), *rev'd on other grounds*, 84 F.3d 542 (2d Cir. 1996) (statements by the defendant-president and founder of a clearing broker that he considered two different executive "equal partners" with himself, even though the referenced executives made no capital contributions when they joined the firm, sufficed to admit statements of one of those executives against the defendant as a party-opponent admission).

C. THE STATEMENTS AT ISSUE WERE MADE DURING THE COURSE OF AND RELATING TO MATTERS WITHIN THE AGENTS' AUTHORITY

Applying basic principles of agency here, it is clear that Sterling Stamos' business records, and statements authored by and/or adopted by its partners, employees and other authorized agents within the scope of their agency and employment, are binding admissions upon the partners of the business, including the Sterling Partners.

The Sterling Stamos partnership was organized to provide "a full range of investment advisory and management services, and acting as an investment manager or management

company. (*See* Griffin Decl. Exh. 13, Sterling Stamos Agreement, § 1.03 "Purposes of the Partnership," at SE_T751849-1852.) Sterling Stamos also used a mission of corporate philanthropy to solicit investors. As part of this effort, Sterling Stamos adopted a mission to donate a substantial portion of its profits to philanthropic causes. (*See* Deposition of Basil Stamos, dated Jan. 3, 2012, at 14:7-9; attached to the Griffin Declaration as Exh. 9.) Basil Stamos testified that Peter Stamos' objectives for Sterling Stamos were to "build a world-class investment company that had a strong social conscience and a strong philanthropic arm; that we would do something that other firms didn't do, and that was to give a substantial portion of our profits to good work." (*Id.* at 30:14-22.)

All partners in Sterling Stamos, including the Sterling Equities partners, were responsible for marketing their funds to potential investors and to solicit additional investors. Griffin Decl. Ex. 12 at 30:19-32:17**.** The profits of the Sterling Stamos business, including 1% management fees and 10% Asset Under Management incentive fees, were split among the partner-owners, including the Sterling Equities Partners, according to the respective allocations set forth in the governing partnership agreements. (*See* Griffin Decl. Exh. 13, § 3 "Capital Accounts of Partners and Operations Thereof," at SE_T751849-1866; Griffin Decl. Exh. 14, § 3 "Capital Accounts of Partners and Operations Thereof," at SSKW00019522-19557.) In addition, the Sterling Equities reaped more than $115 million for the sale of 50% of their ownership interests to Merrill Lynch in 2007.

As a matter of law, because the Sterling Equities Partners reaped the benefits created by the work and actions of their Sterling Stamos agents and partners, they are estopped from denying the existence of that agency relationship. *See Marine Midland Bank*, 50 N.Y.2d at 44.

Thus the statements made and/or adopted by Sterling Stamos' partners and/or agents in the course of the partnership's business activities of i) soliciting, marketing and communicating with investors regarding their investments, ii) identifying, evaluating and managing investment managers and vehicles, are admissions of the Sterling Partners pursuant to Fed. R. Evid. 801(d)(2)(D). This includes all statements made by the following partners and/or employees of Sterling Stamos and documents and statements created or adopted during the course of their partnership and/or employment relationship and within the scope of their duties/employment/agency:

1. ***Peter Stamos*** – Was at all times Sterling Stamos' Chief Executive Officer. (Griffin Decl. Exh. 12 at32:1-20.) The partners of Sterling Stamos, including the Sterling Equities Partners, expressly authorized Peter Stamos to act as their general partner and agent to make all decisions for the benefit of the Sterling Stamos partnership, including final investments decisions, management decisions, and hiring decisions. (Griffin Decl. Exh. 12 at 32:12-33:3; 46:12-20.) Thus all statements by Peter Stamos in the course of conducting Sterling Stamos' business -- including statements to investors about their investments, statements to investment managers, statements to other SS employees about the business of Sterling Stamos -- are admissions of the Sterling Partners under Fed.R.Evid. 801(d)(2)(D). (*See, e.g*., Griffin Decl. Exhs. 22 and 23.)

2. ***Kevin Okimoto*** -- Between July 2002 and June 2009, Kevin Okimoto served as head of the Investment Management Group and/or Chief Operating Officer of Sterling Stamos. Okimoto was also a founding partner of Sterling Stamos with the Sterling Partners. He was responsible for developing and maintaining investor relations, preparing marketing materials on behalf of the partnership, and performing due diligence analyses on fund managers. (*See*

Deposition of Kevin Okimoto, dated Jan. 6, 2012, at 24:16-19; 31:23-32:17, true and correct copies of which are attached to the Griffin Declaration as Exh. 8.) Thus, the statements Okimoto made to investors and the statements he prepared, reviewed and/or authorized to be made by other Sterling Stamos employees or agents to potential and/or existing investors, are admissions which bind the Sterling Stamos partners, including the Sterling Partners pursuant to Fed.R.Evid. 801(d)(2)(D). (*See, e.g*., Griffin Decl. Exhs. 33-37.)

3. ***Derek Daley --*** Between 2002-2003 and 2008-2010, Derek Daley was a partner in Sterling Stamos with the Sterling Partners. He served in numerous capacities at Sterling Stamos, including acting as its General Counsel and its Chief Operating Officer. Statements made by Daley in the course of conducting Sterling Stamos' business, to the extent not protected by attorney-client privilege or the work product doctrine, are admissions of the Sterling Partners. (See, e.g., Griffin Decl. Exhs. 38 and 39.).

