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 OPPOSITION TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE STERLING STAMOS DOCUMENTS

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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 opposition to Defendants' motion *in limine* to exclude Sterling Stamos documents.

As set forth in the Trustee's Motion in Limine to Deem Statements by Certain Sterling Stamos Partners and Employees as Admissions of the Sterling Partners ("Trustee's Motion in Limine No. 5"), Sterling Stamos is a partnership between Peter Stamos and the Sterling Partners. 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). Contrary to the Defendants' argument, the Sterling Partners hold themselves out as general partners of Sterling Stamos, and have exerted control over Sterling Stamos and its employees. Indeed, the Sterling Partners have exerted that control in this litigation by asserting claims of attorney-client privilege over documents and statements made by Sterling Stamos employees. Thus, for all the reasons described in the Trustee's Motion in Limine No. 5 and herein, the Sterling Partners are estopped from denying an agency relationship with Sterling Stamos and its employees now for purposes of the federal rules of evidence.

In addition, the documents objected to by the Defendants constitute records kept in the regular course of Sterling Stamos' business, and therefore are admissible for the additional reason that they fall under the business records exemption to the hearsay rule pursuant to Rule 803(6).

I. STERLING STAMOS' STATEMENTS ARE PARTY ADMISSIONS OF THE STERLING PARTNERS

The Sterling Partners were and are partners of Sterling Stamos. Accordingly, statements made by the Sterling Stamos partners and employees in furtherance of Sterling Stamos' business are admissible against the other partners. *United States v. Saks*, 964 F.2d 1514, 1523-26 (5th Cir. 1992); *Gordon v. Ross*, 87 Civ. 7105 (VLB), 1994 WL 603020, at *1, *5 (S.D.N.Y. Nov. 2, 1994) (statement by an individual whom the defendant considered his "equal partner[]" was admissible against defendant).

A. THE STERLING PARTNERS ARE NOT MERE "LIMITED PARTNERS" OF STERLING STAMOS

The Defendants assert that no agency relationship existed between the Sterling Partners and Sterling Stamos because they had no "control" over Sterling Stamos but were rather merely "limited partners" and "passive investors." None of these assertions are true. As a threshold matter, even if the Sterling Partners were mere "limited partners" of Sterling Stamos, this limitation on liability would not negate the agency relationship, for all the reasons discussed in the Trustee's Motion in Limine No. 5.

In any event, the Sterling Partners are not mere "limited partners." Sterling Stamos is a partnership between the Sterling Partners on the one hand and Peter Stamos and the Stamos partners on the other (and, since 2007 when Merrill Lynch bought half of each side's stake, Merrill Lynch). It consists of numerous interlocking entities.

For purposes of this litigation, the parties have used "Sterling Stamos" to refer to the management company for Sterling Stamos' investment funds, Stamos Partners Capital Management, LP, although the parties themselves have sometimes used "Sterling Stamos" to

refer to other entities.[1] Among the Sterling Stamos entities relevant here are: (1) the management company (Sterling Stamos), (2) the management company's general partner, and (3) Sterling Partners Associates, LLC (the "GP entity"), which is the General Partner for all of Sterling Stamos' domestic funds.

As the Defendants admit, the Sterling Partners are members of the GP entity, *see* Def. Br. at 5; they are also its part owners. Thus, Sterling Stamos routinely holds out Saul Katz and Fred Wilpon in materials to potential investors as its "General Partners," *see, e.g.*, Ex. 11 attached to the accompanying Declaration of Regina L. Griffin dated March 12, 2012 ("Griffin Decl."); Griffin Decl. Exs. 24 and 28, or simply as its "partners." (*See, e.g.*, Griffin Decl. Exs. 29 and 30.)

For this reason alone, because each partner is an agent of every other partner in a partnership, statements made by any authorized employee of Sterling Stamos in the course of his or her employment are admissible against the Sterling Partners under Rule 801(d)(2)(D). *See, e.g., Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 538 (2d Cir. 1992) ("The authority granted in the agency relationship need not include authority to make damaging statements, but simply the authority to take action about which the statements relate.").

