

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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IRVING H. PICARD,	:	
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Plaintiff,	:	
	:	
- against -	:	11-CV-03605 (JSR) (HBP)
	:	
SAUL B. KATZ, et al.,	:	
	:	
Defendants.	:	
	:	
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**MEMORANDUM OF LAW IN OPPOSITION TO TRUSTEE’S
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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Defendants respectfully submit this memorandum of law in opposition to the Trustee's motion *in limine* to deem statements by certain partners and employees of Sterling Stamos Partners ("Sterling Stamos") as admissions of the partners of Sterling Equities ("Sterling Partners").

PRELIMINARY STATEMENT

Each of Defendants and the Trustee has sought a ruling from this Court as to the admissibility, or inadmissibility, of the same Sterling Stamos evidence against Defendants. Defendants have moved for an order precluding the Trustee from offering this evidence because it is neither a party admission nor a business record. (*See* Defs.' Mem. of Law in Supp. of Mot. *In Limine* to Exclude Sterling Stamos Documents, dated Mar. 5, 2012 ("Def. SSP Mem.")). In their motion, which Defendants incorporate herein by reference, Defendants demonstrate that Sterling Stamos documents are not party admissions of the Sterling Partners. Sterling Stamos is *not* a party to this litigation, the Sterling Partners and Sterling Stamos are *not* one and the same, and neither Sterling Stamos nor any employee of Sterling Stamos was an agent for or an alter ego of any Defendant.

The Trustee nevertheless seeks a ruling from this Court that statements of employees of Sterling Stamos *are* admissible as party admissions against the Sterling Partners under Rule 801(d)(2)(D) of the Federal Rules of Evidence. In so doing, the Trustee confuses admissibility against Sterling Stamos with admissibility against the Sterling Partners, misapplies limited partnership law, and advocates an unrecognizable theory of agency. At best, the Trustee has argued for the admission of the statements of Sterling Stamos and certain of its employees against *Sterling Stamos*. He has made no

showing, nor can he, for the admission of such statements against any Defendant, including against any Sterling Partner.

ARGUMENT

The Trustee's entire argument for admission of Sterling Stamos "statements" against the Sterling Partners is predicated on the conduct of Peter Stamos and Sterling Stamos employees undertaken on behalf of the *Sterling Stamos partnership*. He concedes that Peter Stamos was the sole general partner of Sterling Stamos and that he was granted exclusive authority to make all investment and operational decisions for the *Sterling Stamos partnership*. As a result of this breadth of expressly delegated authority to act *for Sterling Stamos*, the Trustee contends that "virtually any act undertaken by [Peter Stamos] or anyone he employed or engaged on behalf of Sterling Stamos was within the scope of his agency" *for the Sterling Partners*. (Tr. *Limine* Mot. No. 5 at 8.) But Sterling Stamos and the Sterling Partners are not one and the same, as demonstrated by Sterling Stamos' partnership structure and the relationship between the Sterling Partners, Sterling Stamos, and its employees.

As set forth in Defendants' motion, no Sterling Partner was a general partner of Sterling Stamos. (See Defs. SSP Mem. at 4-5; Seshens Decl. Exs. F, G, H.) Peter Stamos was the sole general partner, and Defendants were limited partners only. The governing documents vested *all control* over *all components* of Sterling Stamos' business exclusively with Peter Stamos. For example, the Limited Partnership Agreement governing the Sterling Partners' limited partnership interest in Sterling Stamos provides, except as otherwise indicated:

“[T]he business and affairs of the Partnership shall be carried on and managed exclusively by the General Partner, or such other Partners or officers as from time to time may hereafter be designated by the General Partner, who shall have full control thereof, and no other Partner shall take any part whatsoever in the management, operation or control of the business of the Partnership.” (LP Agmt. § 2.01 (Seshens Decl., Ex. F).)

Indeed, to the extent any of the limited partners of Sterling Stamos have any role in the operations of the business, *that role can only be assigned by the General Partner.* (See *id.*

§ 2.04(a).)

The agreement governing Stamos Partners Associates, LLC similarly provides:

“[T]he power to make investment decisions with regard to the assets and liabilities of the Company and to make decisions with regard to the management of the Company shall be vested exclusively in the Managing Member [Peter Stamos], or such other Members or officers as may from time to time hereafter be designated by the Managing Member. Except as authorized by the Managing Member or as otherwise provided herein, the other Members shall have no right or authority to act on behalf of the Company in connection with any matter.” (LLC Agmt. § 2.01 (Seshens Decl., Ex. H).)

Limited partner status is quite distinct from general partner status and does not give limited partners any of the actual or apparent authority attributed to general partners.¹ “The principal-agent relationship which exists between the partners of an ordinary partnership is not present between the limited and general partners of a limited partnership.” *JN Realty LLC v. Estate of Marvin*, 268 F. Supp. 2d 231, 236 (S.D.N.Y. 2003) (internal quotation marks omitted); *United States v. Heffner*, 916 F. Supp. 1010, 1012 n.2 (S.D. Cal. 1996) (“Generally, in a partnership each partner has the legal ability

¹ The limited partner status of the Sterling Partners is established by the relevant partnership documents. It is not altered because an inadmissible Sterling Stamos promotional fund offering document, never reviewed or approved by any Sterling Partner, wrongly described a Sterling Partner as a general partner. (See Tr. *Limine* Mot. No. 5 at 5-7.)

to assert control over the partnership. By contrast, in a ‘limited partnership’ the general partner controls the business of the limited partnership to the exclusion of the limited partners.” (citations omitted)); *cf.* Restatement (Second) of Agency § 1.03, cmt. c. (“In a limited partnership, a statutorily authorized form in which partners’ roles are differentiated, only the general partner or general partners under ordinary circumstances have authority to bind the partnership because the limited partners occupy only a passive investment role.”).