4. ***Ashok Chachra*** – Ashok Chachra began his career at Sterling Stamos as an investment associate in 2002, later acting as a Portfolio Manager in 2004, then Senior Portfolio Manager in 2005, finally serving as Sterling Stamos' Chief Investment Strategist until he left the company in 2010. (Griffin Decl. Exhs. 3 at 50:4-51:1, 320:14-17; and Exhs. 25 and 40.) Chachra also was a founding partner of Sterling Stamos. (Griffin Decl. Exh. 11 at 118:23-119:11.) Chachra's responsibilities included meeting with and conducting due diligence of new and existing investment managers for Sterling Stamos and overseeing teams that conducted due diligence and fund analysis. (Griffin Decl. Exh. 3 at 51:13-52:5 and 25.) Thus, the statements Chachra made in the course of those activities on behalf of the Sterling Stamos partnership are admissions of the Sterling Partners under Fed.R.Evid. 801(d)(2)(D). (*See, e.g.*, Griffin Decl. Exhs. 41 and 44.)

5. ***Rohit Kumar*** – Rohit Kumar served as Sterling Stamos' Managing Director of Risk from July 2005 until March 2010. (Griffin Decl. Ex. 25 and 43at ML&CI000006546; Ex. 12 at 249:1-250:6.) His responsibilities included control of risk and volatility and he reported on that subject to clients, as well as attended meetings with clients and answered questions. (Griffin Decl. Ex. 10, Litigation Deposition Testimony of Chris Stamos, dated January 4, 2012 , 68:9-69:12.) Thus, the statements Kumar made in the course of those activities on behalf of the Sterling Stamos partnership are admissions of the Sterling Partners under Fed.R.Evid. 801(d)(2)(D). (*See, e.g.*, Griffin Decl. Exhs. 41 and 42)

6. ***Kevin Barcelona*** – Kevin Barcelona is Sterling Stamos' Chief Financial Officer ("CFO"), a position he has held since April 2004. (See Griffin Decl. Exh. 1 at 42:12-13; 46:13-15.) His responsibilities include the accounting and activities of Sterling Stamos management company, coordinating fund-related reporting to investors and partners, fund strategy, and audit and tax reporting. (*Id.* 47:8-49:1.) He also performs operational due diligence to evaluate Sterling Stamos investment managers and participates in the preparation of marketing materials. (Griffin Decl. Ex. 1 at 121:18-122:22; 123:1-17, 145:7-146:7; 147:3-11; 150:25-151:9; 187:1-6.) Thus, the statements Barcelona made to Saul Katz and other Sterling Equities partners, and the statements he prepared, reviewed and/or authorized to be made by other Sterling Stamos employees or agents to potential and/or existing investors, are admissions which bind the Sterling Stamos partners, including the Sterling Equities partners pursuant to Fed.R.Evid. 801(d)(2)(D). (*See* Griffin Decl. Exhs. 25-28.)

7. ***Chris Stamos*** – Chris Stamos began working with Sterling Stamos during the winter of 2003 and ultimately became its Chief Operating Officer until approximately June/July 2007. (Griffin Decl. Ex. 10, at 14:17-15:7; 84:8-13; 185:2-16.) Chris Stamos has also been a partner in

Sterling Stamos with the Sterling Partners since approximately winter 2003 up through to the present day. (*Id.* at 79:15-80:11.) Chris Stamos' responsibilities included assisting with the development of Sterling Stamos' marketing materials to clients, co-branding efforts between Stamos and Sterling Equities, which led to the development of the Sterling Stamos logo, interacting with clients, developing and maintaining investor relations, hiring staff for the IT and accounting departments and general operational tasks. (*Id.* at 15:1-7; 34:23-35:15; 75:15-21; 84:18-85:6) Thus, the statements Chris Stamos made to investors and the statements he prepared, reviewed and/or authorized to be made by other Sterling Stamos employees or agents to potential and/or existing investors, are admissions which bind the Sterling Stamos partners, including the Sterling Equities partners pursuant to Fed.R.Evid. 801(d)(2)(D). (*See* Griffin Decl. Ex. 32 and 25.)

8. ***Basil Stamos*** – Basil Stamos was the head of Sterling Stamos' corporate philanthropy division from approximately December 2003 to June/July 2007. (Griffin Decl. Ex. 9 at 13:9-14:4.) Basil Stamos has also been a partner in Sterling Stamos with the Sterling Partners since December 2003 up through to the present day. (*Id.* at 15:11-17; 16:13-20; 63:4-8.) Basil Stamos was responsible for selecting appropriate humanitarian causes for Sterling Stamos to dedicate their capital. (*Id.* at 14:10-21.) Additionally, Basil Stamos interacted with potential Sterling Stamos investors regarding Sterling Stamos' philanthropic projects. (*Id.* at 24:13-20.) After December 11, 2008, Basil Stamos sent emails to several of Sterling Stamos' philanthropic partners to avoid any confusion with Sterling Equities' Madoff investments and emphasize that there was no concern with respect to Sterling Stamos' donations because the firm was solvent as Peter Stamos had correctly advised the firm not to invest with Madoff. (*Id.* at 70:2-71:5; 82:9-83:25; 87:11-88:1; 94:14-96:3.) Thus, the statements Basil Stamos made to investors,

specifically Sterling Stamos' philanthropic partners, are admissions which bind the Sterling Stamos partners, including the Sterling Equities partners pursuant to Fed.R.Evid. 801(d)(2)(D). (*See, e.g.,* Griffin Decl. Exhs. 30 and 31.)

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court deem statements made and/or adopted by agents and/or employees of Sterling Stamos in the course of their agency as admissions of the Sterling Partners pursuant to Federal Rule of Evidence 801(d)(2)(D).

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Respectfully submitted,

By: */s/* David J. Sheehan

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