B. THE STERLING PARTNERS ARE NOT MERE "PASSIVE INVESTORS" IN STERLING STAMOS

Defendants also deny an agency relationship by claiming that the Sterling Partners were merely "passive investors in, not active partners of, Sterling Stamos," Def. Br. at 1. This claim is belied by Sterling Stamos' own documents and witness testimony. These documents and testimony establish, among other things:

[1] *See* Griffin Decl. Ex. 25 (LP agreement for Sterling Stamos Security Fund) ("Sterling Stamos Security Fund, L.P. ('the Fund') has been formed by SP Associates, LLC ('Sterling Stamos') to…"). SP Associates, LLC is the GP entity of which the Sterling Defendants are a member.

- Sterling Partner Saul Katz "was intimately involved in the financial and business aspects of the business" and, during its early years, Sterling Stamos made no significant business decisions without the approval of Saul Katz. (Griffin Decl. Ex. 6 at 62:15 – 63:5.)

- Sterling Stamos identified Sterling Partners Saul Katz and David Katz as "General Partners" and "investment professionals" in materials distributed to investors, and marketed their involvement with the fund to potential investments. (Griffin Decl. Exs. 11, 25 and 7 at 235:10-13.)

- Sterling Partner Saul Katz was the decisionmaker as to whether Sterling Stamos should remain invested in the Merkin/Madoff funds over the objections of its Chief Investment Officer, Noreen Harrington. (Griffin Decl. Ex. 3 at 83:4-84:3.)

- Sterling Partner Saul Katz has been on the Board of Directors of Sterling Stamos since its inception and Sterling Partner David Katz was on the Board of Directors from 2002 to at least 2005. (Griffin Decl. Ex. 6 at 64:25-65:8 and Griffin Decl. Ex. 56.)

- Sterling Stamos informed investors that Sterling Partners Saul Katz and David Katz were "actively involved in the investment decisions as well as the management of Sterling Stamos." (Griffin Decl. Ex. 31.)

- Saul Katz, on behalf of the other Sterling Partners and often with Sterling Partner David Katz, participated in decisions ranging from the design of Sterling Stamos' logo, *see* Griffin Decl. Ex. 60, to its webpage, *see* Griffin Decl. Ex. 32, to the firm's allocation, *see* Griffin Decl. Ex. 33, and management fees, *see* Griffin Decl. Ex. 34.

- The unanimous approval of all "active Sterling Stamos Partners," including Sterling Partners Saul Katz and David Katz was required for the hiring of all new investment professionals. (Griffin Decl. Ex. 35.) Thus, Sterling Partners Saul Katz and Fred Wilpon participated in the interview and hiring process of, among others, Sterling Stamos' Chief Investment Officer, *see* Griffin Decl. Ex. 3 at 16:25-18:15 and its Chief Financial Officer, *see* Griffin Decl. Ex. 1 at 39:1-41:15.

- Sterling Stamos employees wishing to recommend an investment made presentations, including correlation analysis, infrastructure, potential growth, risk management, organization, Sharpe Ratio and investment strategy, to Sterling Partners Saul Katz and David Katz as well as Peter Stamos. (Griffin Decl. Ex. 3 at 24:12-25:11, 31:18-32:5.)

- Sterling Partner David Katz managed one of the Sterling Stamos Funds. (*See* Griffin Decl. Exs. 7 at 160:25-161:20 and 20.)

- Sterling Partners Saul Katz and David Katz were signatories of financial institutions accounts opened on behalf of Sterling Stamos. (*See* Griffin Decl. Ex.

37.)

- Sterling Partner Saul Katz represented the "Sterling side" of the partnership in dealings with Peter Stamos. (Griffin Decl. Ex. 7 at 16:18-23.)

The extent of the Sterling Partners' control over Sterling Stamos is exemplified by the uncontested fact that in 2005, Sterling Stamos was entirely restructured at Saul Katz's demand so that the Sterling Partners could remain involved in Sterling Stamos without having to disclose their Madoff investments to regulators. (*See* Griffin Decl. Ex. 6 at 55:5-60:5.) Following the restructuring, the Sterling Partners were no longer marketed as investment professionals, but the Sterling Partners remained on the Board of Directors of Sterling Stamos. *See* Trustee's Motion in Limine No. 5 at pp. 6-7. The Sterling Partners remained General Partners, *i.e.*, members and part owners of the GP entity. *Id.* The Sterling Partners' assets continued to represent a substantial portion of assets under management, a factor that was stressed to potential investors.