Similarly, under Delaware law, which governs Stamos Partners Associates, LLC, the Sterling Partners’ non-managing membership gave them no control. Limited liability companies are “creatures not of the state but of contract,” and, thus, the duties and obligations of the parties “must be found in the LLC Agreement or some other contract.” *Fisk Ventures, LLC v. Segal*, C.A No. 3017-CC, 2008 Del. Ch. LEXIS 158, at *28 & n.34 (Del. Ch. May 7, 2008). Here, the relevant LLC agreement gave total and exclusive management control to Peter Stamos.

The Trustee supports his claim of control and agency by citing to cases involving the rights and liabilities of *general* partners. But those cases have no application to the rights and liabilities of *limited* partners. *See, e.g., United States v. Kelley*, 305 F. App’x 705, 707-08 (2d Cir. 2009) (statements of managing partner admissible against other partners in a traditional partnership); *United States v. Saks*, 964 F.2d 1514, 1516, 1523-24 (5th Cir. 1992) (declarations of a general partner in a limited partnership were admissible against another general partner); *see also United States v. Clark*, 613 F.2d 391, 403-04 (2d Cir. 1979) (addressing admissibility of statements of co-conspirators and joint venturers). The Trustee’s reference to the Delaware Revised Uniform Partnership Act is

similarly irrelevant. (See Tr. *Limine* Mot. No. 5 at 8 n.4.) Delaware’s Revised Uniform *Limited Partnership Act*, 6 Del. Code § 17-101 *et seq.*, governs the Sterling Stamos limited partnership.

Recognizing that Sterling Stamos’ partnership structure does not support his claim, the Trustee argues that the interactions of Saul Katz and David Katz with Peter Stamos and Sterling Stamos evidence the requisite control to support an agency relationship. (See Tr. *Limine* Mot. No. 5 at 4-5.) But that Peter Stamos sought Saul Katz’s advice and counsel in the formative stages of Sterling Stamos, or that both Saul and David Katz sat on the board of Sterling Stamos, does not establish that either of them *controlled* Peter Stamos or Sterling Stamos, let alone any Sterling Stamos employee.² Cf. 6 Del. Code § 17-303(b)(2), (4) (a limited partner does not control the business of a limited partnership even though it consults with and advises the general partner or attends and participates in meetings with the general partner).

Similarly, the fact that the Sterling Partners provided much of the seed money for the establishment of Sterling Stamos, had significant amounts invested with Sterling Stamos funds, or reaped the benefit of their investment in Sterling Stamos when Merrill Lynch purchased fifty percent of the company is equally irrelevant. Peter Stamos was the general partner of Sterling Stamos, ran Sterling Stamos, and made all decisions for Sterling Stamos. His statements may very well be admissible, therefore, against Sterling Stamos, but there is no basis to admit them against the Sterling Partners. As limited

² The Trustee refers to an “anecdote” in which Fred Wilpon praised Peter Stamos after being told that Sterling Stamos had redeemed an investment with a manager who was friends with Mr. Wilpon and Saul Katz. (Tr. *Limine* Mot. No. 5 at 8.) But this exchange demonstrates Peter Stamos’ complete control of Sterling Stamos, not control by any Sterling Partner.

partners in Sterling Stamos, they had no control over Sterling Stamos, and there is no evidence to the contrary. As a result, the Trustee cannot establish the “critical element” of control necessary to demonstrate that Peter Stamos, or any other Sterling Stamos employee, was an agent of the Sterling Partners. *See 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); *Nat’l Union Fire Ins. Co. of Pittsburgh v. Eaton*, 701 F. Supp. 1031, 1035 (S.D.N.Y. 1988) (“It is basic to an agency relationship that the agent acts subject to the principal’s direction and control” (citing *In re Shulman Transp. Enters., Inc.*, 744 F.2d 293, 295 (2d Cir. 1984))).

The Trustee further has no evidence to suggest that any Sterling Partner deemed, assigned, or otherwise appointed Peter Stamos, or any other Sterling Stamos employee, as his agent for the purpose of making statements about anything at all, let alone about their thoughts regarding Madoff following his arrest. Whether or not statements made by Sterling Stamos employees in hearsay emails after December 11, 2008 fell within the scope of the employment obligations of Sterling Stamos employees *to Sterling Stamos* at that time, which seems rather unlikely, the statements in those emails certainly were not made within the scope of any agency relationship between those Sterling Stamos employees and the Sterling Partners. *Cf. Zaken v. Boerer*, 964 F.2d 1319, 1322 (2d Cir. 1992) (observing that whether statements made by a corporate employee are admissible as admissions of another employee rather than of the corporation depends on the agency relationship between the two employees).

Finally, in the absence of any evidence of an agency relationship, the Trustee’s claim that the Sterling Partners “cannot disavow the existence of an agency relationship”

because they have monetarily benefitted from their limited partnership interest in Sterling Stamos is absurd, and the case he relies upon as support stands for no such proposition. (Tr. *Limine* Mot. No. 5 at 9.) See *Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31, 44 (1980) (holding that a principal is estopped from denying knowledge of its agent where it has been unjustly enriched by the agent's wrongdoing).

CONCLUSION

For the reasons set forth above and in Defendants' motion *in limine* to exclude Sterling Stamos documents, Defendants respectfully request that the Court deny the Trustee's motion *in limine* to deem statements by certain Sterling Stamos partners and employees as admissions of the Sterling Partners.

Dated: New York, New York
March 12, 2012

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