Even after the restructuring of Sterling Stamos, the Sterling Partners continued to assert control, putting pressure on the Chief Executive Officer, Peter Stamos, to "make [the] company more profitable" in 2006 (Griffin Decl. Ex. 38 at SE_T668732) and telling him that they would "run SS on a more bottom line basis." (*See* Griffin Decl. Ex. 39.) The Sterling Partners participated in negotiations with Merrill Lynch regarding certain aspects of the sale of their interests in Sterling Stamos, and when the Sterling Partners and Peter Stamos sold their respective portions of Sterling Stamos and the GP entity to Merrill Lynch, they each received the same amount of money for their respective shares. Saul Katz remains a member of the Board of Directors of Sterling Stamos today.

The Sterling Partners reaped tens of millions of dollars from their partnership in Sterling Stamos, including management fees, incentive fees and sale of a portion of their ownership interests to Merrill Lynch for $115 million. (*See* Griffin Decl. Ex. 7 at 239:11-23.) Having

retained the fruits of the labor of their Sterling Stamos partners and agents, the Sterling Partners are estopped as a matter of law from denying now that such a relationship existed.

II. STERLING STAMOS' MATERIALS TO PROSPECTIVE INVESTORS ARE BUSINESS RECORDS THAT WERE REQUIRED BY LAW TO BE ACCURATE

The Trustee plans to introduce firm overviews, due diligence packages and related materials prepared by Sterling Stamos and distributed to potential investors, such as those referred to in the Defendants' motion in limine as "marketing materials." These materials are admissible for the additional reason that they are records of a regularly conducted business activity pursuant to Federal Rule of Evidence 803(6).

Records made and kept in the ordinary course of a business are admissible pursuant to Rule 803(6), which "'favor[s] the admission of evidence rather than its exclusion if it has any probative value at all.'" *United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000) (quoting *In re Ollag Constr. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir. 1981)). "[T]he sufficiency of foundation evidence is 'assessed in light of the nature of the documents at issue; documents that are standard records of the type regularly maintained by firms in a particular industry may require less by way of foundation testimony than less conventional documents proffered for admission as business records.'" *In re Enron Creditors Recovery Corp.*, 378 B.R. 54, 57 (Bankr. S.D.N.Y. 2007) (quoting *Conoco v. Dep't of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996)). The foundation may be established by any witness who "understands the system used to prepare the records.'" *Id.* (quoting *Conoco*, 99 F.3d at 391); *see also Parker v. Reda*, 327 F.3d 211, 215 (2d Cir. 2003) (business records may be admitted notwithstanding the unavailability of the record's author, so long as a custodian or other qualified witness testifies that the document was kept in the course of a regularly conducted business activity and also that it was the regular practice of that business activity to make the record).

A "principle precondition" to admissibility under the business records is that the records have "'sufficient indicia of trustworthiness to be considered reliable.'" *Williams*, 205 F.3d at 34 (quoting *Saks Int'l, Inc. v. M/V "Export Champion,"* 817 F.2d 1011, 1013 (2d Cir. 1981); *see also In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2003 WL 1610775, at *5 (S.D.N.Y. Mar. 26, 2003) ("The key determination as to whether a document falls under the business records exception to the hearsay rule is whether the document is trustworthy.").

A. STERLING STAMOS' CLIENT PRESENTATION AND OTHER SOLICITATION MATERIALS WERE CREATED AND MAINTAINED IN THE REGULAR COURSE OF ITS BUSINESS

Sterling Stamos is and was a fund of funds in the business of soliciting investors. It is the regular course of business for Sterling Stamos to create "pitch books" or "firm overviews" for potential investors. (*See* Griffin Decl. Ex. 1 at 145:21-146:7.) Among other things, these "pitch books" contain information about the funds such as fund performance and assets under management ("AUM") as well as biographical information of Sterling Stamos investment team members and key operating professionals. (*Id.* at 145:21-152:18.) The information in these presentations is compiled by the CFO and Sterling Stamos staff and "given a legal and compliance review" by counsel. (*Id.* at 150:14-24.) The purpose of firm overviews and fund overviews is to inform potential investors, and to be used by the Sterling Stamos team as they meet with potential investors, to walk them through the history of the firm, its investment process, and the performance of its funds. (Griffin Decl. Ex. 7 at 226:10-227:4.)

Sterling Stamos' CFO and CEO testified specifically about the firm overviews and other introductory materials provided to investors contained in Griffin Decl. Exs. 8, 9 and 25. (Griffin

Decl. Ex. 1 at 153:10-17, 186:9-188:14, 196:16-199:11; Ex. 7 at 224:6-237:4[2]; *see* Griffin Decl. Exs. 8, 9 and 25.) Barcelona testified that these documents and others like them were commonly prepared by Sterling Stamos and provided to potential investors in accordance with standard industry practice; and that the performance information in the document was likely provided by him. (Griffin Decl. Ex. 1 at 153:10-156:2, 186:9-189:4.) The firm overview and related materials include such information as firm history, principles and investment philosophy, investment objectives, asset allocation, estimated net performance results, fund performance results, a description of the investment process, biographies of the investment team and key professionals, an "investment universe" overview including target returns, allocation, performance, and other information about specific funds, and overviews of specific Sterling Stamos Funds.[3] (*Id.* at 152:22-158:19 (Griffin Decl. Ex. 8); 181:11-188:15 (Griffin Decl. Ex. 9).) Barcelona testified that he would provide current fund-related performance and AUM information for these materials and would review to make sure the date was accurate, while the other information would come from the investment team. (Griffin Decl. Ex. 1 at 184:18-23, 187:14-20.) Peter Stamos, as chairman and CEO, reviewed the firm overview. (*Id.* at 158:15-19.) The summary statistics contained in these documents were the standard statistics generated by the firm and collected from underlying fund managers and summarized for potential and existing investors. (Griffin Decl. Ex. 7 at 229:15-20.)

The same information is replicated in the Sterling Stamos responses to due diligence questionnaires such as those challenged by Defendants. For example, Griffin Decl. Ex. 24 is a due diligence package containing a fund overview, documents from the firm overview including

[2] Other examples of firm overviews or pitch books are found in Griffin Decl. Exs. 8, 11, 24 and 53.

[3] Other examples of such investor introductory materials are found at Griffin Decl. Ex. 25.

the investment universe overview and performance estimates, responses to a due diligence questionnaire including legal and regulatory questions, performance, a quarterly review letter and annual audited financial statements for one of the funds.

Thus, the materials challenged by the Defendants are records of acts, events, conditions or opinions of Sterling Stamos, including fund performance, asset allocation, AUM, performance targets and volatility, audited financials, and other information that was contemporaneously gathered and verified by Sterling Stamos employees and reviewed by counsel. The evidence demonstrates that these documents were created and maintained by Sterling Stamos in the regular course of its business of obtaining investors for its funds, and that it was Sterling Stamos' practice as well as industry practice to create these records. The evidence shows that Sterling Stamos provided these documents and documents like them to potential investors for the purpose of inducing investors to invest in its funds. The record, therefore, amply demonstrates that the documents fall under the business records exception. *See Saks Int'l*, 817 F.2d at 1013-14 (evidence that shipping tallies comported with general custom in industry and were actually relied on sufficient to establish they were business records).

B. THE BUSINESS RECORDS AT ISSUE WERE REQUIRED BY LAW TO BE ACCURATE AT THE TIME THEY WERE MADE AND TO BE RETAINED, AND THUS HAVE AMPLE INDICIA OF TRUSTWORTHINESS

Defendants assert that because these documents were prepared for the purpose of soliciting investors, they "by their very nature" lack indicia of trustworthiness. (Def's Br. 7.) If anything, the opposite is true. Registered investment advisors like Sterling Stamos are required by law to adopt compliance policies and procedures to ensure, among other things, the accuracy of disclosures made to investors, clients, and regulators, including account statements and advertisements, and the accurate creation of required records and their maintenance in a manner

that secures them from unauthorized alteration or use and protects them from untimely destruction. *See* The Securities and Exchange Commission, "Information for Newly-Registered Investment Advisers," available at http://www.sec.gov/divisions/investment/advoverview.htm (last visited Mar. 12, 2012) (citing 17 C.F.R. § 275.206(4)-7 (2011)). And indeed Sterling Stamos has adopted such policies. (*See* Griffin Decl. Ex. 52 at SSKW00011851 (July 2005 Compliance Manual).) As recognized in Sterling Stamos' compliance manuals, it is a violation of the Advisors Act to publish, circulate or distribute any advertisement "[w]hich contains any untrue statement of a material fact, or which is otherwise false or misleading." 17 C.F.R. § 275.206(4)-1(a)(5) (2011).[4] Sterling Stamos acknowledges that "advertisement" includes, among other things "letters, including monthly and quarterly letters to investors and those sent by email" and "standardized written material in booklets used by advisers for presentations to prospective clients." *Id.*; *see also* Griffin Decl. Ex. 52 at SSKW00011851; Ex. 59 at SSKW00000067 (April 2006 Compliance Manual). Accordingly, it is Sterling Stamos' policy that all marketing materials must be reviewed and approved by the Compliance Officer. (*See* Griffin Decl. Ex. 52 at SSKW00011851.)

The overview and other client presentations challenged by the Defendants all bear standard SEC disclosure language in compliance with these regulations, and were prepared for presentation to potential investors such as Merrill Lynch and the investment authority of Qatar. The materials were reviewed for financial accuracy by the CFO and for regulatory compliance

[4] "Advertisement" is defined as including "any notice, circular, letter or other written communication addressed to more than one person . . . which offers (1) any analysis, report or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities." 17 C.F.R. § 275.206(4)-1(b) (2011).

by counsel. They thus bear ample indicia of trustworthiness. *See In re WorldCom Inc. Sec. Litig.*, 02 Civ. 3288, 2005 U.S. Dist. LEXIS 2215, at *20-23, 27-28 (S.D.N.Y. 2005) (holding admissible under Rule 803(6) restated financials because of the legal duty to create and file such documents with the SEC in compliance with GAAP standards and because trustworthiness of underlying circumstances surrounding the creation of the records); *In re Ollag Const. Equip. Corp.*, 665 F.2d 43, 46-47 (2d Cir. 1981) (financial questionnaire provided to bank in credit application was trustworthy although bank did not check its accuracy where making false statements in questionnaire could lead to criminal sanctions).

In short, Defendants have not and cannot identify any categorical basis to exclude these documents. To the extent that Defendants assert that an insufficient foundation has been laid for any particular document, such as the DeMarche questionnaire, Defendants will have the opportunity at trial to question Kevin Barcelona, Sterling Stamos' Chief Financial Officer and designated corporate representative regarding document custodian issues, concerning the preparation and maintenance of that document and raise any challenges at that point. (*See* Griffin Decl. Ex. 51.)

III. EMAILS BY STERLING STAMOS EMPLOYEES IN THE REGULAR COURSE OF STERLING STAMOS BUSINESS ARE BUSINESS RECORDS

For the reasons discussed above and in the Trustee's Motion in Limine No. 5, the emails challenged by Defendants are also party admissions and thus not hearsay pursuant to Rule 801(d)(2)(D). The vast majority of them are also admissible under the business records exception. Rule 803(6) is not limited to any particular kind of document. Business records may include internal company memoranda,[5] corporate documents such as demands for withdrawal

[5] *In re Blech Sec. Litig.*, 94 Civ. 7696 (RWS), 2003 WL 1610775, at *5 (S.D.N.Y. Mar. 26, 2003).

liabilities,[6] hand written notes[7] and, contrary to Defendants' suggestion, emails.[8] The admissibility of emails, like any other document, depends on the "regularity of making such records of the business activity;" it is not necessary to establish that the "e-mails at issue were created pursuant to established company procedures for the systematic or routine making of company records." *United States v. Stein*, S1 05 Crim. 0888(LAK), 2007 WL 3009650, at * 1 (S.D.N.Y. Oct. 15, 2007) (internal citations omitted). Like letters, memoranda or notes, emails are admissible under this exception "if they are regularly made in furtherance of the employer's needs and not for the personal purposes of the employee who made them." *Canatxx Gas Storage Ltd. v. Silverhawk Capital Partners*, H-06-1330, 2008 WL 1999234, at *12 (S.D.Tex. May 8, 2008).

It is standard business practice for Sterling Stamos to communicate to its investors via email, Griffin Decl. Ex. 1 at 234:18-25, and email is regularly used for internal communication. (*See* Griffin Decl. Ex. 2 at 62:21-64:11.) Emails are stored and subject to review pursuant to Sterling Stamos' email review procedure. (*See* Griffin Decl. Ex. 58, email review procedure.) The firm maintains emails with the understanding that all records, including email, are subject to review by the SEC. (Griffin Decl. Ex. 52, at SSKW0011882.)

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[6] *The Ret. Plan of the Unite Here Nat'l Ret. Fund v. Kombassan Holding, A.S.*, 629 F.3d 282, 289-90 (2d Cir. 2010).
[7] *United States v. Kaiser*, 609 F.3d 556, 574-76 (2d Cir. 2010).
[8] *Penberg v. HealthBridge Management*, ---F.Supp.2d ---, No. 08 CV 1534 (CLP), 2011 WL 4943526 at *17-18 (E.D.N.Y. Oct. 17, 2011); *Canatxx Gas Storage Ltd. v. Silverhawk Capital Partners*, Civil Action No. H-06-1330, 2008 WL 1999234, at *12-13 (S.D. Tex. May 8, 2008); *Pierre v. RBC Liberty Life Ins.*, Civil Action No. 05-1042-C, 2007 WL 2071829, at *2 (M.D.La July 13, 2007); *DirectTV, Inc. v. Murray*, 307 F. Supp. 2d 764, 769 (D.S.C.Charleston.Div. 2004).

A. CERTAIN STERLING STAMOS INTERNAL AND EXTERNAL EMAILS IN RESPONSE TO MADOFF'S ARREST WERE MADE IN THE REGULAR COURSE OF ITS BUSINESS

After Madoff's arrest was announced on December 11, 2008, Sterling Stamos received an inquiry from Merrill Lynch as to whether the firm had any exposure to BLMIS. (Griffin Decl. Ex. 1 at 223:13-24.) Sterling Stamos began a process of following up with all of its managers to ascertain if it had any indirect exposure to Madoff. (*Id.*) After learning that Sterling Stamos' Merkin investments had been invested in BLMIS, Sterling Stamos' CFO and his team spent approximately the next ten days assessing the portfolio impact their Madoff exposure would have on their funds and circulating the information to others within Sterling Stamos so that it could be communicated to investors. (*Id.* at 228:4-24.)

Sterling Stamos wrote a letter to investors and also hosted a conference call allowing investors, based on the crisis, to submit redemptions based on the negative implications of the Madoff fraud. (Griffin Decl. Ex. 1 at 230:15-23.) The written communication was sent to investors via email. (*Id.* at 234-35.) In addition, Peter Stamos and other Sterling Stamos employees received and responded to investor inquiries and redemption requests via email. (*See* Griffin Decl. Ex. 41.)

The majority of the emails challenged by the Defendants are either emails between Sterling Stamos and investors regarding the potential impact of the Madoff fraud on their investment or on the firm[9], or internal emails among Sterling Stamos employees and agents for the purpose of assessing the impact of the fraud and responding to investors.[10] These emails were made for the business purpose of assessing Sterling Stamos' exposure to a market event,

[9] *See* Griffin Decl. Exs. 12, 26, 40-44, 55.
[10] *See* Griffin Decl. Exs. 45, 46, 48, 49.

strategizing its response, and communicating with investors regarding the potential impact on their investment.

However "shocking" the collapse of BLMIS may have been, it is part of the business of Sterling Stamos to assess the impact of market events on its funds and to inform potential and existing investors of the potential impact on their investments. (*See* Griffin Decl. Ex. 1 at 228:13-24.) These communications were made in the ordinary course of Sterling Stamos' business for a business purpose, and thus are business records admissible under Rule 803(6). *See, e.g.*, *Penberg v. Healthbridge Mgmt.*,--- F.Supp.2d ---, 08 CV 1534 (CLP), 2011 WL 4943526 at *18 (E.D.N.Y. Oct. 17, 2011) (deposition testimony that it was company's regular business practice to share the type of information contained in email and author's regular business and duty to email information such as that included in email rendered email sufficiently likely to be admissible to defeat summary judgment).

B. BASIL STAMOS' EMAILS TO STERLING STAMOS' CORPORATE PHILANTHROPIC PARTNERS WERE MADE FOR A BUSINESS PURPOSE

Defendants also object to a series of emails from Basil Stamos to business contacts in the wake of the Madoff scandal.[11] Basil Stamos has been a partner of Sterling Stamos since at least 2003. Between 2003 and 2007, he was employed by Sterling Stamos to head up its corporate philanthropy division. (Griffin Decl. Ex. 4 at 13:13-14:25.) Sterling Stamos marketed itself as a "new kind of company" that would prove that you could "do well and do good at the same time: that you could be a hedge fund and make the world a better place." (*See* Griffin Decl. Ex. 5 at 17:2-7.) Investors were attracted to a "double bottom line": getting a good return while knowing that they were helping people. (*Id.* at 59:9-15.) Accordingly, Basil Stamos' job

[11] *See* Griffin Decl. Exs. 13-23, 57.

included developing relationships with nonprofit organizations for purposes of potentially partnering with Sterling Stamos. (Griffin Decl. Ex. 4 at 14:12-21.)

Basil Stamos testified that after Madoff was arrested, he became aware of press reports that confused Sterling Equities with Sterling Stamos. Basil Stamos drafted emails to his philanthropic partners to rectify the mistake and reassure them that Sterling Stamos was solvent and doing well. (Griffin Decl. Ex. 4 at 68:23-72:9.) Each of the emails forwarded a press release clarifying the difference between Sterling Equities and Sterling Partners along with comments from Basil Stamos. (*See* Griffin Decl. Exs. 13-23.) Each of the recipients was a major philanthropic partner to whom Sterling Stamos had made donations. (Griffin Decl. Ex. 4 at 82:11-19.)

Defendants argue that these emails were sent at a time "when Basil Stamos was not a Sterling Stamos employee and Sterling Stamos had no philanthropic arm of its business." Br. at n. 7. But although Basil Stamos was not employed by Sterling Stamos as of December 2008, he was and remains a partner who owns a percentage of the firm, and who retains a Sterling Stamos email address from which each of these emails was sent. (Griffin Decl. Ex. 4 at 16:13-20, 63:4-8; *see also* Griffin Decl. Exs. 13-23.) Moreover, Defendants' assertion that Sterling Stamos "had no philanthropic arm" as of December 2008 is contradicted by its own materials for prospective investors as of that time, which continue to include "philanthropy and public service" among its mission, strategy and guiding principles, and encapsulates its firmwide strategy as "idealism of a not-for-profit foundation; efficiency of a for-profit investment firm." (Griffin Decl. Ex. 54 at SSMT02106312-13.) Thus, like the emails between other Sterling Stamos personnel and investors regarding the firm's response to the Madoff arrest, these emails constitute business records of Sterling Stamos.

The remaining emails challenged by the Defendants, like the other documents created or adopted by Sterling Stamos employees and partners in the course of their agency, are properly considered party admissions and admissible under Rule 801(d)(2)(D).[12] Emails by agents or employees relating to matters within the scope of their employment constitute vicarious admissions and adoptions, and any remaining portions of the emails are admissible for the reason that they "provide essential context" to those statements. *Arista Records v. Lime Group LLC*, 784 F.Supp.2d 398, 420 (S.D.N.Y. 2011).

IV. DEFENDANTS HAVE ACKNOWLEDGED THE AGENCY RELATIONSHIP IN THIS LITIGATION

Defendants have asserted attorney client and attorney work product privilege as to dozens of Sterling Stamos emails created between 2002 – 2008 on which Sterling Partners Saul and David Katz and Sterling General Counsel Gregory Nero were copied. (Griffin Decl. Ex. 61.) The topics of these emails, according to the log, relate to "new entity formation," "personnel issues," "Bayou litigation" and "investment advisor registration issues." (*Id.*)

Moreover, when Peter Stamos, Sterling Stamos' Chief Executive Officer, was deposed in this litigation, the counsel for Sterling Partners, Dana Seshens, requested counsel for Sterling Stamos to direct the witness to maintain the attorney/client privilege with respect to certain communications the witness had with counsel and which involved the Sterling Stamos. (Griffin Decl. Ex. 7 at 59:16-60:13.)

[12] As Defendants concede, the Madoff collapse was a "shocking" event. To the extent that Defendants argue that these emails must fall out of the "regular course of business" because of the shocking nature of the event, then these emails should be admissible pursuant to 803(1) or (2) as present sense impressions and/or excited utterances. (*See, e.g.*, Griffin Decl. Ex. 51 ("with so many rumors floating around over the past 30 minutes, Ashok and I are going to call a 5 minute staff meeting to make sure everyone accurately understands the facts relating to Madoff and our relationship to Sterling…"); Griffin Decl. Ex. 50 ("What a mess, we were just referenced incorrectly on cnbc.com article.").)

By asserting an attorney client privilege over documents created and witnesses employed *by Sterling Stamos* and not by the Defendants, the Defendants themselves have conceded an agency relationship. (*See* Griffin Decl. Ex. 61, Griffin Decl. Ex. 7 at 60:9-12; *see also* 8 J. Wigmore, Evidence s 2311, pp. 601-602 (McNaughton rev. ed. 1961) (attorney-client communications in the presence of a third party not the agent of either are generally not protected by the privilege).)

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court deny Defendants' motion in its entirety.

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March 12, 2012

Respectfully submitted,

By: /s/ David J. Sheehan

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